THIRTY-SEVENTH

ANNUAL REPORT

OF THE

NATIONAL LABOR RELATIONS BOARD

FOR THE FISCAL YEAR

ENDED JUNE 30

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CLARENCE S. WRIGHT, *Director, Division of Administration*

---

[1] Appointed February 22, 1972, to succeed Gerald A Brown whose term expired August 27, 1971.
[2] Appointed by the Board June 6, 1972, to succeed Ogden W Fields
[3] Appointed by the Board November 29, 1971, to succeed Eugene G. Goslee
[4] Appointed August 24, 1971, to succeed Acting General Counsel Eugene G Goslee
[5] Appointed October 7, 1971, to succeed H Stephan Gordon who resigned September 18, 1971
[6] Retired October 1, 1971

LETTER OF TRANSMITTAL

NATIONAL LABOR RELATIONS BOARD,
Washington, D.C., January 3, 1973.

SIR: As provided in section 3(c) of the Labor Management Relations Act, 1947, I submit herewith the Thirty-seventh Annual Report of the National Labor Relations Board for the fiscal year ended June 30, 1972, 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 or under the supervision of the Board.

Respectfully submitted.

EDWARD B. MILLER, *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 1972

A. Summary

For the first time in its history, the National Labor Relations Board received more than 40,000 cases in a single year in its administration of the National Labor Relations Act. The total for fiscal year 1972 was 41,039.

The unprecedented filings by individual workers, unions, and employers—primarily charges alleging the commission of unfair labor practices by employers or unions, or both, and petitions for employee secret ballot representation elections—gave the NLRB its busiest year ever.

The record caseload underscores that the field of labor relations continues to be controversial and volatile, particularly with continued growth of the Nation's economy and increase of its work force, and the NLRB caseload emphasizes that labor relations remains an area of national importance and concern.

Importance of the function performed by the NLRB in enforcing the principal labor relations law is borne out by statistics of the Agency's case processing service to the public. Not only has there been an uninterrupted growth of the caseload for more than a decade, but the percentage of increase also has grown. The increase in the last 2 fiscal years has been greater than 10 percent.

The provisions of the statute and the processes of the NLRB are being accepted and utilized on a greater scale each year. The NLRB does not initiate cases; it processes charges and petitions brought before it.

During fiscal 1972 nearly all areas of NLRB activity showed significant changes and, while there were substantial increases in the number of cases received, cases closed, and decisions rendered, the time span for issuance of decisions was shortened.

Overall case intake in fiscal 1972 rose by 3,827 cases—41,039 compared with 37,212 in fiscal 1971, the previous record year. Unfair labor

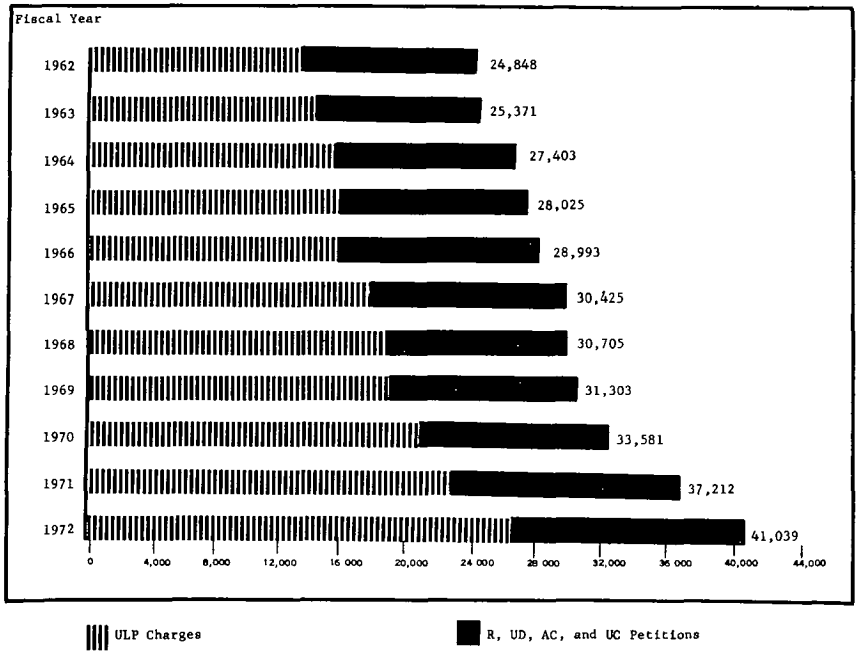
practice charges totaled 26,852, a 13-percent increase over 23,770 the preceding year. Representation petitions rose to 13,711, some 6 percent more than the 12,965 of the year before.

These two classes of cases amounted to 98.8 percent of the 1972 intake. The remaining 1.2 percent included union-shop deauthorization petitions (0.4 percent), amendments to certification petitions (0.2 percent), and unit clarification petitions (0.6 percent). (Chart 1.)

The NLRB closed 39,474 cases of all types, a record number. Up 6 percent from fiscal 1971, the total closings included 25,555 cases involving unfair labor practice charges and 13,919 affecting employee representation. (Tables 7, 8, 9, and 10 give statistics on stage and method of closing by type of case.)

Chart 1

CASE INTAKE BY UNFAIR LABOR PRACTICE CHARGES AND REPRESENTATION PETITIONS



The NLRB's traditional emphasis on voluntary disposition of cases is implemented in great measure in the 31 regional offices, contributing significantly to administration of the Act. In fiscal 1972, some 24,356 unfair labor practice cases were closed by regional offices, rendering formal decisions unnecessary. The case closings in the regional offices came about primarily through voluntary settlements or adjustments by parties to the cases working with NLRB officials, voluntary with-

drawals of charges, and administrative dismissals. Only 4.7 percent of the unfair labor practice cases closed went to the five-Member Board for decision as contested cases.

The NLRB conducted a record 9,020 conclusive secret ballot elections of all types during fiscal 1972, up from 8,459 the previous year. The total was made up of 8,472 collective-bargaining elections, 451 decertification elections, and 97 deauthorization polls. Unions won 4,653 bargaining rights elections, or 55 percent.

In 1972 employee representation elections, 80 percent were arranged by agreement of the parties as to appropriate unit, date, and place of election.

Statistical tables on the Agency's activities in fiscal 1972 will be found in Appendix A of this report, along with a glossary of terms used in the tables and a subject index. An index of cases discussed in this report precedes Appendix A.

1. NLRB Administration

The National Labor Relations Board is an independent Federal agency created by Congress in 1935 to administer the National Labor Relations Act. The Act was amended in 1947 (Taft-Hartley Act) and in 1959 (Landrum-Griffin Act).

Board Members in fiscal 1972 were Chairman Edward B. Miller of Illinois, John H. Fanning of Rhode Island, Howard Jenkins, Jr., of Colorado, Ralph E. Kennedy of California, and John A. Penello of Maryland. Peter G. Nash of New York was General Counsel. The Board Members and the General Counsel are appointed by the President with Senate consent; the Board Members to 5-year terms and the General Counsel to a 4-year term.

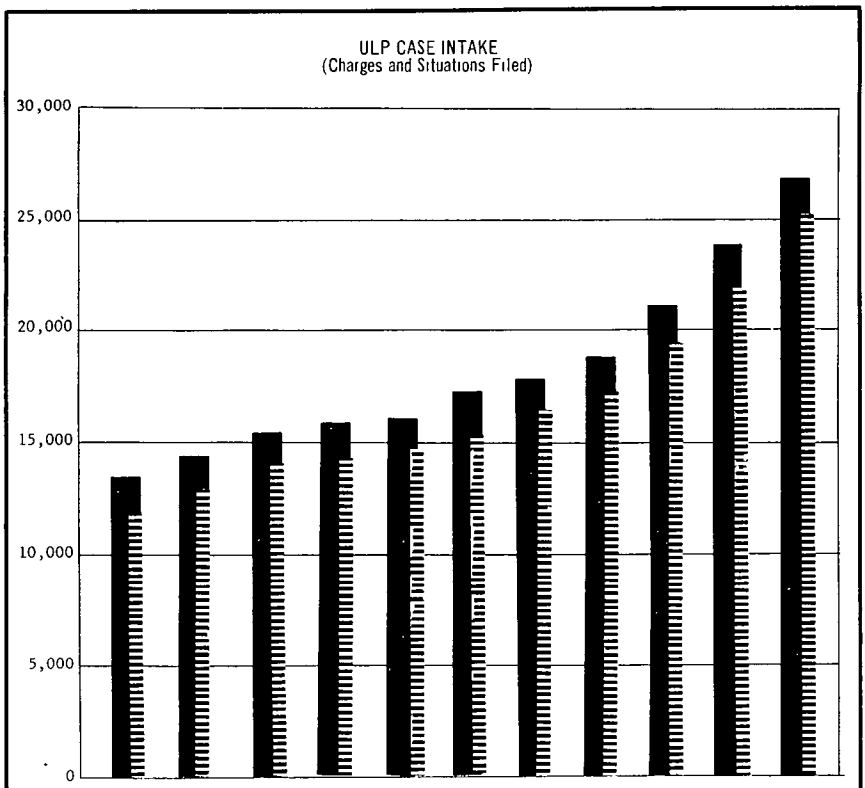
Mr. Penello became a Board Member on February 22, 1972. Mr. Nash became General Counsel on August 24, 1971.

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

In its statutory assignment, the NLRB has two primary functions: (1) to determine and implement, through secret ballot elections, the free democratic choice by employees as to whether they wish to be represented by a union and, if so, by which one; and (2) to prevent and remedy unlawful acts, called unfair labor practices, by either employers or unions, or both. The NLRB does not act on its own motion

in either function. It processes only those charges of unfair labor practices and petitions for employee elections which may be filed with it at one of its 31 regional offices, or 12 other field offices.

Chart 2



	1962	1963	1964	1965	1966	1967	1968	1969	1970	1971	1972
CHARGES	13,479	14,166	15,620	15,800	15 933	17 040	17,816	18 651	21 038	23,770	26 852
SITUATIONS	11 877	12,719	13,978	14,423	14,539	15,499	16 343	17,045	19,402	22,098	25,143

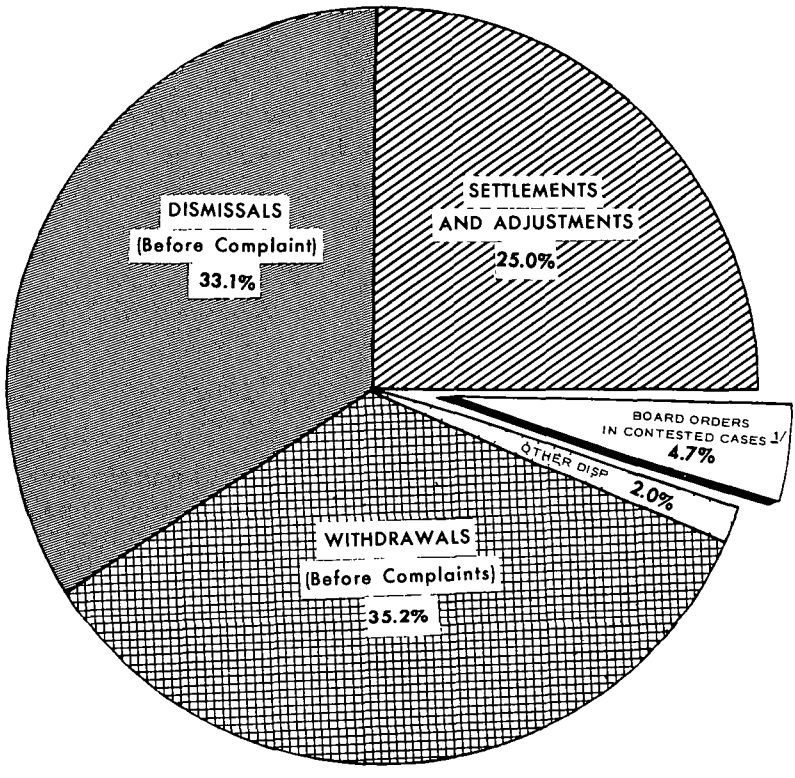
The Act's unfair labor practice provisions place certain restrictions on actions of both employers and unions in their relations with employees, as well as with each other, and its election provisions provide mechanics for conducting and certifying results of representation elections to determine collective-bargaining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

Chart 3

DISPOSITION PATTERN FOR UNFAIR LABOR PRACTICE CASES

(BASED ON CASES CLOSED)

FISCAL YEAR 1972



1/ CONTESTED CASES REACHING BOARD MEMBERS FOR DECISIONS

In handling unfair labor practice cases and petitions for elections, the Agency is concerned with the adjustment of labor disputes either by way of settlements or through its quasi-judicial proceedings, or by way of elections. Congress created the Agency in 1935 because labor disputes could and did threaten the health of the economy. In the 1947 and 1959 amendments to the Act, Congress increased the scope of the Agency's regulatory powers.

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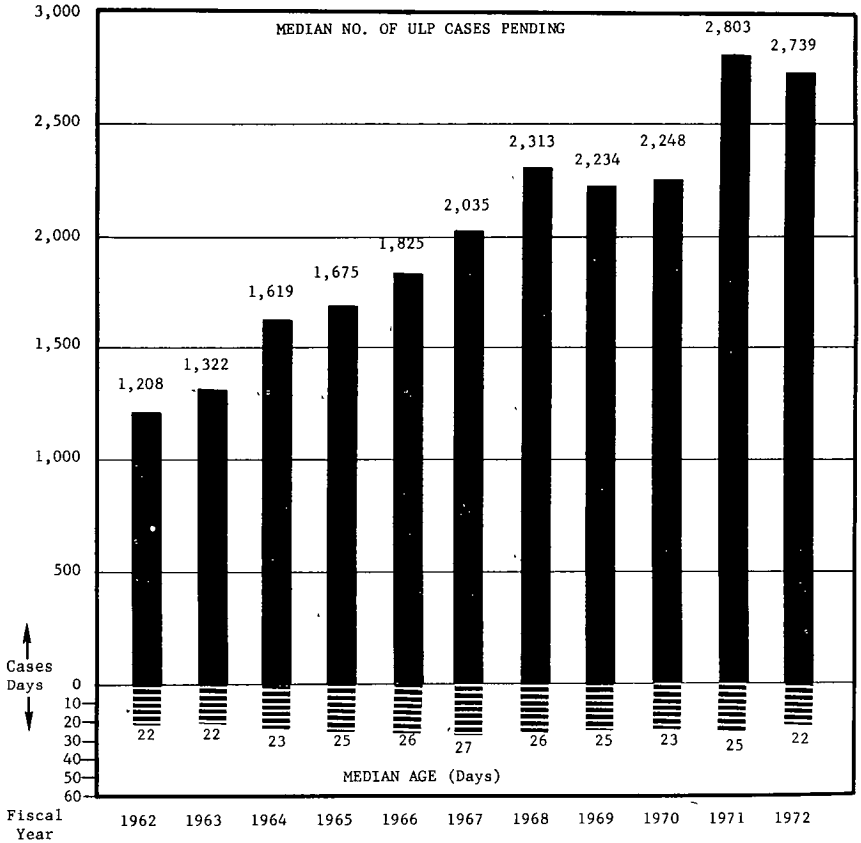
Chart 4

NUMBER AND AGE OF UNFAIR LABOR PRACTICE CASES PENDING UNDER PRELIMINARY INVESTIGATION, MONTH TO MONTH



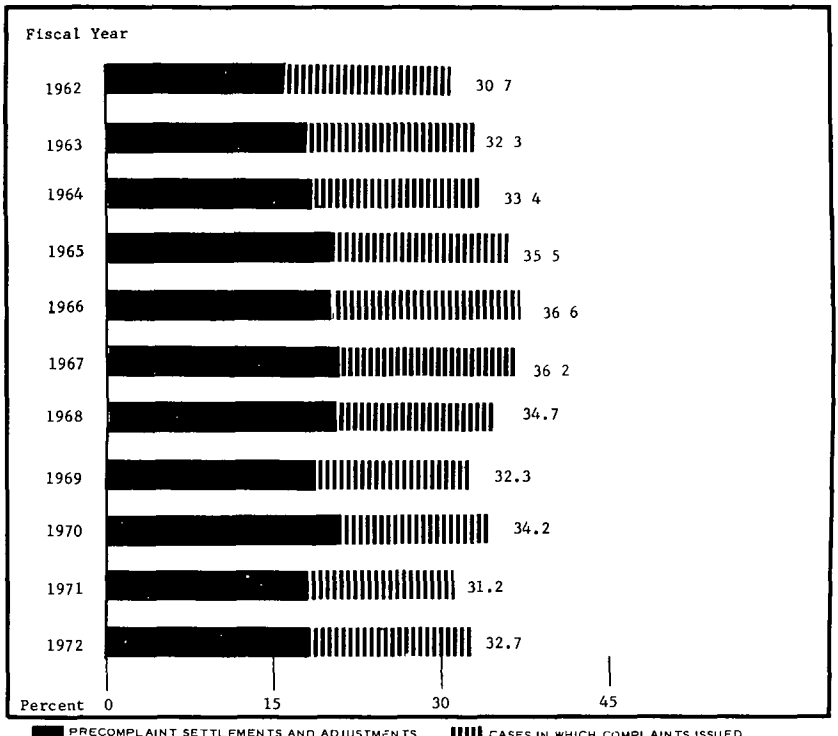
The NLRB has no statutory independent power of enforcement of its orders but may seek enforcement in the U.S. courts of appeals. Similarly, parties may seek judicial review.

Agency authority is divided by law and by delegation. The Board Members primarily act as a quasi-judicial body in deciding cases on formal records. The General Counsel is responsible for the issuance and prosecution of formal complaints and for prosecution of cases before the courts and has general supervision of the NLRB's regional offices.

For the conduct of its formal hearings in unfair labor practice cases, the NLRB employs trial examiners who hear and decide cases. Trial examiners' decisions may be appealed to the Board in the form of exceptions taken, but, if no exceptions are taken, under the statute the trial examiners' recommended orders become orders of the Board.

Chart 5

UNFAIR LABOR PRACTICE MERIT FACTOR



	1962	1963	1964	1965	1966	1967	1968	1969	1970	1971	1972
PRECOMPLAINT SETTLEMENTS AND ADJUSTMENTS (%)	15.3	17 5	17 8	19 4	19 4	20 5	20.2	18 4	20 4	17 7	18.3
CASES IN WHICH COMPLAINTS ISSUED (%)	15 4	14.8	15.6	16 1	17 2	15 7	14.5	13 9	13 8	13 5	14.4
TOTAL MERIT FACTOR (%)	30.7	32 3	33 4	35 5	36 6	36.2	34.7	32.3	34.2	31.2	32.7

All cases coming to the Agency begin their processing in NLRB regional offices, either through filing of unfair labor practice charges or employee representation petitions. Since the NLRB may not act on its own motion in either type of case, charges and petitions are initiated at regional offices by employers, individuals, or unions.

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

Chart 6

COMPLAINTS ISSUED IN UNFAIR LABOR PRACTICE PROCEEDINGS
AND MEDIAN DAYS FROM FILING TO COMPLAINT

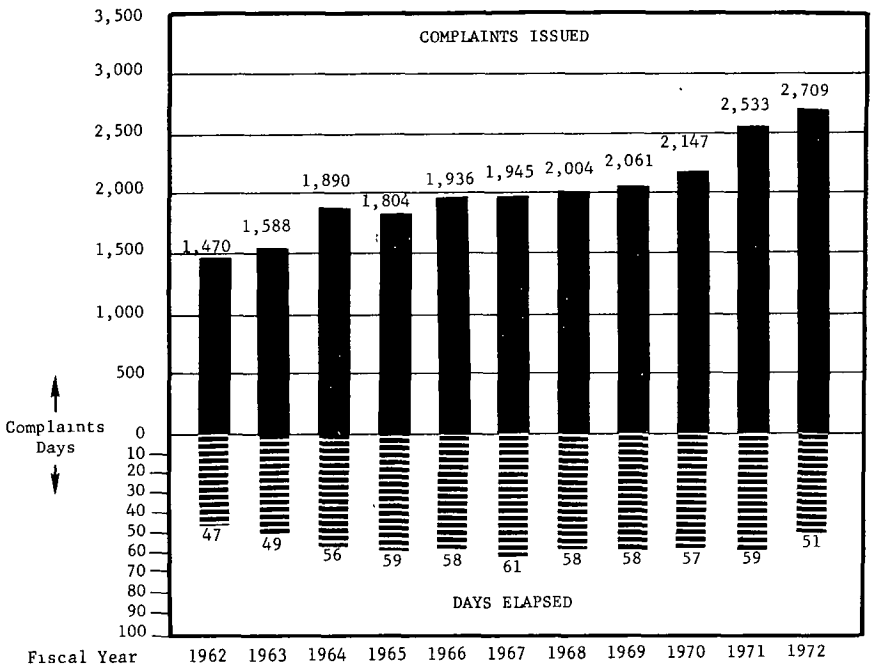
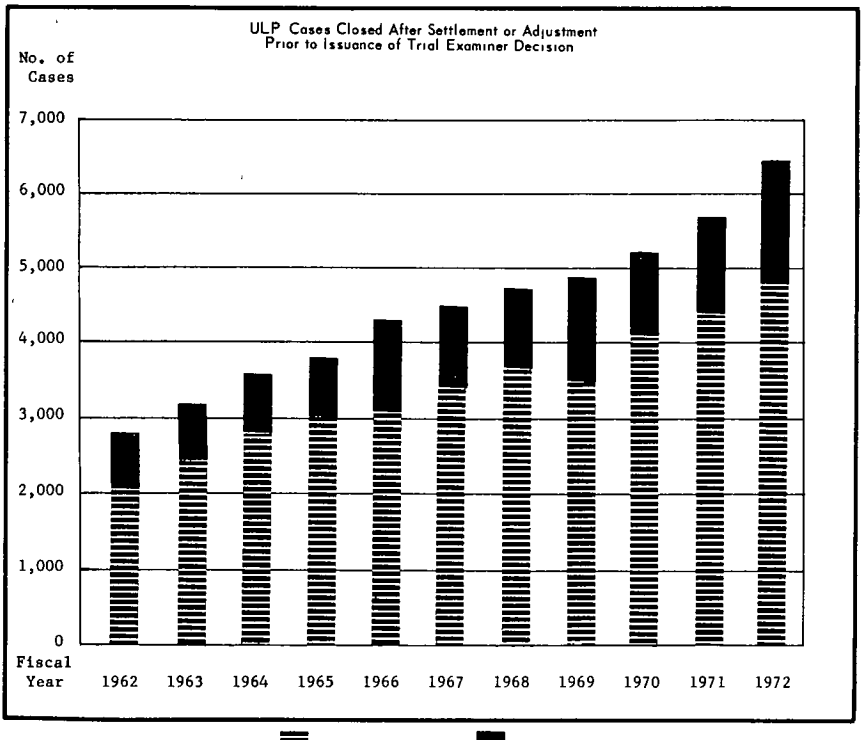


Chart 7

UNFAIR LABOR PRACTICE CASES SETTLED

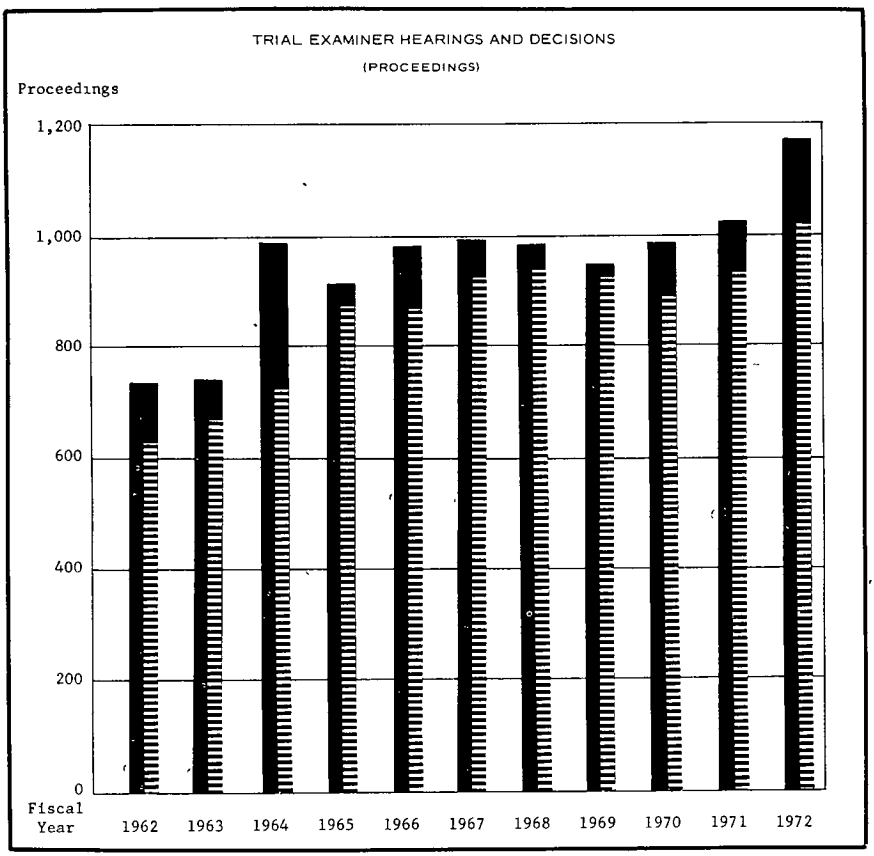


Fiscal Year	Precomplaint	Postcomplaint	Total
1962	2,008	744	2,752
1963	2,401	796	3,197
1964	2,750	846	3,596
1965	3,003	821	3,824
1966	3,085	1,176	4,261
1967	3,390	1,072	4,462
1968	3,608	1,089	4,697
1969	3,451	1,266	4,717
1970	4,054	1,174	5,228
1971	4,277	1,322	5,599
1972	4,755	1,626	6,381

2. Case Activity Highlights

NLRB caseload, in fiscal 1972, showed record high numbers in intake of cases, case closures (particularly those involving unfair labor practice charges), elections conducted, Board decisions issued, as well as increases in a number of other areas.

Chart 8



	1962	1963	1964	1965	1966	1967	1968	1969	1970	1971	1972
Hearings Held	740	745	989	917	982	993	977	951	990	1,025	1,178
Decisions Issued	623	675	734	875	867	934	943	929	894	930	1,023

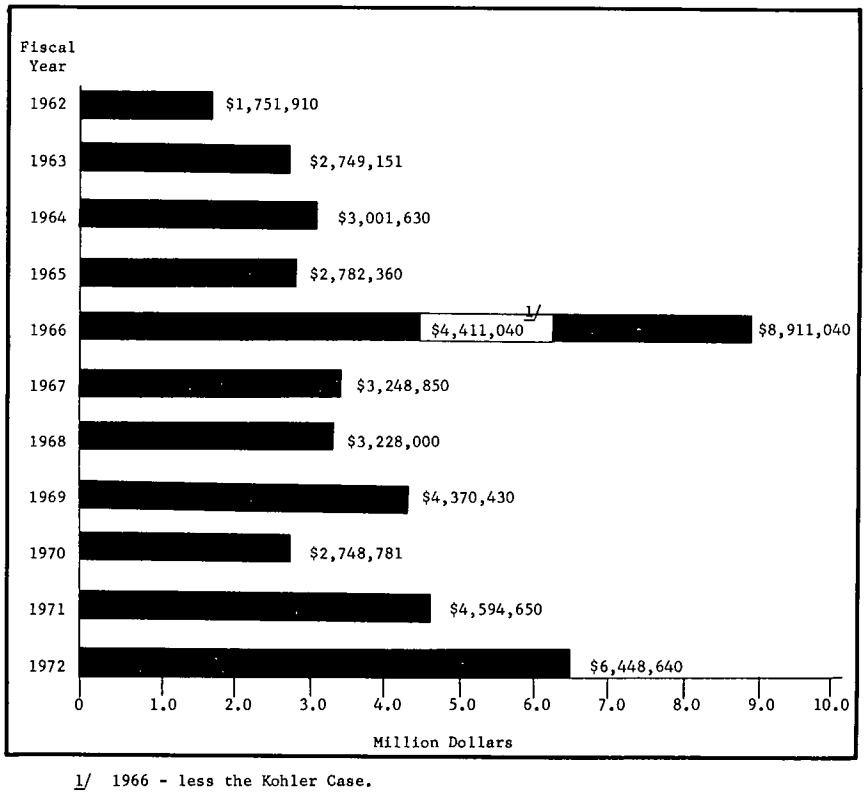
NLRB activity in 1972, coming from employers', employees', and labor organizations' requests for adjustments of labor disputes and answers to questions concerning employee representation, included:

- Intake—a total of 41,039 cases, of which 26,852 were unfair labor practice charges and 14,187 were representation petitions and related cases.

- Closed—a total of 39,474, with a record number, 25,555, involving unfair labor practice charges.
- Elections—a total of 9,020 conclusive elections of all types conducted, a record number.
- Board decisions issued—1,376 unfair labor practice decisions and 3,361 representation decisions and rulings, the latter by Board and regional directors.
- General Counsel's office (and regional office personnel)
  —issued 2,709 formal complaints
  —closed 1,286 initial unfair labor practice hearings, including 108 hearings under section 10(k) of the Act (job assignment disputes).

Chart 9

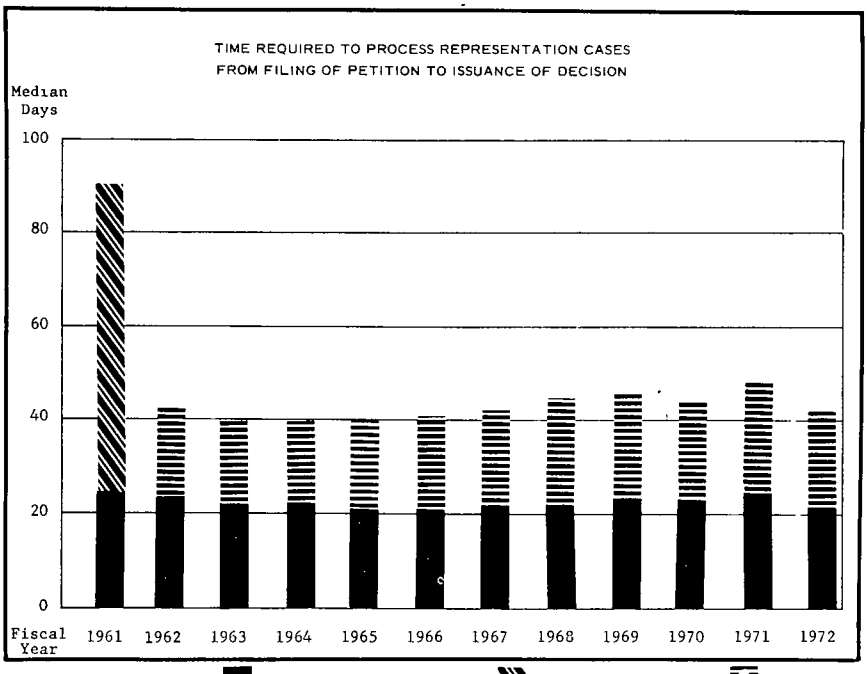
AMOUNT OF BACKPAY RECEIVED BY DISCRIMINATEES



1/ 1966 - less the Kohler Case.

- Regional directors issued 2,054 initial decisions in representation cases.
- Trial examiners issued 1,023 initial decisions plus 56 on backpay and supplemental matters.
- There were 6,381 unfair labor practice cases settled or adjusted before issuance of trial examiners' decisions.
- Regional Offices distributed $6,448,640 in backpay to 6,225 employees. There were 3,555 employees offered reinstatement; 2,544 accepted.
- Regional office personnel sat as hearing officers at 2,526 representation hearings—2,287 initial hearings and 239 on objections and/or challenges.
- There were 524,013 employees who cast ballots in NLRB-conducted representation elections.
- Appeals courts handed down 341 decisions related to enforcement and/or review of Board orders—83 percent affirmed the Board in whole or in part.

Chart 10



FISCAL YEAR	FILING TO CLOSE OF HEARING	CLOSE OF HEARING TO BOARD DECISION	CLOSE OF HEARING TO REGIONAL DIRECTOR DECISION
1961	24	65	-
1962	23	-	18
1963	22	-	17
1964	22	-	17
1965	21	-	18
1966	21	-	19
1967	22	-	20
1968	22	-	22
1969	23	-	22
1970	23	-	20
1971	24	-	23
1972	22	-	20

B. Operational Highlights

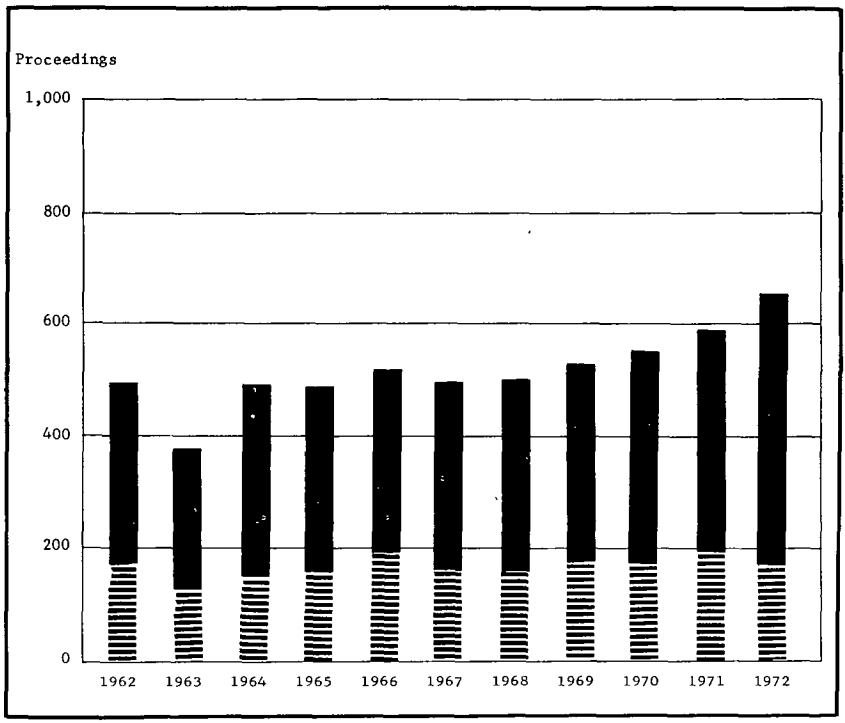
1. Unfair Labor Practices

In fiscal 1972 there were 26,852 unfair labor practice cases filed with the NLRB, a considerable increase of 3,082 over the 23,770 filed in fiscal 1971. The cases filed in 1972 were almost double the 13,479 filed 10 years ago. In situations in which related charges are counted as a single unit, there was a 13.8 percent increase over fiscal 1971. (Chart 2.)

In 1972, alleged violations of the Act by employers increased to 17,736 cases, a 15-percent rise from the 15,467 of 1971. Charges against unions rose more than 9 percent, to 9,030 in 1972 from the 8,250 of 1971.

Chart 11

BOARD CASE BACKLOG



Proceedings	1962	1963	1964	1965	1966	1967	1968	1969	1970	1971	1972
C	323	256	344	336	323	343	352	356	382	390	486
R	165	122	142	148	190	146	144	171	171	196	171
Totals	488	378	486	484	513	489	496	527	553	586	657

There were 86 charges of violations of section 8(e) of the Act, which bans hot cargo agreements: 65 against unions, 18 against both unions and employers, and 3 against employers alone. (Tables 1 and 1A.)

Regarding 1972 charges against employers, 11,164 (or 63 percent of the 17,733 total) alleged discrimination or illegal discharge of employees. There were 6,023 refusal-to-bargain allegations in about one-third of the charges. (Table 2.)

On charges against unions in 1972, there were 5,340 alleging illegal restraint and coercion of employees, about 59 percent as against the 58 percent of similar filings in 1971. There were 2,596 charges against unions for illegal secondary boycotts and jurisdictional disputes, 7 percent more than the 2,427 of 1971.

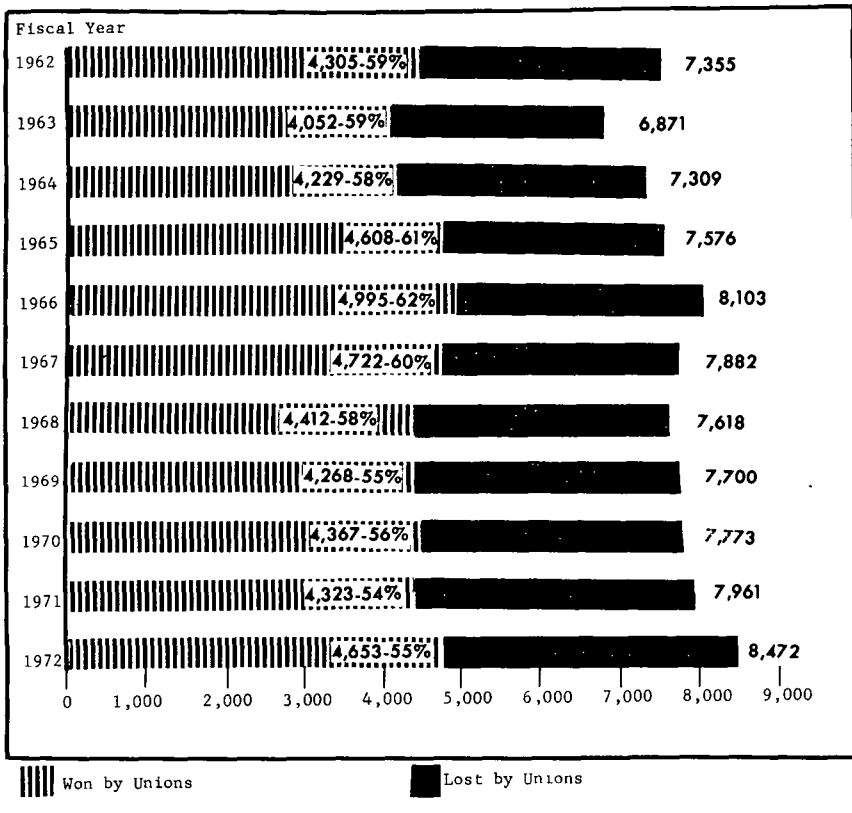
There were 1,882 charges of illegal union discrimination against employees in 1972. There were 449 charges of unions picketing illegally for recognition or for organizational purposes, a decrease from the 472 such charges in 1971. (Table 2.)

In charges against employers in 1972, unions led by filing 61 percent. Unions filed 10,869; individuals filed 6,856 charges (39 percent); and employers filed 11 charges against other employers.

More than half the charges against unions were filed by individuals—4,806—or 53.2 percent of 1972's total of 9,030. Employers filed 3,908 or 43.3 percent of the charges. Other unions filed the 316 remaining charges. Of the 86 hot cargo charges against unions and/or employers (involving the Act's section 8(e)) 71 were filed by employers, 3 by individuals, and 12 by unions.

Chart 12

COLLECTIVE-BARGAINING ELECTIONS CLOSED



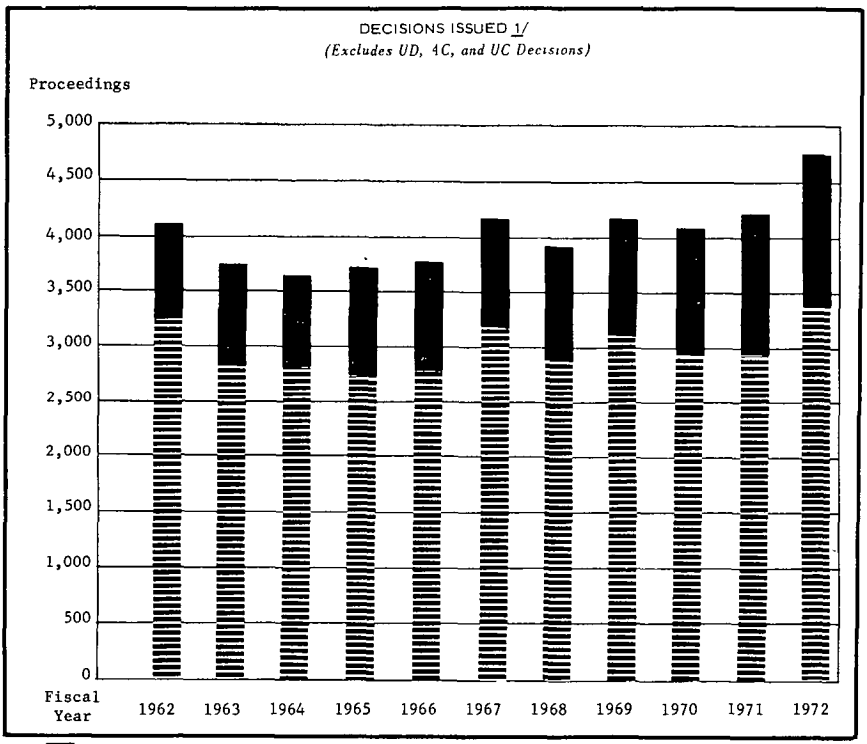
As to the record-high 25,555 unfair labor practice cases closed in 1972, about 93.3 percent were closed by NLRB regional offices, as compared with 92.9 percent in 1971. In 1972 25 percent of the cases were settled or adjusted before issuance of trial examiners' decisions: 35.2 percent by withdrawal before complaint and 33.1 percent by adminis-

trative dismissal. In 1971 the percentages were 23.5, 35.5, and 33.9, respectively.

The number of unfair labor practice charges found to have merit is important to the evaluation of regional workload. In fiscal 1958, 20.7 percent of cases were found to have merit. The highest level was 36.6 percent in fiscal 1966. In fiscal 1972 it was 32.7 percent.

In 1972 the merit factor in charges against employers was 32.6 percent as against 31.2 percent in 1971. In charges against unions the merit factor was 33 percent in fiscal 1972; it was 31.3 percent in fiscal 1971.

Chart 13



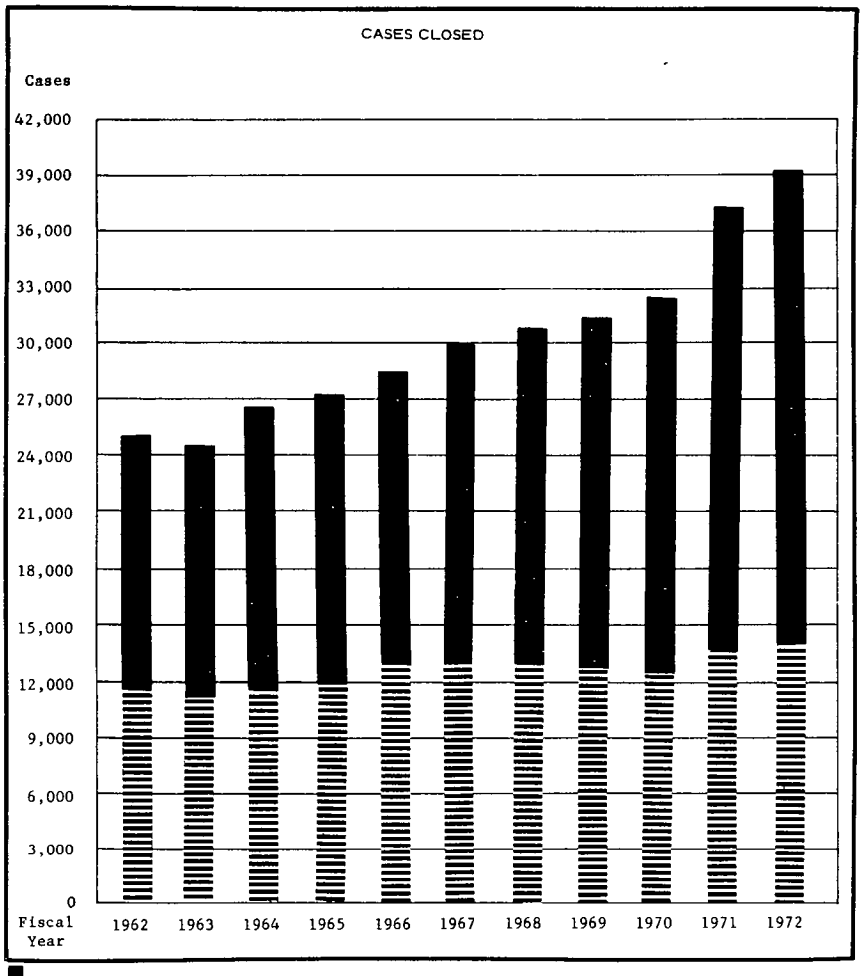
Fiscal Year	1962	1963	1964	1965	1966	1967	1968	1969	1970	1971	1972
C	903	854	776	1,000	991	1,023	1,033	1,063	1,167	1,239	1,376
R	3,211	2,857	2,812	2,707	2,769	3,155	2,869	3,108	2,927	2,962	3,361
Totals	4,114	3,711	3,588	3,707	3,760	4,178	3,902	4,171	4,094	4,201	4,737

1/ Includes supplemental decisions in unfair labor practice cases and decisions on objections and/or challenges in election cases.

Since 1962 (see chart 5) more than 50 percent of merit charges have resulted in precomplaint settlements and adjustments; these amounted to 56 percent in fiscal 1972.

In 1972 there were 3,740 merit charges which caused issuance of complaints, and 4,755 precomplaint settlements or adjustments of meritorious charges. The two totaled 8,495 or 32.7 percent of the unfair labor practice cases. (Chart 5.)

Chart 14



	1962	1963	1964	1965	1966	1967	1968	1969	1970	1971	1972
C CASES	13,319	13,605	15,074	15,219	15,587	16,360	17,777	18,939	19,851	23,840	25,555
R, UD, AC, AND UC CASES	11,708	11,073	11,641	11,980	12,917	13,134	12,973	12,658	12,502	13,360	13,919
TOTALS	25,027	24,678	26,715	27,199	28,504	29,494	30,750	31,597	32,353	37,200	39,474

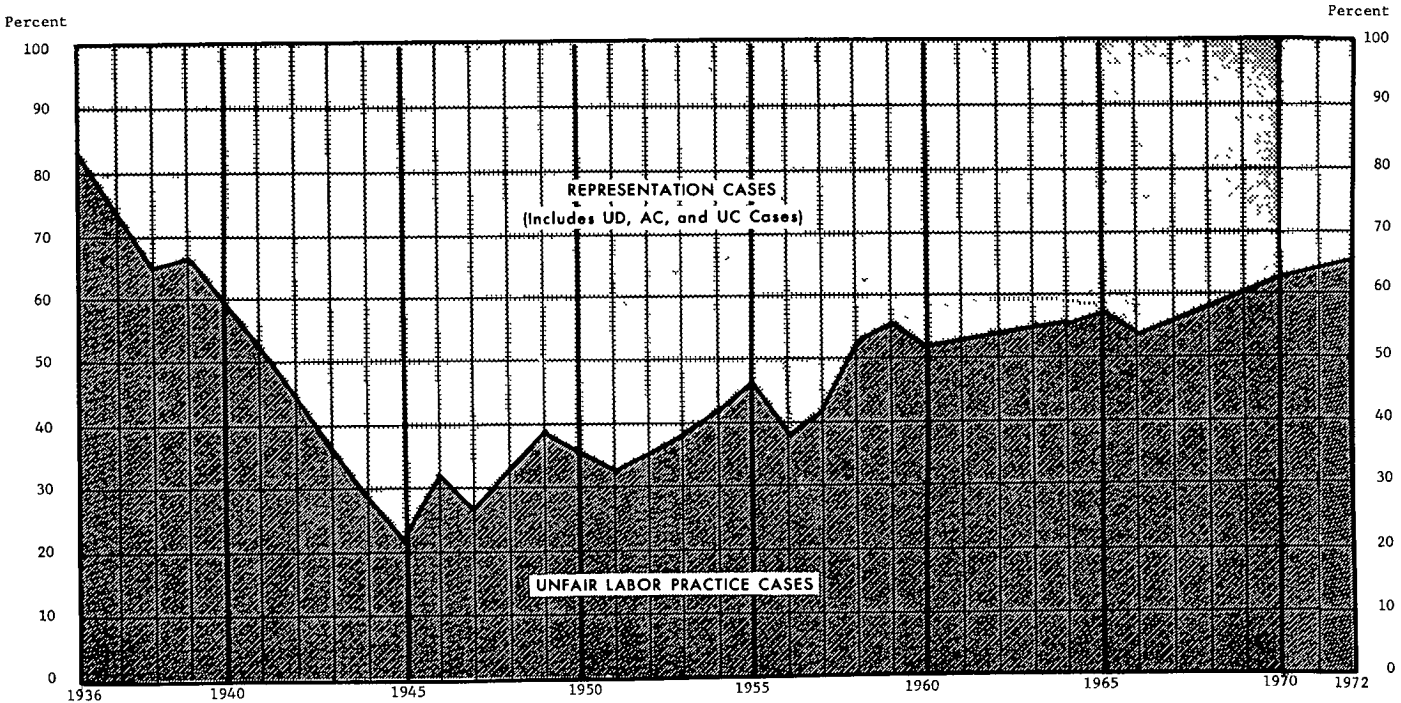
In fiscal 1972 NLRB regional offices issued 2,709 complaints, about 7 percent more than the 2,533 issued in 1971. (Chart 6.)

Of complaints issued, 76.1 percent were against employers, 20.6 percent against unions, and 3.3 percent against both employers and unions.

In 1972, NLRB regional offices processed cases from filing of charges to issuance of complaints in a median of 51 days, 8 less than in 1971. The 51 days included 15 days in which parties had the opportunity to adjust charges and remedy violations without resort to formal NLRB processes. (Chart 6.)

Chart 15

COMPARISON OF FILINGS OF UNFAIR LABOR PRACTICE CASES AND REPRESENTATION CASES



This graph shows the percentage division of the NLRB caseload between unfair labor practice cases and representation cases during fiscal years 1936 - 1972.

Trial examiners in 1972 conducted 1,178 initial hearings involving 1,679 cases, compared with 1,025 hearings involving 1,453 cases in 1971. (Chart 8 and table 3A.) Also, trial examiners conducted 56 additional hearings in 1972 in supplemental matters.

At the end of fiscal 1972, there were 9,503 unfair labor practice cases pending before the Agency, 16 percent more than the 8,206 cases pending at the end of fiscal 1971.

In fiscal 1972 the NLRB awarded backpay to 6,225 workers, in total amounting to $6.4 million. The backpay was 40 percent more than in fiscal 1971. (Chart 9.)

Employees in fiscal 1972 received $122,050 in reimbursement for fees, dues, and fines as a result of charges filed with the NLRB.

During fiscal 1972, in 1,029 cases there were 3,555 employees offered reinstatement, and 2,544, or 72 percent, accepted reinstatement. In fiscal 1971, about 68 percent of the employees accepted offered reinstatement.

Work stoppages ended in 323 of the cases closed in fiscal 1972. Collective bargaining was begun in 1,673 cases. (Table 4.)

2. Representation Cases

In fiscal 1972 the NLRB received 14,187 representation and related case petitions. These included 12,631 collective-bargaining cases; 1,080 decertification petitions; 172 union-shop deauthorization petitions; 83 petitions for amendment of certification; and 221 petitions for unit clarification. The NLRB's total representation intake was 6 percent or 745 cases above the 13,442 of fiscal 1971.

There were 13,919 representation cases closed in fiscal 1972, about 4.2 percent above the 13,360 closed in fiscal 1971. Cases closed in 1972 included 12,383 collective-bargaining petitions, 1,055 petitions for elections to determine whether unions should be decertified, 180 petitions for employees to decide whether unions should retain authority to make union-shop agreements with employers, and 301 unit clarification and amendment of certification petitions. (Chart 14 and tables 1 and 1B.)

There were 13,618 representation and union-deauthorization cases closed in fiscal 1972. About 67 percent, or 9,176 cases, were closed after elections. There were 3,423 withdrawals, 25 percent of the total number of cases, and 1,019 dismissals.

The NLRB regional directors ordered elections following hearings in 1,697 cases, or 19 percent of those closed by elections. There were 30 cases which resulted in expedited elections pursuant to the Act's 8(b)(7)(C) provisions pertaining to picketing. Board elections in 130 cases, about 1 percent of election closures, followed appeals or transfers from regional offices. (Table 10.)

3. Elections

A record 9,020 conclusive elections were conducted in cases closed in fiscal 1972. An additional 303 inconclusive representation case elections were held that resulted in withdrawal or dismissal before certification, or required a rerun or runoff election. Of the conclusive elections, 8,472 (94 percent) were collective-bargaining elections. Unions won 4,653, or 55 percent, of them. There also were 451 elections conducted to determine whether incumbent unions would continue to represent employees (decertification elections), and 97 to decide whether unions would continue to have authority to make union-shop agreements with employers (reauthorizations polls).

Unions lost the right to make union-shop agreements in 56 of the 97 deauthorization elections, while they maintained the right in 41 other elections, which covered 3,359 employees. (Table 12.)

By voluntary agreement of parties involved, 7,196 stipulated and consent elections were conducted. These were 80 percent of the total elections, compared with 80 percent in fiscal 1971. (Table 11.)

With more elections won by unions in 1972 as compared with 1971, more employees (519,477 in 1972; 514,284 in 1971) exercised their right to vote. For all types of elections, the average number of employees voting, per establishment, was 58 (4 less than in 1971). In about three-fourths of collective-bargaining elections each involved 59 or fewer employees. There were about 49 employees for the decertification elections. (Tables 11 and 17.)

In decertification elections, unions won in 134, lost in 317. Unions retained the right of representation of 10,762 employees in the 134 elections won. Unions lost the right of representation of 10,028 employees in the 317 in which they did not win. As to size of bargaining units involved, unions won in units averaging 80 employees and lost in units averaging 32 employees. (Table 13.)

4. Decisions Issued

There were 4,918 decisions issued by the Agency in fiscal 1972, a 12.6 percent increase from the 4,369 decisions of fiscal 1971. Board Members issued 2,349 decisions in 2,951 cases—391 more decisions than the 1,958 of 1971. Regional directors issued 2,569 decisions in 2,701 cases, an increase of 158 over the 2,411 decisions in 1971.

Trial examiners issued 1,023 decisions and recommended orders in fiscal 1972, a 10 percent increase from the 930 of fiscal 1971. (Chart 8.)

Trial examiners in 1972 also issued 32 backpay decisions (24 in 1971) and 24 supplemental decisions (11 in 1971). (Table 3A.)

In 1972 Board Members and regional directors issued 4,737 decisions involving 5,459 unfair labor practice and representation cases. (Chart

13.) The Board and regional directors issued 181 decisions in 193 cases regarding clarification of employee bargaining units, amendments to union representation certifications, and union-shop deauthorization cases.

Parties contested the facts or application of the law in 1,367 of the 2,349 Board decisions.

The contested decisions follow:

Total contested Board decisions	1,367
Unfair labor practice decisions	921
Initial (includes those based on stipulated record)	800
Supplemental decisions	11
Backpay decisions	32
Determinations in jurisdictional disputes	78
Representation decisions total	431
After transfer by regional directors for initial decisions	126
After review of regional directors' decisions	40
Decisions on objections and/or challenges	265
Clarification of bargaining units decisions	10
Amendment to certification decisions	4
Union deauthorization decisions	1

This tally left 982 decisions which were not contested before the Board.

A relatively small number of contested cases reach the Board Members. This is accounted for by case settlements, adjustments, withdrawals, and dismissals. (Chart 3 and Tables 7 and 7A.) These processes effectively dispose of a vast bulk of charges filed with the Agency without the need of extended litigation.

A number of related cases may be covered in Board decisions. In fiscal 1972, the 800 initial contested unfair labor practice decisions were concerned with 1,080 cases. The Board found violations of the Act in 890 of the latter, or 82 percent. In 1971 violations were found in 814, or 80 percent, of the 1,019 contested cases.

In terms of *cases* involved, the contested decisions by the Board showed the following results:

1. *Employers*—During fiscal 1972 the Board ruled on 800 contested ULP cases against employers, or 5 percent of the 16,725 ULP cases against employers disposed of by the Agency and found violations in 661 cases or 83 percent as compared with 82 percent in 1971. The Board remedies in these cases included ordering employers to reinstate 866 employees with or without backpay; to give backpay without reinstatement to 41 employees; to cease illegal assistance to or domination of labor organizations in 21 cases; and to bargain collectively with employee representatives in 250 cases.

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2. *Unions*—In fiscal 1972 Board rulings encompassed 273 contested ULP cases against unions. Of these 273 cases, violations were found in 224 cases, or 82 percent, as compared to 72 percent in fiscal 1971. The remedies in the 224 cases included orders to unions in 15 cases to cease picketing and to give 81 employees backpay.

3. *Both Employers and Unions*—During fiscal 1972 the Board ruled on seven "hot cargo" cases involving combined employer and union respondents. Of these, violations were found in five cases.

At the close of fiscal 1972, there were 657 decisions pending issuance by the Board—486 dealing with alleged unfair labor practices and 171 with employee representation questions. The total was a 12-percent increase over the 586 decisions pending at the beginning of the year. (Chart 11.)

5. Court Litigation

In fiscal 1972, U.S. courts of appeals handed down 341 decisions in NLRB-related cases, 30 less decisions than in fiscal 1971. In the 341 decisions NLRB was affirmed in whole or in part in 83 percent. This was a decrease from the 87 percent in the 371 cases of the prior year.

A breakdown of appeals courts rulings in fiscal 1972 follows:

Total NLRB cases ruled on	341
Affirmed in full	239
Affirmed with modification	39
Remanded to NLRB	16
Partially affirmed and partially remanded	5
Set aside	42

In 21 contempt cases (21 in the prior year) before the appeals courts, the respondents in 15 cases complied with the NLRB order after the contempt petition had been filed but before court decision. In 4, the courts held the respondents in contempt, and in 2 a court denied the Agency's petitions. (See tables 19 and 19A.)

The U.S. Supreme Court affirmed in full two NLRB orders and affirmed one with modification. In one case the Board order was set aside. In a fifth case, the case was remanded to the circuit court of appeals.

U.S. district courts in fiscal 1972 granted 110 contested cases litigated to final order on NLRB injunction requests filed pursuant to section 10(j) and 10(l) of the Act. This amounted to 90 percent of the contested cases, compared with 118 cases granted in fiscal 1971, or 93 percent.

The following shows NLRB injunction activity in district courts in fiscal 1972:

Granted	110
Denied	12
Withdrawn	28

Dismissed	13
Settled or placed on courts' inactive docket	105
Awaiting action at end of the fiscal year	14

There were 276 NLRB-related injunction petitions filed with the district courts in 1972, as against 252 in 1971. The NLRB in 1972 also filed 5 petitions for injunctions in appeals courts pursuant to provisions of the Act's section 10(e). The appeals courts ruled on 6 petitions involving that same section of the Act, denying 5. (See table 20.)

In fiscal 1972 there were 52 additional cases involving miscellaneous litigation decided by appellate and district courts, 47 of which upheld the NLRB's position. (See table 21.)

C. Decisional Highlights

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

1. Deference to Arbitration

The Board's authority, in its discretion, to defer to arbitration for the resolution of disputes between parties was assessed by it in a case [1] in which it found the dispute "in its entirety" arose "from the contract between the parties, and from the parties' relationship under the contract. . . ." The Board noted that where a set of facts presents not only an alleged violation of the Act but also an alleged breach of the collective-bargaining agreement subject to arbitration, it "compels an accommodation between, on the one hand, the statutory policy favoring the fullest use of collective bargaining and the arbitral process and, on the other, the statutory policy reflected by Congress' grant to the Board of exclusive jurisdiction to prevent unfair labor practices." Addressing this accommodation, the Board concluded that where arbitration is available to the parties, even though there has been no recourse to it, the determination of such issues are "best left to discussions in the grievance procedure by the parties who negotiated

[1] *Collyer Insulated Wire, infra,* p 34

the applicable provisions or, if such discussions do not resolve them, then to an arbitrator chosen under the agreement and authorized by it to resolve such issues." The Board therefore dismissed the complaint, but retained limited jurisdiction over the proceeding to be exercised in the event the dispute either was not resolved or submitted to the contract procedures, or the contract procedures were not fair and regular or reached a result repugnant to the Act.

2. Voting Eligibility

The eligibility of economic strikers with an expectation of employment due to their position on a preferential hiring list to vote in a Board election to be conducted more than 12 months after the commencement of the strike was resolved by the Board in the *Wahl Clipper*[2] case. Construing section 9(c)(3) of the Act in the light of its legislative history, the Board concluded that the 12 months after commencement of the strike standard of that section establishes a maximum period for the voting eligibility of economic strikers. It did not view the fact that the strikers—under doctrine evolved since enactment of section 9(c)(3)—were still considered employees and entitled to reinstatement should openings occur, as giving them such an interest in the issues to be resolved by the election as to outweigh the flat 1-year limitation of the statute.

3. Interference With Employee Rights

The scope of section 7 rights of individual employees to act in concert for "mutual aid and protection" received further clarification by the Board in the *Quality Mfg. Co.* and *Mobil Oil Corp.* cases.[3] In *Quality Mfg.* the Board held that an employer may not discipline an employee for demanding union representation at an interview required by the employer relating to disciplinary offenses, nor discipline a union representative for seeking to be present at such an interview. Finding that the employee had a reasonable basis for believing that disciplinary action might result and that the request for union representation was therefore reasonable, the Board concluded the employer's discipline of the employee for insisting on representation was violative of section 8(a)(1). Upon similar reasoning, in *Mobil Oil*,[4] the Board found the employer interfered with the employees' section 7 rights in violation of section 8(a)(1) by denying their requests for union representation at interviews investigating the theft of property while insisting upon

[2] *Wahl Clipper Corp., infra*, p. 70.
[3] *Infra*, p. 92.
[4] *Infra*, p. 92

the employees' attendance at those interviews. The Board held the employer's actions to be unwarranted interference with the employees' "right of concerted protection, rather than individual self-protection against possible adverse employer action."

An employer's refusal to reinstate striking employees who had engaged in picketing for recognition of a union representative within 1 year of the holding of a valid election—an activity found by the Board to be specifically interdicted by section 8(b)(7)(B) of the Act—was held by the Board in the *Claremont Petrochemicals* case [5] not to be a violation of the Act. On the basis of case precedent and congressional intent the Board concluded that where the activity engaged in by an employee is participation in an activity which controvenes the policies of the Act the employee has forfeited his right to invoke other provisions of the same statute to restore him to his job with backpay.

4. The Bargaining Obligation

The obligation under the Act to bargain concerning a decision to sell an employing enterprise was considered by the Board in the *General Motors* case,[6] which involved the sale of an enterprise found by the Board to constitute an arms-length withdrawal of capital by the seller and a corresponding investment of capital by the purchaser. The Board held that decisions of this nature, "in which a significant investment or withdrawal of capital will affect the scope and ultimate direction of an enterprise, are matters essentially financial and managerial in nature. They thus lie at the very core of entrepreneurial control" and are not subjects for bargaining within the scope of the *Fibreboard* doctrine.[7]

5. Union Fines

The action of a union in imposing fines on some of its members, who, as supervisors for the employer, crossed the union's picket line during a strike and performed work which but for the strike would have been performed by the striking employees, was held by the Board in the *Loc. 2150, IBEW* case [8] to constitute coercion of the employer in his selection of representatives for the processing of grievances and therefore prohibited by section 8(b)(1)(B). The Board held that such disciplining of supervisor-union members is precluded where the underlying dispute providing a basis for the discipline is between the employer and the union rather than between the union

[5] *Loc 707, Highway & Motor Freight Drivers, Intl Brotherhood of Teamsters, infra,* p. 100.
[6] *Infra,* p 105
[7] *Fibreboard Paper Products Corp* v *N L R.B ,* 379 U S 203.
[8] *Infra,* p 109

and the supervisor. "The intent is to prevent the supervisor from being placed in a position where he must decide either to support his employer and thereby risk internal union discipline or support the union and thereby jeopardize his position with the employer. To place the supervisor in such a position casts doubt both upon his loyalty to his employer and upon his effectiveness as the employer's collective-bargaining and grievance adjustment representative."

6. Hot Cargo Agreements

The scope of proscription of hot cargo provisions by section 8(e) of the Act received further definition by the Board in the *IAM* [*Lufthansa*] case.[9] There it held that an airline—a carrier-by-air subject to the Railway Labor Act—and a union representing its food service employees had violated that section by entering into a contractual agreement under which the airline agreed to contract only with union caterers for food catering services at locations where it did not use its own employees, wherefore it terminated its arrangements with nonunion caterers at those locations. From an examination of the legislative history of section 8(e), the Board concluded that, although the airline was not a statutory employer within the definition of that term in section 2(11) of the Act, the agreement was nevertheless illegal. The Board held that the term "employer," as used in section 8(e) to define the parties between whom hot cargo agreements were proscribed, was intended by Congress to be construed in a generic sense rather than as a statutory term, thereby making the term as broad as the term "person" used in section 8(b)(4)(B) to define the scope of prohibition under that section of activity having a cases-doing-business objective. Only this construction would render the scope of the prohibition against business interruptions through contract agreements of section 8(e) as broad as the similar prohibition through strikes and picketing afforded by section 8(b)(4)(B).

[9] *Infra*, p. 133.

D. Financial Statement

The obligations and expenditures of the National Labor Relations Board for fiscal year ended June 30, 1972, are as follows:

Personnel compensation	$37,161,178
Personnel benefits	3,299,135
Travel and transportation of persons	2,173,407
Transportation of things	73,108
Rent, communications, and utilities	1,464,994
Printing and reproduction	792,931
Other services	1,962,080
Supplies and materials	398,001
Equipment	272,155
Insurance claims and indemnities	33,993
Subtotal obligations and expenditures [10]	47,630,982
Transferred to other accounts (GSA)	7,941
Total Agency	47,638,923

[10] Includes reimbursable obligations distributed as follows:

Personnel compensation	$11,972
Personnel benefits	2,357
Travel and transportation of persons	522
Other services	37,450
Total obligations and expenditures	52,301

II

Jurisdiction of the Board

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

A. University Hospitals

Two cases decided during the report year [6] presented the question whether the Board, having recently asserted jurisdiction over private

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[1] See secs. 9(c) and 10(a) of the Act and also definitions of "commerce" and "affecting commerce" set forth in sec. 2(6) and (7), respectively. Under sec. 2(2), the term "employer" does not include the United States or any wholly owned Government corporation, any Federal Reserve Bank, any state or political subdivision, any nonprofit hospital, any person subject to the Railway Labor Act, or any labor organization other than when acting as an employer "Agricultural laborers" and others excluded from the term "employee" as defined by sec 2(3) of the Act are discussed, *inter alia,* in the Twenty-ninth Annual Report (1964), pp. 52–55, and Thirty-first Annual Report (1966), p. 36.

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

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

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

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

[6] *Loyola University Medical Center,* 194 NLRB No. 30; *Duke University,* 194 NLRB No 31

nonprofit universities,[7] was nevertheless precluded by section 2(2) of the Act from asserting jurisdiction over hospitals operated by such universities. The Board concluded that the statutory exemption for nonprofit hospitals was not limited to organizations or associations which operated only hospitals, but applied to any nonprofit hospital operated by another nonexempt, nonprofit entity.[8] Accordingly, the petition in *Loyola*, seeking a unit of maintenance employees who spent the majority of their time working in the hospital at the university's medical center, was dismissed. In *Duke*, where an election was directed in a universitywide unit of service employees, all employees spending a majority of their working time in the university's hospitals or in satellite units and laboratories whose operations were found to be closely and initimately related to those of the hospitals were excluded from the unit. The fact that, in the *Duke* case, the hospitals had no separate legal existence apart from the university did not remove them from the statutory exemption.

B. Quasi-Public Institutions

Another case [9] involved a private university which, pursuant to state law, was being operated as a state-related university, with one-third of its trustees appointed by the governor, the speaker of the state house of representatives, and the president *pro tempore* of the state senate. The governor, the mayor of Philadelphia, and the state superintendent of public education were *ex officio* trustees. A state appropriation accounted for approximately two-thirds of the university's unrestricted income; the university was required to submit a proposed budget and appropriation request annually to the state secretary of education, and the request was incorporated into the State's overall budget. The State had erected a number of buildings on the university campus and retained title to them. The university was also required to file an annual statement, setting forth the amounts and purposes of all its expenditures, with the state auditor general who was empowered to audit the university's expenditures of state funds.

The Board concluded that, although the university admittedly was not a "political subdivision within the meaning of section 2(2) of the

[7] *Cornell University*, 183 NLRB No 41 (1970), Thirty-fifth Annual Report (1970), p. 26.

[8] Chairman Miller and Members Jenkins and Kennedy for the majority Member Fanning, dissenting, viewed the legislative history of the statutory exemption as indicating that only charitable organizations engaged exclusively in the operation of hospitals, were not to be treated as "employers" In his view, the majority, in effect, recast the statute to exempt hospital employees, not employers, since jurisdiction was asserted over Duke as an employer

[9] *Temple University—of the Commonwealth System of Higher Education*, 194 NLRB No. 195

Act, assertion of jurisdiction would not effectuate the policies of the Act in view of the unique relationship between the university and the State. In the Board's view, the substantial state involvement in the financial affairs of the university and the extensive direct state control over the university's activities rendered this case clearly distinguishable from the *Cornell* case,[10] in which the university, although running certain schools for the State, was overwhelmingly private with no comparable state involvement in its administration.[11]

In a subsequent case,[12] the Board found at least as close a nexus, if not closer, between the city of New York and a public library system as that between the State and the university in *Temple.* Accordingly, the Board concluded that, whether or not the library system was a political subdivision within the meaning of section 2(2) of the Act, it would not effectuate the policies of the Act to assert jurisdiction over it.

In *Nassau Library System,*[13] a library system composed of 53 member libraries, the status of many of which was similar to that of the library in the *Queens Borough* case, received approximately 20 percent of its operating funds from the county and 75 percent from the State. Its trustees were elected by the trustees of the participating member libraries and could be removed from office by the state department of education. Before receiving funds from the county, the library system had to have a proposed budget approved by the county board of supervisors. To receive funds from the State, it had to submit a plan of service to the state education department, indicating what use would be made of the funds; the state officials would later visit the libraries to see that the plan was carried out, that funds were invested in securities approved in advance by the State, and that the library system was complying with state regulations concerning the purchase of books and periodicals. The Board concluded that the case for a result similar to that reached in the *Temple* and *Queens Borough Public Library* cases was even more compelling here than in those cases. Accordingly, jurisdiction was declined without determining whether the library system was a statutory employer or a political subdivision.[14]

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[10] *Cornell University,* fn 7, *supra.*

[11] Chairman Miller and Members Jenkins and Kennedy for the majority. Member Fanning, dissenting, was of the view that there was no meaningful distinction between the instant case and *Cornell,* and that, as *Temple* satisfied the jurisdictional standard established by the Board for private nonprofit colleges and universities, and admittedly was an "employer," jurisdiction should be asserted.

[12] *Queens Borough Public Library,* 195 NLRB No. 174

[13] 196 NLRB No. 125.

[14] Compare *Minneapolis Society of Fine Arts,* 194 NLRB No. 55, where jurisdiction was asserted over a nonprofit corporation operating an art museum and art instructional programs, where only a small percentage of the employer's finances were derived from tax revenues, and no state or municipal government exercised any supervision or control over the employer's operations.

C. Other Enterprises

One case decided during the report year [15] involved the question of whether to assert jurisdiction over a corporation which served as a purchasing agent for its parent corporation, which owned virtually all of its stock and was, in turn, wholly owned by the Italian government. The subsidiary received a commission, set by the parent corporation and designed to cover only the subsidiary's operating costs, for each purchase made on behalf of the parent. All the subsidiary's directors were appointed and employed by the parent and a majority of them resided in Italy. All policy decisions were made in Rome and labor relations policy was established by labor relations experts employed by the parent corporation. The Board concluded that, as the parent corporation was an instrumentality of the Italian government, the close relationship between it and the subsidiary rendered it inappropriate to assert jurisdiction over the subsidiary's employees, irrespective of whether the Board had legal jurisdiction over such employees.[16]

In the *Evans & Kunz* case,[17] the Board was presented for the first time with the question of whether to assert jurisdiction over a law firm. As the firm furnished legal services valued in excess of $300,000, of which in excess of $50,000 was furnished to clients which met the Board's jurisdictional standards for direct inflow or direct outflow, the Board concluded that it had statutory jurisdiction. However, in view of the fact that the firm, which was composed of four to six attorneys, confined most, if not all, of its activities to the practice of law solely within a State, the Board concluded that the impact of the case on commerce was not sufficiently substantial to warrant the assertion of jurisdiction. This conclusion was declared to be applicable only to the facts of the instant case and not to law firms as a class.

In another case,[18] the Board declined to assert jurisdiction over a nonprofit corporation which operated and maintained a condominium containing residential units and recreational facilities, although its gross revenues for the preceding year exceeded $500,000 and it pur-

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[15] *AGIP, USA,* 196 NLRB No 177.

[16] Members Jenkins and Kennedy for the majority Member Fanning, dissenting, pointed out that the subsidiary was not a wholly owned agency of the Italian government Therefore, in his view, the relationship between the subsidiary and the foreign government was insufficient to justify denying the subsidiary's employees, who were American nationals, the protection of the Act, even assuming that sec 2(2)'s exemption of "wholly owned Government corporation[s]" encompassed foreign governments Member Fanning noted that the majority had not pointed to any legislative history suggesting that American employees working for foreign interests should lose their rights under the Act

[17] *Evans & Kunz, Ltd ,* 194 NLRB No. 197.

[18] *Point East Condominium Owners Assn ,* 193 NLRB No. 6

chased more than $6,000 of goods which had moved in interstate commerce. The Board noted that the employer, although a distinct and separate legal entity from the individual unit owners, was essentially the creature of the unit owners, each of whom shared only generally in its services; it provided no services to persons other than the owners; and any profits received were returned to the owners. Thus, unlike retail enterprises, which sell products or services to the ultimate consumer, the employer was simply an instrumentality through which the unit owners had merged to share the expenses involved in the maintenance of their property. As the relationship between the employer and the owners was not one of doing business, the retail standard for determining jurisdiction was inappropriate. Since the employer did not meet any of the Board's other jurisdictional standards, the petition for an election was dismissed.

In an advisory opinion issued pursuant to section 102.103 of the Board's Rules and Regulations,[19] the Board informed the parties that it would not assert jurisdiction over a racetrack. The Board noted that, in prior cases,[20] it had consistently declined to assert jurisdiction over horseracing because it regarded racetrack operations as essentially local in character, and declared that it was still of the opinion that the effect on commerce of labor disputes involving racetrack enterprises was not sufficiently substantial to warrant the assertion of jurisdiction, and that, accordingly, it would not do so here.[21]

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[19] *Centennial Turf Club*, 192 NLRB No. 97.

[20] *Walter A. Kelley*, 139 NLRB 744 (1962); *Jefferson Downs*, 125 NLRB 386 (1959); *Hialeah Race Course*, 125 NLRB 388 (1959); *Pinkerton's Natl. Detective Agency*, 114 NLRB 1363 (1955); *Los Angeles Turf Club*, 90 NLRB 20 (1950).

[21] Chairman Miller and Member Kennedy for the majority. Member Fanning, dissenting, was of the view that the decision in *Kelley* was based almost entirely on the extent to which racing was regulated by the States, and had been undermined by the Board's assertion of jurisdiction over gambling, which was likewise subject to extensive state regulation, as well as over private hospitals and nursing homes, nonprofit colleges and universities, and professional baseball Accordingly, he would advise the parties that the Board would now assert jurisdiction over racetracks.

On July 18, 1972, the Board published in the Federal Register a notice of proposed rulemaking advising that it is considering the promulgation of a rule whereby it would exercise jurisdiction over the horseracing and dogracing industries and establish jurisdictional standards therefor. All interested parties were invited to submit, by October 17, 1972, written data, views, or arguments for consideration in connnection with the proposed rule. The Board will review the submissions and thereafter determine whether to exercise jurisdiction and, if it does, under what standards it will do so.

III

Effect of Concurrent Arbitration Proceedings

It is clear that the jurisdiction of the Board over unfair labor practices is exclusive under section 10(a) of the Act and is not "affected by any other means of adjustment or prevention that has been or may be established by agreement, law, or otherwise." However, consistent with the congressional policy to encourage utilization of agreements to arbitrate grievance disputes,[1] the Board, in the exercise of its discretion, will under appropriate circumstances withhold its processes in deference to an arbitration procedure.

The Board has long held that, where an issue presented in an unfair labor practice proceeding has previously been decided in an arbitration proceeding, the Board will defer to the arbitration award if the proceedings appear to have been fair and regular, all parties had agreed to be bound, and the decision of the arbitration panel is not clearly repugnant to the purposes and policies of the Act.[2] The Board has likewise deferred in a number of cases [3] where arbitration procedures were available but had not been utilized, but has declined to do so in other such cases.[4]

A. Initial Deferral to Arbitration

In the *Collyer* case,[5] the question whether the Board should withhold its processes in favor of a grievance-arbitration machinery pro-

[1] E g , *Textile Workers Union* v *Lincoln Mills,* 353 U.S 448 (1957) ; *United Steelworkers* v *Warrior & Gulf Navigation Co.,* 363 U.S. 574, 578–581 (1960).

[2] *Spielberg Mfg Co.,* 112 NLRB, 1080, 1082 (1955).

[3] E g , *Joe Schlitz Brewing Co.,* 175 NLRB 141. The case was dismissed, without retaining jurisdiction pending the outcome of arbitration, by a panel of three members ; Members Brown and Zagoria did so because they would defer to arbitration , Member Jenkins would not defer but dismissed on the merits. Thirty-Fourth Annual Report (1969), pp. 35–36 ; *Flintkote Co ,* 149 NLRB 1561 (1964), Thirtieth Annual Report (1965), p 43 ; *Montgomery Ward & Co ,* 137 NLRB 418, 423 (1962) ; *Consolidated Aircraft Corp ,* 47 NLRB 694, 705–707 (1943).

[4] E g., cases discussed in Thirty-fourth Annual Report(1969), pp 34, 36 ; Thirty-second Annual Report (1967), p 41 ; Thirtieth Annual Report (1965), p 43.

[5] *Collyer Insulated Wire,* 192 NLRB No. 150

vided by a contract was again presented. The complaint alleged that the employer had violated section 8(a) (5) and (1) of the Act by unilaterally changing wage rates for skilled tradesmen and incentive factors used in computing wage rates for certain other employees and reassigning job duties of certain employees, all during the term of a collective-bargaining contract which, the employer contended, authorized it to make these changes. The Board noted that the contract and its meaning lay at the center of this dispute; the Act would become involved only if the issue of contractual interpretation were decided adversely to the employer. The contractual issue was of a kind which, in the opinion of the Board majority, was eminently suited to resolution by an arbitrator with special skill and experience in resolving contractual disputes. The contract contained a very broad arbitration clause, clearly applicable to this dispute, and providing that all disputes under the contract were to be resolved exclusively through the contractual grievance and arbitration procedure.

Under these circumstances, in the main opinion of the Board, Chairman Miller and Member Kennedy concluded that the purposes of the Act would best be served by withholding the Board's processes and leaving the parties to resolve their dispute in the manner prescribed by their contract. They noted that section 203(d) of the Taft-Hartley Act [6] and the legislative history of the Taft-Hartley amendments to the NLRA clearly showed the preference of Congress for voluntary settlement of labor disputes through arbitral processes, and that the Supreme Court had expressed approval of Board decision deferring to such processes.[7] The Board itself had long given hospitable acceptance to the arbitral process in cases where an arbitration award had already been issued, and, more recently, in the *Schlitz* case,[8] had deferred to contractual grievance and arbitration machinery in the absence of such an award under circumstances very similar to those in the instant case; there was a long and successful collective-bargaining relationship, no contention was made that the employer's action was designed to undermine the union, and it appeared that an arbitrator's interpretation of the contract would resolve both the unfair labor practice issue and the contractual issue in a manner compatible with the purposes of the Act. The overwhelming majority of collective-bargaining agreements contained arbitration clauses, and grievance-arbitration procedures had functioned successfully for a long time.

[6] Sec. 203(d) of the Labor-Management Relations Act provides: "Final adjustment by a method agreed upon by the parties is hereby declared to be the desirable method for settlement of grievance disputes arising over the application or interpretation of an existing collective-bargaining agreement."

[7] *Carey* v *Westinghouse Electric Corp.*, 375 U.S. 261, 271 (1963); *Smith* v *Evening News Assn.*, 371 U.S 195, 198 (1962).

[8] *Jos. Schlitz Brewing Co., supra,* fn. 3.

In the opinion of Chairman Miller and Member Kennedy, utilization of such procedures would resolve most disputes involving both a possible unfair labor practice and a possible breach of contract without requiring the use of the more formal and lengthy combination of administrative and judicial litigation.

They were unwilling to assume that the results of arbitration proceedings would be unacceptable under *Spielberg* [9] standards. The main opinion concluded that the parties should be required to honor their agreement to submit all contractual disputes to arbitration, rather than bypassing the contractual procedures by casting their dispute in statutory terms.

Accordingly, the complaint was dismissed. However, because the dispute had arisen at a time when Board decisions may have led the parties to believe that the Board approved dual litigation of disputes before the Board and an arbitrator, and in order to eliminate the risk of prejudice to any party in the event the resolution of the dispute failed to satisfy *Spielberg* standards, the Board retained jurisdiction for the limited purpose of entertaining an appropriate and timely motion for further consideration upon a showing either that the dispute had not, with reasonable promptness after the issuance of the Board's decision, been resolved by amicable settlement in the grievance procedure or submitted promptly to arbitration, or that the grievance and arbitration procedures had not been fair and regular or had reached a result which was repugnant to the Act.

Member Brown expressed his views in a separate concurring opinion, urging deferral to arbitration as a means of encouraging collective bargaining in cases involving a good-faith dispute over the interpretation or application of an existing contract, as distinguished from disputes involving the acquisition of new rights. In the former situation, he indicated, declining to defer would permit the parties to ignore their agreement to arbitrate. Accordingly, he would defer in any dispute covered by the collective-bargaining agreement and subject to arbitration, whether the dispute involved violations of section 8(a)(5), 8(a)(3), or 8(a)(1) and whether the charge had been filed by the employer, the union, or an employee; an employee is bound by the acts of his bargaining agent, unless such acts violate the duty of fair representation. Member Brown indicated that he would not defer in representation cases, since it was the Board's function to make unit determinations which would assure employees the fullest freedom in exercising the rights guaranteed by the Act, nor would he defer where the collective-bargaining process had been repudiated.

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[9] *Spielberg Mfg Co*, *supra*, fn 2

Members Fanning and Jenkins dissented in separate opinions. Member Fanning viewed the majority's decision as establishing compulsory arbitration of a dispute even though the contractual time limits for filing a grievance had expired, abandoning the *Spielberg* standards for review of arbitration awards, and stripping parties of statutory rights merely because an arbitration procedure was available. He reasoned that prior cases in which the Board has deferred were clearly distinguishable, that the Board was without power to adopt a general policy of deference to grievance and arbitration procedures, and that, in any event, such a policy should not be adopted, since arbitrators would often fail to pass on statutory issues or provide appropriate remedies for statutory violations.

Member Jenkins viewed the purposes and language of the Act, the intent of Congress in enacting it, and Supreme Court decisions all as prohibiting the Board from barring access to itself by relinquishing its jurisdiction to a private arbitration tribunal. He saw no policy reason for deferring to arbitration, even if the Board possessed the power to do so; statistics showed that the savings in time to the parties was negligible and their money costs were greatly increased; the Board's decisions protect the public interest by providing precedents for future cases and conduct and by establishing remedies preventing future misconduct, none of which can be provided by an arbitration award; the policy of deferring would permit the parties to contract themselves out of the Act's reach; and to the minor extent that the Board's workload was decreased, there would probably be a corresponding increase of disagreements between the parties, causing increased work and expenses to settle them.

In reliance on the decision in *Collyer*, the Board subsequently deferred to grievance-arbitration procedures in cases involving allegations that employers had violated the Act by unilaterally changing the working hours of employees working on Saturday,[10] revoking employees' parking privileges,[11] failing to check off employees' union dues

[10] *Coppus Engineering Corp*, 195 NLRB No. 113 (Chairman Miller and Member Kennedy for the majority, Member Jenkins dissenting).

[11] *Great Coastal Express*, 196 NLRB No. 129. Chairman Miller and Member Kennedy, for the majority, noted that the parties had previously arbitrated other matters which, like parking privileges, were not specifically mentioned in their contract. Member Fanning, dissenting, would not defer for the reasons stated in his dissent in *Collyer*, but in any event would not defer where, as here, the subject matter of the dispute appeared not to be covered by the contract and the employer had discouraged an informal settlement of the matter.

and remit them to the union,[12] assigning unit work to employees outside the bargaining unit,[13] and subcontracting unit work.[14]

In a number of other cases, however, the Board concluded that deferral would be inappropriate. In one such case,[15] involving the discharge of employees in violation of section 8(a)(3) and (1) of the Act, the contract between the parties did not bind them to any procedure for final resolution of disputes should a grievance be denied by the employer's general manager at the final step; only by *ad hoc* agreement of the parties could an arbitration proceeding be convened to resolve the dispute. The Board held that it would not defer to this type of grievance machinery.

In another case,[16] it was alleged that a union had unlawfully caused the discharge of employees in violation of section 8(b)(2) and (1)(A) of the Act, but the employer was not before the Board. The Board adopted the reasoning of a trial examiner that the employer could not be compelled to arbitrate and that even if the employees could invoke the arbitration procedures, deferral would be inappropriate. The employees' positions in an arbitration proceeding would be adverse to that of both parties to the contract, since implicit in the employees' claim against the unions was a contention that the employer had wrongfully discharged them. Thus, in an arbitration proceeding, the employees' rights would be at the mercy of the alleged wrongdoers.

B. Effect of Prior Arbitration Award

In several cases where arbitration awards had been issued, the Board declined to honor them. In one such case,[17] an arbitrator held that an employer's contract with a union at one plant was applicable to employees at a new plant 8 miles away who had been hired after the effective date of the contract. In reaching this conclusion, the arbitrator purported to apply standards followed by the Board to determine whether the employees at the new plant were an accretion to the

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[12] *Norfolk, Portsmouth Wholesale Beer Distributors Assn.*, 196 NLRB No. 165 Chairman Miller and Member Kennedy, for the majority, pointed out that the employer's obligation to check off dues was contractual, rather than statutory, and the issue of arbitrability could be submitted to the arbitrator Member Fanning, dissenting, argued that the case was not controlled by *Collyer*, as the parties did not differ on the interpretation of the contract, but only on a legal issue, and it was doubtful that the union could bring a grievance under the contract in this case.

[13] *Titus-Will Ford Sales*, 197 NLRB No. 4 (Chairman Miller and Member Penello for the majority; Member Jenkins dissenting)

[14] *Bethlehem Steel Corp. (Shipbuilding Dept.)*, 197 NLRB No 121 (Chairman Miller and Members Kennedy and Penello for the majority; Member Jenkins dissenting).

[15] *Tulsa-Whisenhunt Funeral Homes*, 195 NLRB No. 20.

[16] *Laborers' Intl. Union, Loc 573 (F. F. Mengel Construction Co.)*, 196 NLRB No. 62

[17] *Combustion Engineering*, 195 NLRB No. 161.

old one, but failed to consider many factors relied on by the Board, and reached a decision inconsistent with Board precedent. The Board held that while the question of whether the existing contract was intended to cover the employees at the new plant was a question for the arbitrator, it was the obligation of the Board to determine whether these employees constituted an accretion to the existing unit, and this determination was not governed by the arbitrator's decision. The Board concluded that the employees were not an accretion to the existing unit, and the employer therefore violated section 8(a) (3) and (1) of the Act by applying the contract, including its union-security provisions, to them.

Collyer was also held not to be controlling in a case [18] where a joint grievance committee had recommended that a discharged employee be reinstated on condition that he withdraw the charge he had filed with the Board. The Board declared that the issue before it was not whether to require the parties to utilize available grievance-arbitration procedures, but whether to defer to the joint grievance committee's decision under *Spielberg*. The Board was not satisfied that the statutory issue—whether the employee's discharge was discriminatory—had been either raised or resolved in the arbitration proceeding. Accordingly, the Board did not give binding effect to the award, but decided the case on the merits, finding that the discharge was discriminatory and in violation of section 8(a) (3) and (1) of the Act.

In another case,[19] the question before the Board was whether an employee had been discharged for filing numerous grievances. In a proceeding before an arbitrator concerning the discharge, the parties had stipulated that the issue was whether the discharge violated the collective-bargaining agreement. This agreement, which prohibited discrimination against employees because of union affiliation or activities, was introduced into evidence, as was one of the grievances filed by the discharged employee. The arbitrator, in his "opinion and award" reducing the discharge to a suspension, did not discuss the issue of discrimination.

On these facts, a Board majority concluded that the arbitrator's award should not be honored. The arbitrator's opinion and award did not indicate that he had considered the issue of discrimination, and the Board was unwilling to assume that he had considered every provision in the contract. The introduction of a single grievance into evidence did not disclose the discharged employee's prolific grievance activity. In the Board's view, honoring an arbitration award which

[18] *Montgomery Ward & Co*, 195 NLRB No. 136

[19] *Airco Industrial Gases—Pacific*, 195 NLRB No. 120.

gave no indication that the arbitrator ruled on the unfair labor practice issue would result in an unwarranted extension of the *Spielberg* doctrine. Accordingly, the Board reached the unfair labor practice issue and found that the employee had been discharged for filing grievances, in violation of section 8(a) (3) and (1) of the Act.[20]

Subsequently, in the *Yourga* case,[21] the Board held that the party asserting that the Board should give controlling effect to an arbitration award had the burden of demonstrating that the statutory issue of discrimination had been presented in an arbitration proceeding. The Board reasoned that the party urging acceptance of the arbitration award had the strongest interest in establishing that the issue of discrimination had been previously litigated, and would normally have ready access to documentary proof, or the testimony of competent witnesses, to establish the scope of the issue submitted to the arbitrator. As the record in *Yourga* was silent as to whether the unlawful motivation issue had been submitted to the joint grievance committee, the Board declined to defer to that committee's decision upholding the employee's discharge.[22]

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[20] Members Fanning and Jenkins for the majority Member Kennedy, dissenting, was of the view that the issue of discrimination had been presented to the arbitrator, and that an arbitrator, in determining whether a discharge was for just cause, must necessarily consider whether the true reason for the discharge was one which could not be regarded as "just cause" Thus, in the instant case, evidence could have been presented to show that the employer had violated the nondiscrimination clause of the contract by discharging the employee for his grievance activities. In Member Kennedy's view, an arbitration award satisfying *Spielberg* standards should not be disregarded because of evidence of discrimination which could have been, but was not, presented to the arbitrator. The majority, in disagreeing, noted that the dissent's position adopted the doctrine of *res judicata* which was not applicable to this case. The majority observed that to hold that the employee had a duty to litigate the unfair labor practice issue before the arbitrator would amount to abdicating the Board's responsibility of protecting statutory rights of employees whenever a contract contained a clause prohibiting discrimination because of union affiliation or activities.

[21] *Yourga Trucking,* 197 NLRB No 130

[22] Chairman Miller and Member Penello, for the majority, dismissed the complaint on the merits, finding that the discharge was not discriminatorily motivated. Member Kennedy, concurring in the result, adhered to his dissent in *Airco,* pointed out that essentially the same evidence presented at the Board hearing, including the grievance upon which the claim of discrimination was based, had been presented to the joint grievance committee, and argued that the party seeking to set aside an arbitration award should have the burden of establishing that the arbitrator did not consider the unfair labor practice issue. He would find that the joint grievance committee's award satisfied *Spielberg* standards and would defer to it

IV

Board Procedure

A. Settlement Procedure

Two cases decided during the report year involved questions concerning the validity of agreements to settle unfair labor practice cases. In one,[1] during a hearing to determine the amount of backpay due three discriminatees, the employer made a settlement offer whereby the discriminatees would waive their right to reinstatement[2] and accept amounts of backpay substantially less than the amounts alleged by the General Counsel to be due. The employer's counsel discussed this proposal with the discriminatees in the presence of counsel for the General Counsel. However, the trial examiner refused to allow counsel for the General Counsel to consult with the regional director on whether to participate in these discussions. Counsel for the General Counsel refused to advise the discriminatees whether to accept the offer. They accepted the offer. The General Counsel objected to it, without stating any reasons, but the trial examiner recommended that the Board approve the settlement and dismiss the backpay proceeding upon consummation of the settlement by payment to the discriminatees of the amounts of backpay set forth therein. After such consummation, counsel for the General Counsel alleged, for the first time, that the discriminatees had been coerced into waiving reinstatement.

Under these circumstances, the Board concluded that it could not approve the settlement. It held that the discriminatees, as the only parties entitled to affirmative relief in a backpay proceeding, were entitled to discuss a settlement with the employer, as long as counsel for the General Counsel was present to protect their interests. Here,

[1] *Lou De Young's Market Basket,* 197 NLRB No 116

[2] Two of the discriminatees had been offered reinstatement earlier in the hearing. One accepted the offer; the other indicated he would accept but requested more time to consider it.

however, counsel for the General Counsel had refused to give the discriminatees the benefit of his views,[3] and had sat by idly while, according to his own account, the discriminatees were coerced into waiving their statutory right to reinstatement. Furthermore, he had failed to raise the charge of coercion at a time when the trial examiner, and the Board on an interlocutory appeal from any adverse ruling by the trial examiner, could have evaluated it before the settlement was consummated. Finally, the trial examiner had erred in ordering the settlement consummated in the face of the General Counsel's objection, thereby hampering the Board's effective review of the settlement because the parties, acting in reliance on the trial examiner's action, had altered the *status quo*. In view of the failure of counsel for the General Counsel and the trial examiner to protect the interests of the discriminatees and the Board, the Board concluded that the public interest required rejection of the proposed settlement.

In the other case,[4] the Board found that a union had violated section 8(b)(1)(A) of the Act by applying collective-bargaining agreements in a manner which discriminated against the charging parties, two individuals who were not union members, although the regional director had approved informal settlement agreements with respect to these violations. The agreements provided for backpay in an amount to be determined by the regional director in accordance with existing Board formulas. The regional director determined that one discriminatee was entitled to backpay amounting to approximately $400. The discriminatee contended that payment of this amount would not adequately remedy the alleged violation of the Act, and that his backpay should be approximately $40,000. The regional director ultimately recomputed the backpay at an amount in excess of $16,000. When the union refused to pay this amount, approval of the settlement agreement was withdrawn.

The Board concluded that when the settlement agreement was executed there had been no meeting of the minds; the expectations of the discriminatee and the union as to the amount of backpay involved differed sharply. In these circumstances, the Board held that it would be inequitable to hold the parties to the commitments contained in the settlement agreement, and that the regional director did not commit reversible error in withdrawing his approval of the settlement agreement and reopening the case for further processing nor, having done

[3] While not basing its decision on this point, the Board was critical of the trial examiner's refusal to allow counsel for the General Counsel to seek advice from his superior, the regional director, since the latter was a party to the proceeding under the Board's Rules and Regulations and would, in the Board's view, undoubtedly have instructed counsel for the General Counsel to participate actively in the settlement discussions

[4] *Intl Photographers of the Motion Picture Industries, Loc. 659 (MPO–TV of Calif.)*, 197 NLRB No. 134.

so as to one of the discriminatees, did he abuse his discretion in likewise issuing a complaint as to the other discriminatee. The Board's principle that a settlement agreement may not be set aside unless the respondent fails to comply with its terms or commits further unfair labor practices was not applicable here, since, in reality, no agreement was reached.[5]

B. Status of Strike Settlement Agreements

Two cases decided during the report year involved questions concerning the validity of agreements to settle a strike on terms limiting the strikers' right to reinstatement. In *United Aircraft*,[6] after an economic strike which lasted 2 months, the parties executed a recall agreement under which strikers for whom jobs were not immediately available would be placed on a preferential hiring list for a period of approximately 4½ months. At the end of that period, the employer had not reached its prestrike complement of employees; the Board found that this was for economic reasons. Thereafter, strikers not yet recalled were treated only as applicants for new employment; although many new employees were hired, some strikers were not recalled, and others were recalled only as new employees without the seniority and other privileges which they had formerly enjoyed.

The Board pointed out that, while it is not bound by any private adjustment of rights guaranteed by the Act, it may, in its discretion, accept a particular private adjustment as conforming to the policy of the Act. That policy is to encourage collective bargaining, including the negotiation of strike settlement agreements. Here, the recall agreement was one of three agreements negotiated by the parties in order to settle the strike; in the course of the negotiations, the employer made concessions which it might not have been willing to make had it known that the union would seek to repudiate part of the recall agreement. The employer had entered into, and carried out, the recall agreement in good faith; the union and employees had accepted the benefits of the agreement and did not propose to surrender those benefits. Furthermore, the recall agreement was signed long before the Board's decision in *Laidlaw*,[7] and while it limited the strikers' rights to reinstatement as set forth in that decision, it gave them greater rights than did earlier

[5] Members Fanning and Kennedy for the majority Chairman Miller, dissenting, was of the view that the parties' agreement that the regional director would determine the amount of backpay due was a binding agreement which could not be vitiated merely because one party subjectively expected more backpay than the regional director determined was due him, and could not be set aside in the absence of noncompliance with its terms or the commission of further unfair labor practices.

[6] *United Aircraft Corp (Pratt & Whitney Div)*, 192 NLRB No 62.

[7] *Laidlaw Corp*, 171 NLRB 1366 (1968), Thirty-third Annual Report (1968), pp 25, 83.

Board law, by giving them preference in hiring for approximately 4½ months, whereas earlier Board decisions [8] (later overruled by *Laidlaw*) required their reinstatement only to jobs which were available at the time of their application for reinstatement. Even under *Laidlaw*, the Board pointed out, an employer could unilaterally terminate strikers' reinstatement rights for legitimate and substantial business reasons.

Accordingly, the Board concluded, such rights should also be terminable by agreement between the employer and the strikers' bargaining representative. They were in the best position to know the employer's business needs and the employees' prospects of obtaining substantially equivalent employment elsewhere, and the union might also be able to obtain other benefits for employees in return for a concession on the reinstatement cutoff date. As long as the period fixed by the agreement for reinstatement of economic strikers was not unreasonably short, was the result of good-faith collective bargaining, and was not intended to be discriminatory or used in a discriminatory manner, the Board held the agreement should be accepted as effectuating the policies of the Act.

In the Board's view, these requirements were satisfied in the instant case. The reinstatement period of 4½ months was not unreasonably short and was one term in a series of agreements resulting from good-faith bargaining. It was not designed to undermine the union; simultaneously with the recall agreement, the employer signed a new collective-bargaining agreement with the union, thereby guaranteeing that the union would retain its representative status for the duration of the new contract irrespective of the number of strikers not reinstated. Accordingly, the Board adopted the recall agreement as determining the reinstatement rights of the strikers and held that the employer did not violate section 8(a)(3) and (1) of the Act by treating strikers as applicants for new employment after the cutoff date set forth in the recall agreement.[9]

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[8] *Atlas Storage Div*, 112 NLRB 1175, 1180 (1955), enfd *sub nom. Chauffeurs, Teamsters & Helpers "General" Loc. 200* v. *N.L.R.B.*, 233 F.2d 233 (C.A. 7, 1956), *Bartlett-Collins Co*, 110 NLRB 395, 397–398 (1954), enfd *sub nom. American Flint Glass Workers' Union* v *N.L.R.B.*, 230 F.2d 212 (C.A.D.C.), cert denied 351 U.S. 988 (1956).

[9] Chairman Miller and Members Jenkins and Kennedy for the majority. Members Fanning and Brown, dissenting, viewed the recall agreement as requiring that strikers be given preferential treatment until the employer reached its prestrike complement of employees, which actually occurred 4 months after the cutoff date set forth in the recall agreement and less than a year after the strike began, but would have occurred prior to the cutoff date had the employer not suffered serious economic setbacks during the period before the cutoff date. In light of the language in section 9(c)(3) of the Act, permitting economic strikers to vote in a representation election for 12 months after the commencement of a strike, Members Fanning and Brown would not accept a strike settlement with a cutoff date less than a year after the strike began, particularly where, as here, it resulted in the denial of reinstatement to more than 1,500 strikers. In their view, the right of these strikers, who had not been permanently replaced, to reinstatement did not depend on *Laidlaw*, it was made clear in *N.L.R.B.* v *Fleetwood Trailer Co*, 389 U.S. 375 (1967), which merely reaffirmed established law.

However, in another case [10] decided on the same day as *United Aircraft*, the Board declined to give controlling weight to a strike settlement agreement providing that strikers would be placed on a preferential hiring list for 6 months, but if not reinstated by then, would be treated as applicants for new employment. The employer in that case had substantially reduced its employee complement during the strike by eliminating one shift. During the 6-month reinstatement period provided in the strike settlement agreement the shift was not restored, and only a few strikers were recalled to replace employees who quit, thereby further reducing the employee complement; instead of recalling more strikers, the employer increased the amount of overtime worked in the plant. After the expiration of the reinstatement period, however, the employer substantially increased the employee complement by hiring many new employees. A number of the strikers were not recalled; those who were recalled were treated as new employees, without seniority or other benefits previously enjoyed by them.

The Board found that, as the employer had failed to show economic justification for failing to restore jobs which had been abolished during the strike, for failing to fill all jobs which became vacant during the reinstatement period, and for dramatically increasing the number of new hires after the expiration of this period, these actions were motivated by a desire to penalize the strikers. The strike settlement agreement was found to be merely part of a scheme by the employer, who could have reinstated all the strikers during the reinstatement period, to avoid doing so. Accordingly, the agreement did not meet the requirement, set forth in *United Aircraft*, that such an agreement not be intentionally used to defeat the strikers' statutory right to reinstatement. The Board therefore concluded that controlling weight could not be accorded to the terms of the agreement, and that the employer had violated section 8(a)(3) and (1) of the Act by discriminatorily failing to recall strikers as job openings became available and treating those recalled as new employees.[11]

C. Other Issues

In one case,[12] the Board, in finding that an employer violated section 8(a)(1) by denying merit increases to employees because they had selected a union as their bargaining representative, rejected the em-

[10] *Laher Spring & Electric Car Corp.*, 192 NLRB No. 65.

[11] Chairman Miller and Members Jenkins and Kennedy for the majority. Members Fanning and Brown, concurring, would have held that *N.L.R.B* v. *Fleetwood Trailer Co*, *supra*, fn 53, precludes curtailment of the right of strikers to reinstatement at least until the normal level of prestrike production is reached irrespective of the motivation of the parties.

[12] *General Motors Acceptance Corp.*, 196 NLRB No. 13.

ployer's contention that this finding was barred by section 10(b) of the Act [13] because its policy of granting merit increases to employees with satisfactory performance ratings was changed more than 6 months before the filing of charges. The board pointed out that, within the 6-month period immediately preceding the filing of the charge, the employer made its customary review of employees' performances and had given each employee a work performance rating, but had continued to deny all unit employees merit increases while hiring new employees to perform unit work at rates in excess of those being paid to unit employees. When the unit employees complained about this disparity in treatment, they were told that there would be no further merit increases until the matter of negotiations with the union was settled. Meanwhile, the employer failed to bargain in good faith with the union, and assisted and supported an employee movement to renounce the union. Thus, the finding of a violation was not based on time-barred events or on the theory that the withholding of merit increases was a continuing violation, but on separate and distinct acts within the 10(b) period which were calculated to place responsibility on the union for the employees' failure to receive merit increases and to make it clear to the employees that to receive such increases they would have to abandon the union.[14]

In another case,[15] the Board held that a trial examiner had erred in granting, over the objection of the General Counsel, the charging party's motion to amend the complaint to allege that an employee had been discriminatorily discharged in violation of section 8(a)(3) and (1) of the Act. The Board pointed out that section 3(d) of the Act clearly gives the General Counsel final authority over the investigation of charges and the issuance of complaints, and that the trial examiner's authority to amend a complaint is limited to cases where an amendment is sought or consented to by the General Counsel or where evidence has been received into the record without objection. Since, in the instant case, the General Counsel refused to amend the complaint to allege a discriminatory discharge, and objected to the

[13] Sec. 10(b) provides, in relevant part, that "no complaint shall issue based upon any unfair labor practice occurring more than six months prior to the filing of the charge with the Board and the service of a copy thereof upon the person against whom such charge is made . . . ."

[14] Members Fanning, Jenkins, and Penello for the majority. Chairman Miller and Member Kennedy, dissenting, were of the view that the case was governed by the Board's decision in *Bonwit Teller,* 96 NLRB 608 (1951), holding that withholding a wage increase cannot be treated as a continuing violation to avoid the 10(b) limitation, and that sec. 10(b) precluded a finding of a violation in this regard, as any violation occurred when the employer imposed a freeze on merit increases, almost 2 years before the filing of charges

[15] *GTE Automatic Electric,* 196 NLRB No. 134.

admission of any evidence on that issue, the amending of the complaint was improper.

In another case,[16] the Board found that the employer had violated section 8(a)(5) and (1) of the Act, and issued a bargaining order on the basis of the Supreme Court's decision in *Gissel Packing Co.*,[17] despite the fact that the union's objections to an election which it had lost were found to be without merit. The Board viewed its decision in *Irving Air Chute* [18] as holding only that a bargaining order will not be issued where the union has lost a valid election. In determining the validity of an election, the Board may consider relevant evidence which, although not raised in formal objections, is discovered during a postelection investigation, and may set aside the election solely on the basis of such evidence. In the instant case, the investigation disclosed violations of section 8(a)(1) of the Act, which were specifically alleged in the complaint and which required that the election be set aside. To withhold a bargaining order simply because this conduct was not mentioned in the union's objections would, in the opinion of the Board, frustrate employees' rights, which were of paramount importance.

The Board also held that the trial examiner did not abuse his discretion in denying the employer a 1-month continuance to prepare its defense to allegations of the complaint which were added at the hearing. As the General Counsel had notified the employer several days before the hearing of his intention to seek these amendments to the complaint, and the trial examiner had offered the employer a continuance until a date 10 days after it had received this notice—an offer which was rejected—and given it an opportunity to renew its request for a longer continuance at the conclusion of the General Counsel's case, the Board concluded that the requirements of due process had been satisfied.[19] However, the Board dismissed allegations which had been added to the complaint at the hearing without any prior notice to the employer.

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[16] *Pure Chem Corp*, 192 NLRB No 88.

[17] *N L R B.* v. *Gissel Packing Co*, 395 U.S 575 (1969).

[18] *Irving Air Chute Co, Marathon Div*, 149 NLRB 627 (1964), Thirtieth Annual Report (1965), p. 38.

[19] Chairman Miller and Members Fanning, Brown, and Jenkins for the majority. Member Kennedy, dissenting, viewed *Irving Air Chute* as permitting the issuance of a bargaining order only where the election is set aside on the basis of objections filed in the representation case He would further find that amending the complaint with only 3 working days' notice to the employer was contrary to the Board's Rules and Regulations, which provide that a respondent has 10 days after the service of a complaint to file an answer thereto and that a hearing may not be held until at least 10 days after the service of the complaint, and did not meet the requirements of due process, which entitles a respondent to make a full investigation of the facts and prepare a defense before being required to cross-examine witnesses called by the General Counsel

V

Representation Proceedings

The Act requires that an employer bargain with the representative designated by a majority of his employees in a unit appropriate for collective bargaining.[1] But it does not require that the representative be designated by any particular procedure as long as the representative is clearly the choice of a majority of the employees. As one method for employees to select a majority representative, the Act authorizes the Board to conduct representation elections.[2] The Board may conduct such an election after a petition has been filed by or on behalf of the employees, or by an employer confronted with a claim for recognition from an individual or a labor organization. Incident to its authority to conduct elections, the Board has the power to determine the unit of employees appropriate for collective bargaining[3] and formally to certify a collective-bargaining representative on the basis of the results of the election. Once certified by the Board, the bargaining agent is the exclusive representative of all employees in the appropriate unit for collective bargaining with respect to rates of pay, wages, hours of employment, or other conditions of employment. The Act also empowers the Board to conduct elections to decertify incumbent bargaining agents who have been previously certified, or who are being currently recognized by the employer. Decertification petitions may be filed by employees, by individuals other than management representatives, or by labor organizations acting on behalf of employees.

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

A. Existence of Questions Concerning Representation

Section 9(c)(1) empowers the Board to direct an election and certify the result thereof, provided the record of an appropriate hearing

[1] Secs. 8(a)(5) and 9(a)
[2] Sec 9(c)(1).
[3] Sec 9(b).

before the Board [4] 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 these requirements.[5]

The investigation of a petition for a representation election must establish a proper basis for the finding of the existence of a question concerning representation. The ultimate finding depends further on the presence or absence of certain factors, some of which are discussed in the following sections.

1. Qualification of Representative

The Board will refuse to direct an election where the proposed bargaining agent fails to qualify as a bona fide representative of the employees. Five cases which presented the question of qualification in unique circumstances came to the Board during the year. In *American Mailing Corp.*[6] the contention was made that an election should not be held due to the fact that the petitioner was allegedly incapable of representing all its members fairly because its constitution, bylaws, and other internal documents discriminated against females.[7] The Board found, however, that the employer's actions at the hearing in the case effectively precluded litigation of the meaning of these documents. Thus, the Board concluded that the record was insufficient to establish that the petitioner engaged in, or was required to engage in, sex discrimination. Consequently, the Board held that the petitioner was not disqualified from representing the employees in the unit [8] and directed an election with the proviso that any certification which might result therefrom was subject to revocation upon a showing that the petitioner had not complied with its duties of equal representation.

In another case decided during the year, the Board found that the petitioner was disqualified from acting as a collective-bargaining representative.[9] Thus, in *Douglas Oil Co.*[10] the evidence showed that

[4] Sec 9(c)(1) provides that a hearing must be conducted if the Board "has reasonable cause to believe that a question of representation . . exists . . . ."

[5] See also NLRB Statements of Procedure, Series 8, as amended, sec. 101.23(b).

[6] 197 NLRB No. 33

[7] *Amicus curiae* briefs were filed by, *inter alios,* the United States Equal Employment Opportunity Commission.

[8] Citing *Alto Plastics Manufacturing Corp.,* 136 NLRB 850 (1962). Twenty-seventh Annual Report (1962), p. 49. See discussion of this case, *infra*

[9] Section 2(5) of the Act defines the term labor organization as "any organization in which employees participate and which exists for the purpose . . of dealing with employers concerning grievances, labor disputes, wages, rates of pay, hours of employment, or conditions of work"

[10] 197 NLRB No. 42.

the president of the petitioner, while acting as an employer, had entered into a collective-bargaining agreement with the petitioner. Moreover, the petitioner had no affiliated local unions, had never held a local membership meeting, and could not substantiate its claim that it had designated certain individuals to represent the membership on a local basis. Furthermore, the petitioner had attempted to extend its coverage to unrepresented service stations and, thus, to forestall organizing campaigns from "other" labor organizations, without affording the employees the right to a self-determination election. In reaching its decision the Board relied on *McDonald's of Canoga Park, Calif.*,[11] where it had reaffirmed the principle [12] that a labor organization must have no ulterior purpose in its single-minded protection and advancement of the interests of the employees who have selected it as their collective-bargaining representative. The Board concluded that a substantial doubt existed as to whether the petition in *Douglas Oil* does act or is competent to act as representative under this standard and as petitioner, by its conduct at the hearing, precluded resolution of that doubt, the Board dismissed the petitions filed in the case and revoked a certification which had theretofore been issued to the petitioner.

Several years ago, in *Alto Plastics Manufacturing Corp.*[13] the Board held that if it found that a petitioner had satisfied the statutory definition of a labor organization,[14] it could not refuse to process the petition even if it could be demonstrated that the petitioner may provide representation that would be ineffective or otherwise unsatisfactory. Rather, the Board continues to police the certification and may revoke it when a showing is made at a later date that the petitioner has failed to fulfill its statutory obligations.[15] During the year the Board had occasion to reaffirm the *Alto Plastics* principle. In *Hotel Properties*,[16] the employer contended that the Board should inquire into the background of the petitioner, that it should find the petitioner had underworld connections, and that the Board should refuse to process the petition. The Board concluded, however, that the petitioner met the statutory definition of a labor organization. Inasmuch as the Board decided that it would continue to adhere to *Alto Plastics*, it directed an election in the case.

The Act [17] prohibits the certification of a labor organization as the representative of guards where such union either admits nonguards as

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[11] 162 NLRB 367 (1966).

[12] As set forth in *Bausch & Lomb Optical Co.*, 108 NLRB 1555, 1559 (1954). Nineteenth Annual Report (1954), pp 22, 97

[13] 136 NLRB 850 (1962).

[14] See fn. 9, *supra*.

[15] 136 NLRB at 854.

[16] *Hotel Properties, d/b/a Landmark Hotel & Casino*, 194 NLRB No. 139.

[17] Sec. 9(b)(3).

members or is directly or indirectly affiliated with an organization which admits both guards and nonguards to membership.[18] During the year this issue of the qualification of a guard union to represent employees was presented to the Board in two cases.

In the first case, *Rock-Hil-Uris*,[19] it was contended that a prohibited indirect affiliation existed because the petitioning guard union participated in a trust fund arrangement contractually established between a multiemployer association and a union which represented nonguard employees.[20] The Board found, however, that the trust fund was not exclusively administered by the nonguard union and that there was no evidence that the nonguard union had utilized the participation of its representatives in the management of the trust funds in a manner to influence or interfere with the petitioner's affairs. Therefore, the Board directed an election with the caveat that if it could later be established that the nonguard union had acted in some manner to deprive the petitioning guard union of its independence the Board would entertain a motion to revoke any certification which may issue in the case.

In the second case, *Bonded Armored Carrier*,[21] a nonguard union supplied an attorney to assist in the formation of a newly established union which petitioned for a unit of guards. In addition, the nonguard union advanced funds to the petitioning union which were to be repaid when the latter was in a more stable financial position. The Board held that these facts, standing alone, were insufficient to show indirect affiliation. With a proviso similar to the one in *Rock-Hil-Uris*, *supra*, the Board directed an election.[22]

2. Bars to Raising Questions of Representation

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

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[18] However, the Board has held that certification of the arithmetic results of an election is appropriate when the petition is filed by a qualified labor organization and the nonqualified labor organization intervenes See: *Wackenhut Corp.*, 169 NLRB 398 (1968)

[19] *Rock-Hil-Uris, d/b/a New York Hilton at Rockefeller Center,* 193 NLRB No. 47.

[20] In *Magnavox Co.*, 97 NLRB 1111 (1952), Seventeenth Annual Report (1952), p 78, the Board held that an indirect affiliation existed where a nonguard union participated in affairs of another union seeking to represent guards to such an extent and for such a duration as to indicate that the guard union had lost the freedom and independence to formulate its own policies and principles. See also *Inspiration Consolidated Copper Co*, 142 NLRB 53 (1963), and *Midvale Co*, 114 NLRB 372 (1955) But see *Mack Mfg Corp*, 107 NLRB 209 (1963), Nineteenth Annual Report (1954), p 47, and *Willcox Construction Co*, 87 NLRB 371 (1949), Fifteenth Annual Report (1950), p 50

[21] 195 NLRB No. 68

[22] Because an official of the nonguard union was instrumental in the formation of the guard union and because, as of the date of the hearing on the petition in the case, no bill had been submitted to the petitioning guard union by the nonguard union, Member Kennedy would have found prohibited assistance and would have dismissed the petition

Thus, under the Board's contract-bar rules, a present election among employees currently covered by a valid collective-bargaining agreement may, with certain exceptions, be barred by an outstanding contract. Generally, these rules require that to operate as a bar, the contract must be in writing, properly executed, and binding on the parties; it must be of definite duration and in effect for no more than 3 years; and it must also contain substantive terms and conditions of employment which in turn must be consistent with the policies of the Act.

During the year the Board had occasion to consider two cases in which it was alleged that illegal contract provisions removed the contracts as bars to election petitions. In both cases the Board applied its earlier decision in *Paragon Products Corp.*,[23] which held that a contract containing a union-security provision which is unlawful on its face [24] does not constitute a bar to an election, and in both cases the Board found that the contracts did contain such illegal provisions and directed elections on the petitions.

Thus, in *Peabody Coal Co.*[25] the contract provision in question required the employer to give preference in hiring to members of the labor organization which was a party to the agreement. In *Pine Transportation* [26] the contract provided that employees in or promoted to positions outside the bargaining unit retained and continued to accumulate seniority provided they retained membership in the union. The Board majority, citing [27] *Columbia Steel & Shafting Company*,[28] found this provision to be unlawful on its face and held that it removed the contract as a bar.

The period during the contract term when a petition may be timely filed is ordinarily calculated from the expiration date of the agreement. A petition is timely when filed not more than 90 nor less than 60 days before the terminal date of an outstanding contract.[29] Thus, a petition which is filed during the last 60 days of a valid contract will be considered untimely and will be dismissed.[30] During this 60-day "insulated" period, the parties to the existing contract are free to execute a new or amended agreement without the intrusion of a rival

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[23] 134. NLRB 662 (1961), Twenty-sixth Annual Report (1961), p. 44.

[24] That is, a provision which goes beyond the limited form of union security permitted by sec. 8(a)(3).

[25] 197 NLRB No 152

[26] 197 NLRB No 43.

[27] Chairman Miller and Members Kennedy and Penello, with Members Fanning and Jenkins dissenting. Members Fanning and Jenkins relied on their dissent in *Columbia Steel, infra.*

[28] *United Steelworkers of America, Loc. 1070,* 171 NLRB 945 (1968), Thirty-third Annual Report (1968) p 113.

[29] *Leonard Wholesale Meats,* 136 NLRB 1000 (1962), Twenty-seventh Annual Report (1962), pp. 58–59

[30] *Deluxe Metal Furniture Co*, 121 NLRB 995 (1958), Twenty-third Annual Report (1958), p 21.

petition, but if no agreement is reached or if the agreement which is reached does not constitute a bar itself, then a petition filed after the expiration of the old valid contract will be timely and entertained. In addition, the Board's contract-bar rules do not permit the parties to an existing collective-bargaining relationship to avoid this filing period by executing an amendment or new contract term which prematurely extends the date of expiration of that contract. In the event of such premature extension, the new contract ordinarily will not bar an election.

The Board has held, however, that its contract-bar rules are not so inflexible as to exclude deviations in situations where unusual circumstances compel a different result.[31]

During the year the Board had occasion to consider whether the President's August 15 to November 13, 1971, wage-price freeze presented such an unusual circumstance as to afford the parties wider latitude in reaching an agreement that would constitute a bar.

In *West India Mfg. & Service Co.*,[32] the employer and the incumbent labor organization were parties to an agreement which was to expire on October 31, 1971. They began negotiations for a new agreement sometime prior to October 31 but no new agreement was reached because of the uncertainties created by the wage-price freeze. Thus, the parties executed an extension agreement extending their original contract until December 1, 1971. In the interim, on November 1, 1971, a rival union filed a petition. Although the Board noted that under its ordinary contract-bar rules the extension agreement would not be a bar and the petition filed would be considered to be timely, it stated that the practical result of the wage-price freeze was that the parties were unable to bargain intelligently during the entire insulated period and hence were effectively deprived of this period. To remedy this denial, the Board, consistent with its longstanding policy of taking into account other instruments of national labor policy in suitable situations,[33] dismissed the petition, granting the parties to the contract a full 60-day period during which they could bargain free from the filing of any petitions.[34]

This result was extended in *Hill & Sanders-Wheaton*[35] to a situation where the contract between the employer and the incumbent labor organization expired before the August 15, 1971, date of the wage-price freeze, without agreement on a new contract. The union, the day

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[31] *Aerojet-General Corp.*, 144 NLRB 368 (1963), Twenty-ninth Annual Report (1964), p 28

[32] 195 NLRB No 203

[33] See *Aerojet-General Corp , supra,* fn 30

[34] See also *Dennis Chemical Co ,* 196 NLRB No. 37, and *California Parts & Equipment,* 196 NLRB No 170, where, under similar circumstances, the Board extended the insulated period

[35] 195 NLRB No. 204

following expiration of the contract, went out on strike. Shortly thereafter and during the freeze a Federal mediator, who had entered the contract negotiations, contacted the union and requested that the employees return to work. As a result of mediation, on August 16, 1972, the employer and the union signed an agreement which reinstated all the terms and conditions of the old contract until November 27 or such time as the freeze was ended. The strike was called off and employees returned to work. On September 30 a petition was filed by a rival labor organization. The Board stated that the incumbent union in this case had acceded to governmental policies and had returned from strike status and continued to refrain from striking during the course of the freeze, thus forfeiting any chance it had to negotiate and sign a contract before the intervening petition was filed. The Board stated that to hold an election in these circumstances would penalize the union for cooperating with national economic policy.[36] Thus, the Board dismissed the petition and granted the parties to the old contract an additional 60 days during which they could bargain for a new agreement.

In another case decided during the year, the Board found that rationale used in *West India Mfg.* and *Hill & Sanders-Wheaton* was inapplicable. In *Bowling Green Foods* [37] the petition was filed 6 weeks after the freeze period expired and at a time when a newly negotiated agreement had been signed by the incumbent union but not by the employer.[38] The Board concluded that the freeze was followed by the establishment of sufficiently clear, broad guidelines to have enabled the parties to resume negotiations which the freeze period either had precluded or clouded. Accordingly, and as the parties had an opportunity to bargain pursuant thereto, the Board found that there was nothing to deter it from applying the ordinary contract-bar rules; that at the time the petition was filed there was no written, signed agreement that would act as a bar; and that an election should be directed.

In a context unrelated to the wage-price freeze, another case decided during the year raised the issue of whether, under *Electric Boat Div., General Dynamics*,[39] the insulated period should be extended. In *Utilco Co.*[40] the contention was made that the petition should not be entertained because an earlier petition had been filed during the 60-day insulated period and was not withdrawn until after the contract had expired. Thus, it was argued that the parties to the contract had been

[36] Citing *Aerojet-General Corp., supra,* fn 30

[37] 196 NLRB No 111

[38] A contract is not a bar to a petition which is filed before all necessary parties to the agreement have signed *Bab-Rand Co.*, 147 NLRB 247, 250 (1964).

[39] 158 NLRB 956 (1966), Thirty-first Annual Report (1966), p. 48

[40] 197 NLRB No 103

prevented from enoying the full insulated period. The Board found, however, that the parties to the contract were largely to blame for any prejudice which resulted from the filing of the petition since they failed to promptly notify the regional director of the existence of the contract.[41] In addition, the Board found that the parties to the contract continued to bargain in spite of the filing of the petition and, thus, that their failure to reach agreemenet was in no way tied to the petition. Consequently, the Board directed an election.

In *Hershey Chocolate Corp.*[42] the Board held that the ordinary contract-bar rules do not apply in situations where a schism had arisen within the labor organization which is a party to the contract. In order to resolve the confusion resulting from the schism and to reestablish bargaining stability the Board will direct an election on a petition filed during the term of the contract. A necessary prerequisite to a finding of schism is the existence of a basic intraunion conflict which is defined as being "any conflict over policy at the highest level of an international union . . . which results in a disruption of existing intraunion relationships."[43] During the year the Board was presented with a schism issue in *Allied Chemical Corp.*[44] In that case, two international union officials were contesting for the position of union president. The election of one official resulted in a complaint being filed by the other with the Secretary of Labor and a resulting civil action by the Secretary to set aside the election. Thereafter, the incumbent labor organization executed an agreement to merge the union with another international union, but the unsuccessful candidate filed suit to enjoin the merger and, simultaneously, sought to affiliate the union with yet another international union. The Board found that these facts demonstrated that the two officials of the union were seeking to pull it in different directions. However, they both sought to realize their objectives, not by fragmenting the organization, but rather by controlling it. Under these circumstances, the Board stated that there was no disruption or realignment sufficient to undermine the industrial stability flowing from the existing contract, and that therefore no schism existed. Accordingly, the Board found that the subsisting agreement was a bar and dismissed the petition.

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[41] The Board found that this factor distinguished the case from *Electric Boat Div., General Dynamics Corp., supra* If the regional director had been promptly notified of the existence of the agreement, he could either have dismissed the petition while there remained time within the insulated period for further negotiations or, if it appeared that any question existed as to the status of the contract for contract-bar purposes, he could have proceeded to a determination of that issue, and then, if necessary, given the parties an additional insulated period under the doctrine of *Electric Boat*

[42] 121 NLRB 901 (1958), Twenty-third Annual Report (1958), p. 21.

[43] *Id.* at 907.

[44] *Allied Chemical Corp., Specialty Chemicals Div., Baker & Adamson Works,* 196 NLRB No 77

B. Units Appropriate for Bargaining

1. Joint Employers of Unit Employees

The issue of whether a single business entity is the employer of the unit employees for the purpose of collective bargaining or whether this business entity and some other business organization constitute joint employers for this purpose was presented to the Board in two unusual situations during the year.

In *Hamburg Industries* [45] one employer was in the business of contracting with railroad companies for the repair and maintenance of railroad cars and it employed three superintendents as well as seven other nonproduction and maintenance employees. This employer contracted with another employer who supplied 283 production employees and 13 supervisors to perform the necessary work on the rail cars. The first employer instructed the second on the work to be performed and its three superintendents constantly checked the performance of the workers and the quality of the work. These work instructions were conveyed to the production workers by the supervisors employed by the second employer. The first employer could force the second to remove its employees from the plant, could veto overtime, and could change the work hours for all employees. Moreover, although the second employer could set the rate of pay and grant increases to its own employees, it had to absorb the costs, unless the first employer approved an increase. In view of the first employer's control over the second's operations in the areas of work instructions, quality control and the right to reject finished work, work scheduling, and indirect control over wages, the Board majority found them to be joint employers.[46]

Jackson Manor Nursing Home [47] was the second case decided during the year involving a joint-employer issue. In this case Jackson Manor, as lessor, entered into a lease-purchase agreement with an individual as lessee. This lease required the lessee to consult with the lessor on all matters concerning employee labor relations. Subsequently, the lessor and lessee entered into an amendment to the lease agreement which stated that during the term of the agreement the lessee had complete

[45] *Hamburg Industries, Fidelity Services, & Industrial Technical Services,* 193 NLRB No 13.

[46] Members Fanning, Jenkins, and Kennedy, with Chairman Miller dissenting. Because he found no common ownership, no common control over labor relations policy, and no close direct day-to-day supervision by the first employer over the employees of the second, Chairman Miller dissented and would have found no joint-employer relationship.

[47] *Jackson Manor Nursing Home, and/or Isaac Mizrahi d/b/a Jackson Manor Nursing Home,* 194 NLRB No. 152

power and control to make all decisions relating to all matters concerning labor relations with the employees. The lease agreement, however, gave the lessor the right to be present and to fully participate in any and all collective-bargaining sessions that may occur during the term of the lease. Further, the agreement stated that the lessor's consent must be obtained before the lessee could enter into any labor agreement or contract. The Board concluded that this contractual provision placed the lessor in a definite position to influence all of the lessee's labor policies, regardless of any disclaimers to the contrary. Consequently, the Board found the lessor and the lessee to be joint employers.

2. Single Location Units of Multilocation Operations

The Board has held that a single-plant, or single-store, unit is presumptively appropriate absent a bargaining history in a more comprehensive unit or a functional integration so severe as to negate the identity of a single-plant, or single-store, unit.[48] Thus, for example, even where there was substantial centralization of authority and considerable product integration between two facilities, the Board has held that one of the two facilities could constitute a separate appropriate unit if the requested facility retained a substantial degree of autonomy.[49] Under its broad authority, the Board, in determining whether such a unit is appropriate, has traditionally looked to such factors as the community of interest among the employees sought to be represented; whether they comprise a homogeneous, identifiable, and distinct group; whether they are interchanged with other employees; the extent of common supervision; the previous history of bargaining; and the geographic proximity of the various parts of the employer's operation.[50]

The appropriateness of a unit of employees at a single location in a retail store chain or other multiple-location enterprise was in issue in several cases decided during the year, including *Twenty-first Century Restaurant.*[51] There, the Board reviewed a regional director's decision that a single-restaurant unit was appropriate. The Board majority disagreed, concluding that this unit was inappropriate, and dismissed the petition. In doing so, the Board noted that all of the policies followed by the employer's "McDonald's" restaurants, including labor relations policies, were established at the employer's corporate headquarters. All administration, payroll, and recordkeeping functions were centralized and a uniform fringe benefits program was

[48] *Frisch's Big Boy Ill-Mar,* 147 NLRB 551 (1964).

[49] *Black & Decker Mfg. Co ,* 147 NLRB 825 (1964).

[50] *Haag Drug Co.,* 169 NLRB 877 (1968) ; *Montgomery Ward & Co.,* 150 NLRB 598 (1964).

[51] *Twenty-first Century Restaurant of Nostrand Ave. Corp., Licensee of McDonald's Corp.,* 192 NLRB No. 103. Chairman Miller and Member Kennedy, with Member Fanning dissenting.

applied to all locations. The employer had separate administrative divisions, headed by general managers, responsible for insuring that each location within their area operated in accordance with corporate policies and standards. They set uniform hours and prepared the labor schedule formula which determined the crew size working at each location. The general managers could transfer employees from location to location, they reviewed employee timecards, made regular visits to the restaurants within their areas, and approved all hiring at any rate above the state minimum wage. They also approved all discharges of permanent employees and all wage increases, promotions, and transfers. Although the managers of the individual restaurants were authorized to hire new employees and to discharge employees within 90-day probationary period, they could only recommend discharges after the probationary period. On the basis of these facts, the Board concluded that any meaningful decision governing labor relations matters emanated from established corporatewide policy, as implemented by the general managers. Consequently, the Board found that a unit limited to a single location was not appropriate for the purpose of collective bargaining.[52] In another "McDonald's" case decided during the year [53] the Board, on facts similar to *Twenty-first Century*, affirmed the regional director's decision that single-stand units were inappropriate.[54]

In a case decided during the year, *Gray Drug Stores*,[55] a Board majority held that the appropriateness of a single-store unit had been rebutted. In that case there was a lack of autonomy at the single-store level as reflected by the strict limitations on the individual store manager's authority in personnel, labor relations, merchandising, and other matters. In addition, the employer's district managers had an extensive role in the day-to-day operation of the stores, which included the final say on such matters as the hiring and discharging of employees, wage scales, scheduling of employees' work hours, vacations, and permanent or temporary transfers. While the Board held that these considerations militated against single-store units, it found that the countywide unit requested by the petitioner was also inappropriate. In

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[52] Member Fanning dissented In his view, the record showed that there was minimal interchange between employees in the employer's restaurants and that there was meaningful autonomy and control over employees at the local level including training of employees, scheduling hours of work, and authority to hire and fire employees by the restaurant managers

[53] *Waiakamilo Corp , d/b/a McDonald's,* 192 NLRB No. 102

[54] For the same basic reasons expressed in *Twenty-first Century,* Member Fanning dissented.

[55] 197 NLRB No. 105 Chairman Miller and Members Kennedy and Penello, with Members Fanning and Jenkins dissenting

so holding, the Board noted that it has been the policy of the Board to find that the appropriate bargaining unit in retail chain operations should embrace employees of all stores within the employer's administrative or geographic area and that the decision in *Sav-On Drugs* [56] did not abandon this rule. Thus, the Board held that the countywide unit requested by the petitioner was not sufficiently remote from the employer's stores in an adjacent county to reflect a separate community of interest on the basis of geographic considerations, since the stores in the two counties appeared in a cluster. Moreover, the employees in the two counties shared common intermediate supervision. Consequently, the Board determined that a unit composed of the employees employed in both counties was appropriate.[57]

The Board was faced with a similar question in *Bank of America.*[58] There, the petitioner filed two separate petitions seeking separate bargaining units in two of the employer's branch banks, but the employer contended that the minimum appropriate unit was one embracing employees of all 72 branches, agencies, and facilities geographically located within a single two-county administrative district. Under the facts of the case, however, a Board majority concluded that single-branch bargaining units were appropriate. In reaching this result, the Board noted that the individual branch managers enjoyed substantial autonomy in the direction, retention, and promotion of the branch employees. They had authority to hire and fire, schedule vacations and overtime, and make effective evaluations of the performances of the branch employees. Moreover, the employees had little contact with employees of other branches; the employees in the branches were separated both geographically and functionally in their day-to-day duties from employees of other branch banks, and other operations of the employer; and the majority of the employees' grievances were settled at the branch level. In addition, the branch manager had direct responsibility for maintaining the branch as a profitable operation: the branch had its own budget and profit-and-loss statement and was regarded as a separate economic entity. The Board concluded that the individual branches were self-contained economic units and that their

[56] 138 NLRB 1032 (1962). Twenty-eight Annual Report (1963), p. 51. There, the Board stated that it would apply to retail chain operations the same unit policy which it applies to multiplant locations generally and that it had merely added the possibility that a single location or grouping other than an administrative or geographical area may be appropriate

[57] Members Fanning and Jenkins dissented. They would have found the countywide unit requested by the petitioner to be appropriate It encompassed a standard metropolitan statistical area, treated as such by the Bureau of Labor Statistics and other Federal agencies and departments and the Board previously relied on the identification of such areas in making unit determinations

[58] *Bank of America Natl. Trust & Savings Assn*, 196 NLRB No. 76 Members Fanning, Jenkins, and Penello, with Chairman Miller concurring separately and Member Kennedy dissenting

employees were homogeneous, identifiable groups with sufficient communities of interests to constitute appropriate bargaining units.[59]

Under Board policy in relation to the public utility industry, a systemwide unit has been regarded as the optimum bargaining unit because of the inherent integration and interdependence of all operations in the utility industry, and the large unit has been favored over the smaller one.[60] However, although a systemwide unit has been regarded as the most desirable, it is not at all times and in all circumstances the only appropriate type of unit in a public utility.[61] In two cases decided during the year the Board decided that public utility units which were less than systemwide were appropriate.

Thus, in *Michigan Bell Telephone Co.*[62] a Board majority found appropriate a unit of all commercial department employees at the telephone company's Battle Creek, Michigan, commercial offices. The Board relied on the fact that the manager of the office had substantial autonomy in controlling the day-to-day activities of the employees. The employees had only telephonic contact and no interchange with employees in the employer's other commercial offices; there was no history of bargaining for commercial department employees in the preceding 20 years; and no labor organization sought to represent a broader unit of such employees. The Board reasoned that a commercial office in a telephone utility, engaged in soliciting and servicing telephone subscriptions in a well-defined geographic area, may be compared with an outlet or territory in a selling operation. The Board concluded that, viewed in this light, the less than systemwide unit confined to employees at the commercial office was presumptively appropriate.[63]

A less than systemwide unit in the public utility industry was also found appropriate in *Central Power & Light Co.*[64] There, a Board

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[59] Chairman Miller, in a separate concurrence, stated that while he felt the majority understated the amount of employee interchange, he agreed that the employer treated each branch as a separate, administrative entity, and thus afforded considerable local autonomy

Member Kennedy dissented as he believed the employer's operations to be so highly centralized and its procedures so integrated that a unit less than divisionwide was inappropriate He relied particularly on the facts that the employer's centralization and corporate uniformity precluded a finding that there was any real local autonomy in the branches Moreover, Member Kennedy viewed the record to reflect substantial interchange and transfers between branches and stated that stable collective bargaining following a Board election cannot be realized in a single branch where the unit itself is unstable by reason of this frequent interchange and transfer.

[60] *Louisiana Gas Service Co*, 126 NLRB 147 (1960).

[61] *Mountain States Telephone & Telegraph Co.*, 126 NLRB 676 (1960). Twenty-fifth Annual Report (1960), p 55

[62] 192 NLRB No 178

[63] Chairman Miller and Member Kennedy dissented They stated that the facts in the case, including the fact that the employees in the requested unit comprised only 1.5 percent of the employer's commercial department employees and conformd to no administrative district or division of the employer, supported a continuation of Board policy favoring systemwide units, or at least units of considerable breadth, in the telephone industry

[64] 195 NLRB No 139 Members Fanning and Jenkins, Chairman Miller dissenting

majority found that the managers of the employer's plants and divisions had been given a substantial degree of autonomy both with respect to their operating responsibilities and with respect to labor relations matters such as the hiring, discharging, and promoting of employees and the establishment of rates of pay and other conditions of employment. Furthermore, the Board found that a unit consisting of all the production and maintenance employees working within the geographical confines of one of the employer's electrical distribution districts was appropriate inasmuch as these employees were engaged in the functionally integrated task of producing and delivering power essentially to the environs of one city, with interchange between these employees and employees in other areas being negligible. The Board concluded that the employer had not administratively centralized the direction and control of the production, transmission, and distribution operations as to require a finding that only a systemwide unit of production and maintenance employees is appropriate.[65]

3. Truckdriver Units

The Act [66] excludes from the definition of "employee" any individual having the status of an independent contractor. A significant criterion in determining whether an individual is an independent contractor rather than an employee, is the common law right-of-control test. Generally, where the person for whom the services are performed retains the right to control the manner and means by which the result is to be accomplished, the relationship is one of employment.[67] On the other hand, where control is reserved only as to the result sought, the relationship is that of independent contractor.[68] The resolution of this question depends on the facts of each case [69] and the Board follows the ordinary tests of the law of agency in determining whether individuals are covered by the Act.[70]

During the year the Board was presented with several cases including *Tryon Trucking*,[71] involving the issue of whether truckdrivers were employees or independent contractors. In that case the employer had executed leases with a number of truck owner-operators. The leases stated that the intention was to establish an independent contractor

[65] As in *Michigan Bell*, Chairman Miller dissented and would have found a systemwide unit appropriate He felt that the majority was granting the unit based solely on geography and he would not find that this is enough on which to premise a finding of the appropriateness of a unit.

[66] Sec. 2(3).

[67] *Western Nebraska Transport Service*, 144 NLRB 301 (1963).

[68] *Pure Seal Dairy Co*, 135 NLRB 76 (1962)

[69] *Golden Age Dayton Corp*, 124 NLRB 916 (1959), Twenty-fifth Annual Report (1960), p. 44.

[70] *Vindicator Printing Co*, 146 NLRB 871 (1964)

[71] 192 NLRB No. 123, Members Fanning and Brown, with Chairman Miller dissenting.

relationship, and was terminable upon 30 days' notice by either party. However, the employer required that each truck exhibit the name of the employer; participated in the hiring of drivers; inspected the owner-operators' equipment; performed the dispatching service; and required the submission of logs. In addition, the employer determined the method and amount of the percentage pay system, could require reimbursement of a portion of cargo insurance claims when it determined driver negligence; imposed rules against riders; gave annual bonuses to drivers who had no chargeable accidents; and in the past had terminated leases when a driver-owner trip-leased outside the employer's certified area of operations. Accordingly, the Board concluded that the employer retained sufficient control over the drivers to preclude a finding that any of the owners-operators were independent contractors.[72]

A similar result was reached in *Aetna Freight Lines*[73] where the evidence showed that when an owner-driver made a mistake in logs or manifests requiring correction, the employer issued stoploads (instructions not to give such drivers loads until he corrects his errors) through its dispatchers. Moreover, the employer had issued a directive that four stoploads could result in cancellation of the driver's lease. The employer provided a number of services for the drivers including assistance in the purchase and financing of their equipment; selling them all necessary items, such as gas, oil, safety devices, and parts; and it established central pickup points for the salvage of items such as tires for resale. The employer also had the practice of from time-to-time issuing directives setting forth procedures to be followed by drivers in situations which arise in the course of their duties, such as accidents. Applying the right-of-control test, the Board concluded that the drivers were employees of the employer.[74]

A contrary result was reached in *Fleet Transport Co.*[75] where the record showed that the owner-operators, and not the employer, determined what days and hours to work, what routes to use, where to have repairs made to equipment, where to purchase fuel, and where to park the equipment when not in use. Moreover, the owner-operator was free to refuse loads without penalty and could decide whether to hire or fire a driver, what work rules to impose on the drivers, and

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[72] Chairman Miller dissented In his view, the owner-operators had both substantial responsibilities of ownership and opportunities to profit from sound management Moreover, he felt that the employer retained only that modicum of control required of it by the Interstate Commerce Commission

[73] 194 NLRB No 120 Members Fanning and Jenkins, with Chairman Miller concurring separately

[74] In a separate concurrence, Chairman Miller stated that he was satisfied that in this case sufficient control over the manner in which the drivers operate had been demonstrated to support a finding of employee status.

[75] 196 NLRB No 61. Chairman Miller and Members Kennedy and Penello.

what rates of pay and fringe benefits the drivers would receive. The Board concluded that the only indicia of control over the means of performing the work which was retained by the employer were those required by the state public service commission. Consequently, the Board found the owner-operators to be independent contractors.

4. Faculty Units

The Board's decision to assert jurisdiction over nonprofit educational institutions [76] gave rise to questions concerning the appropriate unit for collective bargaining in several cases decided during the year. One such case in which the Board was called on to make unit determinations with respect to university teaching staffs was *Adelphi University.*[77] In finding appropriate a unit of all full and regular part-time faculty including professional librarians and research associates, the Board was required to pass on a variety of issues involving the faculty members' alleged supervisory or managerial status and the inclusion and exclusion of certain employees on supervisory and other grounds. One such issue involved the question of whether the 11 faculty members who served on the university's personnel committee and the 3 faculty members who served on the university's grievance committee should be excluded from the unit as supervisors. The function of the personnel committee was to pass on all matters of tenure, hiring or promotions to associate or full professor, granting sabbatical or honorary leaves-of-absence, and suspending or terminating full-time faculty members during the term of their contracts. The record showed that in almost all cases, the various recommendations made by the committee with respect to personel actions were adopted by the board of trustees.

The grievance committee heard and recommended the adjustment of all faculty grievances, except dismissal proceedings. Faculty members could present grievances which might arise from failure to achieve tenure or promotion or from alleged discrimination by the university administration. If the committee were unable to effect an informal settlement, it investigated the grievance and reported its findings to the grievant and to the administration. If the grievant or the grievance committee did not concur in the disposition of the grievance by the administration, either or both could appeal to the board of trustees.

While the Board noted that the personnel committee had considerable and effective authority with respect to a wide range of actions affecting the status of the university's professional personnel, it noted

[76] *Cornell University,* 183 NLRB No 41 (1970). Thirty-fifth Annual Report (1970), pp. 22, 26

[77] 195 NLRB No. 107. Chairman Miller and Member Fanning, with Member Kennedy dissenting in part

that in *C. W. Post Center* [78] such authority exercised by the faculty as a group on the basis of collective discussion and consensus was deemed to be insufficient to render the individual members of such a group supervisors within the meaning of the Act. The Board stated that the committees in this case, as in *C. W. Post*, involved the concept of collegiality, wherein power and authority is vested in a body composed of all of one's peers or colleagues, and that this does not square with the traditional authority structures with which the Act was designed to cope in the typical organizations of the commercial world.[79] Furthermore, the Board noted that the ultimate authority did not rest with the committee peer groups, but rather with the board of trustees. Thus, the members of the committees were not advised to advocate management's interests in making their decisions, nor were they advised that they were management's representatives in making them. Rather, the board of trustees saw fit to seek, in a formalized manner, the advice of the faculty, and the faculty saw fit to channel its collective advice through these elected committees. Consequently, the Board concluded that the members of the committees did not fit the traditional role of "supervisor" as that term is thought of in the commercial world and that these faculty members should not be disenfranchised merely because they have some measure of quasi-collegial authority either as an entire faculty or as representatives elected by the faculty.[80]

Other unit placement issues involved in the *Adelphi* case included graduate assistants. These individuals did not have faculty rank, were not listed in the universitys catalogues as faculty members, had no vote at faculty meetings, were not eligible for promotion or tenure, were not covered by the university personnel plan, and had no standing before the grievance committee. The Board concluded that they were primarily students and did not share a sufficient community of interest with the regular faculty to warrant their inclusion in the unit. With respect to the university director of admissions, who exercised sporadic supervisory authority over nonunit personnel inasmuch as he

[78] 190 NLRB No 109 (1971). Thirty-sixth Annual Report (1971), pp

[79] The Board noted that the statutory concept of "supervisor" grows out of the fact that in commercial organizations authority is normally delegated from the top of the organizational pyramid in bits and pieces to individual managers and supervisors who in turn direct the work of the larger number of employees at the base of the pyramid.

[80] Inasmuch as he concluded that the members of the personnel committee would be supervisors under the Act if they exercised their authority as individuals, Member Kennedy dissented He concluded that it should make no difference that these faculty members exercise their authority on a collective basis through committee decision rather than as individuals Moreover, Member Kennedy stated that diffusion of authority throughout the entire faculty, as in the *C. W Post* case, is not analogous to the concentration of that authority in an 11-man committee within a faculty of 600 members In addition, Member Kennedy would have found that the members of the grievance committee who hear and recommend the adjustment of faculty grievances by the university should be excluded from the unit

could hire a full-time secretary, the Board concluded that this authority, standing alone, was insufficient to exclude him from the bargaining unit. The Board noted, however, that if a bargaining representative were selected in the case, it could not represent the director of admissions in these limited supervisory duties.

In *Fordham University* [81] a bargaining committee for the law school sought a separate unit of full-time and regular part-time faculty of the law school and no other union sought to include them in a broader unit. The law school was located in a separate building from the rest of the university and 57 percent of the law professors held full professor rank, while less than 20 percent of the faculty members in the university as a whole held this position. Moreover, law school faculty members were eligible for tenure after 3 years while faculty members in the remainder of the university needed at least 7 years' service before acquiring tenure. The salaries of law school faculty members were higher than that of faculty members in the university as a whole. Other factors which set the law school apart from the rest of the university were that the law school was a member of the Association of American Law Schools, the New York Court of Appeals regulated the hours during which classes in the law school were to be held, and the American Bar Association, whose approval was necessary before the law school could operate, required that the law school had a certain financial independence and a certain faculty-student ratio. Moreover, the members of the law school faculty had their own supervisor, had a voice separate from that of the faculty of the remainder of the university in determining their working conditions, had little or no interchange with the rest of the university, and operated under a school calendar which differed from the university as a whole. On these facts, and because no labor organization sought to include the law school faculty in a broader bargaining unit, the Board concluded that the law school faculty constituted an identifiable group of employees whose separate community of interests was not irrevocably submerged in the broader community of interests which they shared with other faculty members.

With respect to the chairmen of other departments at Fordham, the Board found that the decisions regarding appointment, promotion, and tenure of the professors in the various departments were made not by the chairmen alone but by the faculty of the department acting as a group. Moreover, the chairmen did not direct the work of faculty members and the department chairmen, as well as the faculty members, considered department chairmen to be representatives of the

[81] 193 NLRB No 23. Chairman Miller and Member Jenkins, with Member Kennedy dissenting in part.

faculty rather than of the university administration. Accordingly, the Board found that they were not supervisors within the meaning of the Act and included them in the universitywide unit.[82]

5. Retail Store Units

The Board has consistently held that while a storewide unit of selling and nonselling employees in retail establishments is inherently appropriate,[83] it is not the only appropriate unit and the Board has approved less than storewide units in certain circumstances. Thus, in *Sterns' Paramus*,[84] for example, the selling and nonselling employees were separately supervised, worked in different areas, received different training, and wore different dress; different factors were rated in determining job performance; there was no interchange between selling and nonselling employees and few transfers had been made. In considering retail department store unit issues this year, the Board dismissed several petitions which sought employees in less than storewide units and directed elections in several other such cases.

In one of these cases [85] the petitioner sought a unit confined to all nonselling employees in the store. The Board found, however, that the petitioner's claim that this unit was appropriate was based on the single negative characteristic that none of the included employees performed selling functions. All selling and nonselling employees utilized common lockerrooms, restaurant, parking lot, and lounge facilities, and they shared the same benefits, were hourly paid, and punched a timeclock. Moreover, the nonselling shipping and receiving employees had virtually no work contacts, and virtually no job-related concerns in common with the nonselling employees in other areas. Accordingly, the Board found that the requested unit was inappropriate.

In *Sears, Roebuck & Co.*[86] the petitioner sought a unit confined to the store's display department employees. These employees, however, spent approximately 80 percent of their time in the store's selling departments working with sales employees in selecting, arranging, and accessorizing merchandise. Moreover, all of the store's full-time employees received identical fringe benefits, and all employees used the same parking lot, timeclock, coffeeshop, and restrooms. Because of the continuous contact with and interrelationship of work duties be-

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[82] Inasmuch as he found the department chairmen's situation at Fordham to be substantially similar to that in *C. W Post*, where they were excluded from the unit, Member Kennedy dissented on this issue

[83] Thirtieth Annual Report (1965), pp. 48–50.

[84] *Allied Stores of New York, d/b/a Stern's, Paramus*, 150 NLRB 799 (1965), Thirtieth Annual Report (1965), p. 27

[85] *The Grand, Div of Beco Stores of Delaware, Subsidiary of Beco Industries*, 197 NLRB No. 156

[86] 194 NLRB No 48.

tween the display employees and sales employees and the sharing of common conditions of employment, including common intermediate and ultimate supervision, the Board concluded that the display employees had an insufficient community of interest separate from the other employees in the store and dismissed the petition. Similarly, in *John Wanamaker, Philadelphia*,[87] the display employees in the unit sought by the petitioner worked in many different areas of the store, had no special training or skills, received the same wage rates and benefits as other employees, and shared the same work-related facilities as the other store employees. Accordingly, the Board found the requested unit inappropriate and dismissed the petition.

In *Levitz Furniture* [88] the store consisted of a building, one-third of which contained furniture and furniture accessories for display purposes, and the remainder of which was used for storage, offices, and shop space. The petitioners sought a unit of warehouse employees. In that case the Board stated that it would not permit a separate warehouse unit unless the following three factors pertain: (1) the employees are under separate supervision; (2) they perform substantially all their work tasks in buildings geographically separated from those in which the bulk of the remaining employees work; and (3) they are not integrated, to any substantial degree, with other employees in the performance of their ordinary duties. Inasmuch as it found none of these factors to be satisfied in the case, the Board dismissed the petitions.

In two *J. C. Penney* [89] cases, however, the Board found that units confined to the employees performing automotive service work at the employer's automotive centers were appropriate. In those cases, the requested employees worked in a service area separate from the other employees in the service center. Although all employees at the employer's stores were governed by the same rules and regulations and received the same employee benefits, the Board found that the service employees constituted homogeneous and identifiable groups which were sufficiently distinct from the other departments in the stores, and from the other employees in the service centers, to warrant their separate representation. In reaching this result the Board noted that while both the service and the sales employees employed in the automobile service departments were under common supervision, there was little interchange or permanent transfer between the service employees and selling employees at the centers. Moreover, service employees were furnished uniforms whereas sales personnel were required to wear shirts

[87] 195 NLRB No. 82.

[88] *Levitz Furniture Co of Santa Clara*, 192 NLRB No. 13

[89] *J C. Penney Co., Store 1302*, 196 NLRB No. 67, Members Fanning, Jenkins, and Penello, with Member Kennedy dissenting in part; *J. C. Penney Co. Store 1345, Honolulu, Hawaii*, 196 NLRB No 63, Members Fanning and Jenkins, with Member Kennedy dissenting in part.

and ties or dresses. The service employees performed manual work in connection with the repair and maintenance of automobiles and they were hourly paid. The sales employees worked on a commission basis. On these facts, the Board directed elections in the requested units.[90]

6. Casual Employees Units

In one rather unusual case decided during the year, the Board found appropriate a unit of day laborers employed by an employer who was engaged in providing its customers with temporary unskilled workers. Thus, in *All-Work, Inc.*,[91] the employer contended that no unit was appropriate because the employees were casual and had no community of interest with one another and because the employer did not have sufficient control over the employment conditions of its employees to enable the parties to engage effectively in collective bargaining. The Board found, however, that the employer controlled the wage rates, the manner in which they were paid, the assignment of work, and, in many cases, the transportation of the laborers to the jobsites. Thus, effective and meaningful collective bargaining could take place since, although the employer did not actually supervise the work performed, it had control over some of the most important aspects of the employer-employee relationship. Moreover, the Board found that the relationship of the laborer to the employer was not greatly different from the relationship of the stevedore to stevedoring companies. As the Board had previously recognized stevedores as "casual laborers" and had held that the casual nature of their employment did not deprive them of their rights as "employees' 'under the Act,[92] the Board held that the laborers employed by the employer were, for similar reasons, entitled to such protection.

7. Unit Status of Confidential and Managerial Employees

Apart from the categories excluded by the Act, or as to which statutory limitations require specific treatment, several other special categories of employees are governed by Board policy. There are established rules based on policy considerations which apply to these cate-

[90] Member Kennedy dissented in both cases He would have found that the smallest appropriate unit in the cases was the entire complement of employees in the service centers, including the sales employees In Member Kennedy's view, there was a functional integration of the work of the sales and service employees inasmuch as the installation of the items sold by the sales employees was a constituent part of the transaction which required close coordination between the sales and service personnel

[91] 193 NLRB No 137.

[92] *Tamphon Trading Co*, 88 NLRB 597 (1950), Fifteenth Annual Report (1950), p 81.

gories. These include confidential employees, managerial employees, plant clerical employees, office clerical employees, and technical employees. Another category is that of relatives of management which, except to the extent of the exclusion of "any individual employed by his parent or spouse" under section 2(3), is also the subject of Board policy. During the year the Board had occasion to reexamine its policy with respect to managerial employees in *Bell Aerospace*.[93] In that case, the Board was asked to reconsider its prior decision involving the same employer,[94] wherein the Board concluded that the buyers who were alleged to be managerial employees had the right to be represented for the purposes of collective bargaining. In that earlier case, the Board relied on its decision in *North Arkansas Electric Cooperative*.[95] Inasmuch as the United States Court of Appeals for the Eighth Circuit denied enforcement in *North Arkansas Electric*,[96] the employer in *Bell Aerospace* requested the Board to reconsider its previous decision and dismiss the petition.

In its opinion, the court of appeals reviewed the legislative history of section 2 (3) and (11) of the Act as well as previous courts of appeals decisions which described Board law as excluding, as managerial employees, those who formulate, determine, and effectuate an employer's policies. The court concluded that although the Board's practice of excluding "managerial" employees from rank-and-file bargaining units was not specifically referred to in the legislative history, the Congress must nevertheless have been aware of the Board's stated policy and the failure of Congress "to change the statute to specifically include managerial employees as 'employees' . . . must be given some weight by this court." It thus rejected the Board's approach in the decision which it was reviewing, which argued for the exclusion from the coverage of the Act of only such managerial employees as participated in the formation, determination, or effectuation of management policy with respect to employee relations matters.

The Board, in denying the motion for reconsideration in *Bell Aerospace*, respectfully disagreed with the court's analysis of the legislative history and said that the rationale underlying the Board's history of excluding managerial employees rests on the premise that conflicts of interests are likely to arise between the collective employee group represented by a labor organization and personnel who work as, with, or for management representatives whose area of responsibility includes bargaining with such a labor organization. The Board stated that because Congress declined to amend the Act to exclude this specific type

[93] *Bell Aerospace Co., Div. of Textron*, 196 NLRB No. 127.
[94] 190 NLRB No. 66 (1970).
[95] 185 NLRB No. 83 (1970). Thirty-sixth Annual Report (1971), pp.
[96] *N.L.R.B.* v. *North Arkansas Electric Cooperative*, 446 F.2d 602.

of managerial personnel, it does not follow that it thereby meant to exclude all managerial personnel. The Board concluded that congressional silence with respect to managerial employees in general, when considered in the specific context of the legislative history, does not indicate any intent as to Board policy in this broad area, nor does it suggest that the Congress explored any facet of this problem other than the Board's treatment of personnel associated with the formulation and implementation of labor relations policies. The Board found that, while there was support in the legislative history and in prior decisions for the exclusion of those employees concerned with management policies in the labor relations area, the touchstone in any case is whether the duties and responsibilities of any managerial employee or group of managerial employees do or do not include determinations which should be made free of any conflict of interest which could arise if the person involved was a participating member of a labor organization. Inasmuch as the Board found no such conflict of interest regarding the employer's buyers, it adhered to its original decision in the case.

In another case decided during the year, the contention was made that the employees in question were either confidential, managerial, or supervisory and that they therefore should not be granted bargaining rights under the Act. Thus, the petitioner in *Hudson Waterways*[97] sought to represent paymasters whose duties included paying off the crews of the employer's ships. Following established procedures, the paymasters studied the payroll and other office records about the vessels' current and past voyages with a view to determining the existence of actual or potential areas of dispute about such matters as the hours worked by individual crewmembers and the computations of the amounts of overtime pay due. If the paymasters' study revealed actual or potential pay disputes, they then conferred with the chief paymaster to determine how the employer wished the dispute to be handled at the point of payoff.

The employer contended that the paymasters' function in settling disputed pay claims was a grievance-adjustment function; that, in performing this function paymasters obtain or have access to information of a confidential character about the employer's labor relations policies; and that, moreover, if the paymasters became represented by a union, the employer would be exposed to the risk that paymasters would be influenced by their prounion sympathies in "negotiating" settlements of pay disputes, thus confronting the employer with a conflict of interest. The Board found, however, that the paymasters' discretion in settling specific claims was circumscribed both by the previous instructions given them by the chief paymaster and by the past records of like disputes settled with employer approval. The

[97] *Hudson Waterways Corp & Seatrains Lines*, 193 NLRB No. 58.

Board noted that the employer had made no showing that the paymasters had ever paid wage claims which involve some judgment independent of the decisions or rules already formulated by the employer and made binding on all concerned. The Board concluded that the authority granted the paymasters fell short of that envisaged either by the Act's definition of the "authority . . . to adjust grievances," or by the Board's definition of one who "formulates, determines, or effectuates labor relations policy." In addition, the Board noted that it would not deny employees the right of representation simply on the basis of speculative apprehensions with respect to potential conflicts of interest and that, in any event, the employer would have the means to take corrective action should such apprehensions be realized. Accordingly, the Board held that the paymasters were employees within the meaning of the Act who were entitled to representation if they so desired.

C. Conduct of Elections

1. Eligibility of Replaced Economic Strikers

Eligibility of replaced economic strikers to vote in a Board-conducted election is governed by section 9(c)(3), as amended in 1959. The amended provision, which changed the Taft-Hartley total prohibition against eligibility for replaced economic strikers states: "Employees engaged in an economic strike who are not entitled to reinstatement shall be eligible to vote . . . in any election conducted within twelve months after the commencement of the strike." In *Laidlaw Corp.*[98] the Board held for the first time that economic strikers unconditionally applying for reinstatement at a time when their positions have been filled by permanent replacements remain employees and, as such, are entitled to full reinstatement upon the departure of replacements unless said employees have acquired regular and substantially equivalent employment elsewhere. In *Wahl Clipper Corp.*,[99] a case decided during the year, the Board was presented with the issue of whether such replaced economic strikers, who *are* entitled to reinstatement under the doctrine of *Laidlaw*, are eligible to vote in an election conducted in excess of 12 months from the commencement of the strike.

In resolving this issue, the Board stated that the legislative history of the amendment to section 9(c)(3), while not definitive, lends con-

[98] 171 NLRB 1366 (1968), Thirty-third Annual Report (1968), pp 25, 83

[99] 195 NLRB No. 104. Chairman Miller and Members Jenkins and Kennedy, with Member Fanning dissenting.

siderable support to the view that the 12-month limitation was established as a maximum period of voting eligibility for economic strikers. Furthermore, the Board noted that while the reference in the provision to employees "who are not entitled to reinstatement" at first blush seems to qualify the limitation, neither the *Laidlaw* Board decision nor the Supreme Court's decision in *Fleetwood Trailer* [1] had been handed down at the time of this 1959 amendment. Since the Board's review of the congressional debates indicated to it that Congress at that time was under the impression that a striking employee who had been replaced had no remaining job rights or any entitlement to reinstatement where the strike was economic in character, the Board concluded that the reference to employees "not entitled to reinstatement" was not necessarily intended to qualify the limitation, but more probably was intended only as a further description of economic strikers, to distinguish them from unfair labor practice strikers.

Moreover, the Board held that it would be inappropriate to view replaced economic strikers in a manner similar to laid-off employees as to whom the Board either permits or denies voting eligibility on an analysis of whether or not such persons have a reasonable expectancy of reemployment within the foreseeable future. The Board held that the parallel with laid-off employees was not apt since the contingencies prerequisite to reemployment for economic strikers are considerable. Thus, the replaced economic striker must await not merely an improvement in the business of his employer, but also the termination of employment of his replacement—an event the timing of which is highly speculative if it is to occur at all. Consequently, the Board concluded that the statute required a holding that replaced strikers are not eligible to vote in an election held more than 12 months after the commencement of an economic strike. Since the election directed in the case would be held more than a year from the date the strike began, the Board found that only those replaced former economic strikers who were actually reinstated by the eligibility date of the election would be entitled to vote.[2]

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[1] *N L R B.* v *Fleetwood Trailer,* 389 U.S 375 (1967), Thirty-fifth Annual Report (1970), p 160.

[2] Member Fanning dissented In his view, the sec 9(c)(3) time limitation applies only if the strikers fit the definition of coverage; i.e., those "engaged in an economic strike who are not entitled to reinstatement" Since the employees in the case before the Board were, under the doctrine of *Laidlaw,* entitled to reinstatement, Member Fanning would treat these former strikers in a manner similar to laid-off employees and permit them to vote without challenge when they have a reasonable expectancy of reinstatement within the forseeable future.

2. Election Propaganda

In determining whether the election propaganda of one of the parties has exceeded permissible bounds and requires setting an election aside, the Board balances the right of the employees to a free and informed choice of a bargaining representative against the right of the parties to wage a free and vigorous campaign with all the normal tools of legitimate electioneering. An election will be set aside, however, when there has been misrepresentation or campaign trickery involving a substantial, material departure from the truth, but will not be set aside on the basis of propaganda, where the message was merely inartistically or vaguely worded or subject to different interpretations.[3] Threats and promises of benefit are, of course, forbidden. These principles were applied by the Board in a number of cases during the year; the following are representative examples.

The question of whether statements constitute proscribed threats or permissible campaign propaganda was considered in *Blaser Tool & Mold Co.*[4] There another company owned 95 percent of the dies used by the employer to manufacture its products. This same company was the employer's major customer inasmuch as it purchased 98 percent of the employer's production. In this context, the employer's president delivered a speech to all of the employees in which he stated that the customer was free to withdraw its patronage at any time and he was apprehensive that this customer would cease doing business with the employer if the employees voted for the union. Citing *N.L.R.B.* v. *Gissel Packing Co.*,[5] the Board stated that employer predictions of adverse consequences arising from sources outside his control are required to have an objective factual basis in order to be permissible. Since the employer offered no factual basis for its president's suggesting the possibility that its major customer would withdraw its patronage if the employees voted for the union, the Board concluded that the statements were implied threats of job loss and plant closure made for the purpose of inducing the employees to vote against the

[3] *Hollywood Ceramics Co.*, 140 NLRB 221 (1962). Twenty-eighth Annual Report (1963), p 57.

[4] 196 NLRB No. 45. Members Fanning and Jenkins, with Chairman Miller dissenting in part.

[5] 395 U S 575, 619 (1969), Thirty-fourth Annual Report (1969), pp. 113–116.

union in the forthcoming Board election and, thus, constituted election interference.[6]

As noted previously, the Board may set aside elections where one of the parties makes a substantial misrepresentation of a material fact and circumstances prevent an effective reply, so that the misrepresentation reasonably may be considered to have had a substantial impact on the election.[7] In one case decided during the year, the union passed out leaflets the day before the election which were capable of a construction that the union was responsible for getting certain quoted wage increases for the workers in the rail, steel, auto, trucking, can, and airline industries. The Board held that while this representation was a considerable exaggeration of the facts, it did not believe that such propaganda, despite its overstatement of the petitioner's importance and effectiveness, was that kind of serious misrepresentation about existing campaign issues which would unduly influence the employees in making their choice at the polls. *Thiem Industries.*[8] The Board found that it was a matter of fairly common knowledge that the petitioner was not the exclusive, or even the predominant, representative in such industries as basic steel and automobile fabrication. Thus, the matters asserted were of a nature which the employees could be expected to assess with some accuracy. Accordingly, the Board held that the document in question was not likely to have had sufficient impact on voter freedom of choice to warrant setting the election aside.

In *Smith Co.*[9] the Board considered whether certain claims by a union constituted unlawful promises of benefits. The Board adopted a regional director's decision which overruled employer objections that the petitioner represented to employees that if the union won the election there would be a union contract with many benefits. Benefits enumerated as ensuing from a union victory were, *inter alia:* pension and dental plans; union ability to keep an employee on the job even if the employer wished to fire him, whereas in the absence of a union victory the employer was free to fire; tickets for an amusement park at a discount; availability of a blood bank and loans from a credit

[6] Chairman Miller dissented. He stated that he felt while the 8(c) discussion in *Gissel* indicated that it is within the Board's province to find that certain alleged employer "predictions," read in context, may be thinly disguised threats, the Court was not laying down an inflexible rule that any prediction made without clear factual basis *must* be construed as an implied threat. Rather, stated Chairman Miller, *Gissel* means only that if the remarks *can be* construed as either a threat or a prediction, the presence or absence of stated objective bases may be taken into account by the Board in determining into which category (threat or prediction) the remarks fall. Since he could perceive no way in which it is possible to read into the remarks made by the employer in this case any threat of action by the employer, Chairman Miller would have found the remarks to be mere "suggestions of a possibility" which do not rise to the level of a prohibited threat.

[7] *Hollywood Ceramics Co , supra* at fn 1.

[8] 195 NLRB No 200.

[9] *Smith Co., Successor to Republic Corp Marketing Services,* 192 NLRB No. 162. Members Fanning and Brown, with Chairman Miller dissenting.

union; and special discounts on tires, cars, and appliances. The regional director concluded, and the Board agreed, that employees are generally able to understand that a union cannot obtain benfits automatically by winning an election but must seek to achieve them through collective bargaining. Thus, union promises of the type involved in the case were deemed to be easily recognized by employees to be dependent on contingencies beyond the union's control and do not carry with them the same degree of finality as if uttered by an employer who has it within his power to implement promises or benefits. The statements attributed to the union were considered to be within the bounds of privileged campaign propaganda.[10]

In *Hineline's Meat Plant*,[11] the Board considered whether an employer's announcement of a new benefit plan during the critical preelection period was privileged or grounds for setting aside the election. There, the employer had submitted a proposed profit-sharing plan to the Internal Revenue Service 4 days prior to the filing of the petition by the union. At a meeting of employees held 11 days prior to the election, employer's counsel announced the plan and described it in detail. The employer contended that Internal Revenue Service regulations required an announcement of the plan to employees prior to its submission. The regional director's investigation of the petitioner's objections, however, disclosed that while the regulations of the Internal Revenue Service require an employer to inform its employees of the plan, it is not required as a condition precedent to approval by the IRS of the proposed plan. The Board stated that, in these circumstances, it was not persuaded that the timing of the announcement of the profit-sharing plan at the particular time was not calculated and designed to influence the employees in their choice of a bargaining representative in the election. Thus, relying on the Supreme Court's decision in *Exchange Parts*,[12] the Board adopted the regional director's recommendation that the election be set aside and a new election be directed.[13]

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[10] Chairman Miller dissented and would have directed a hearing on certain benefits which derive wholly from the union and not from collective bargaining and were allegedly promised on the condition that the petitioner won the election and, thus, they were more than privileged campaign propaganda

[11] 193 NLRB No. 135 Members Jenkins and Kennedy, with Chairman Miller dissenting.

[12] *N L.R B* v. *Exchange Parts Company*, 375 U.S 405 (1964), Twenty-ninth Annual Report (1964), p 103.

[13] Inasmuch as the establishment of the profit-sharing plan had been decided on well before the advent of the union campaign, Chairman Miller dissented and would have found no election interference. Chairman Miller stated that the *Exchange Parts* case supported his, rather than the majority's, position, and that the result of the majority decision was to require that employees be kept ignorant of a benefit which the employer had legitimately decided to provide, and which employees might well want to take into account in deciding whether or not they desired to be represented by a union.

3. Other Issues

In one case decided during the year the Board was presented with the issue of whether the results of an election should be overturned due to alleged threats of violence. Thus, in *Urban Telephone* [14] the employer contended that the union was responsible for the acts of one of the employer's employees who allegedly had a reputation in the community for fighting and who made express and veiled threats of violence to other employees if they did not support the union in the election. Although this individual was vocal on behalf of the union at meetings of employees held by the employer, he was not appointed by the union organizers to speak on their behalf and he was not one of those designated as a union steward by his fellow employees. Since there was no evidence that this employee actively solicited membership or authorization cards for the petitioner, that he openly represented himself to the other employees as an organizer or representative of the petitioner, or that petitioner knew of and condoned this individual's activities, the Board adopted the hearing officer's conclusion that the employee was not an agent of the petitioner. For this reason, and, inasmuch as the Board adopted the hearing officer's further conclusions that two of the threats made by the employee were vague and ambiguous, the objections were overruled and the petitioner was certified.[15]

The case of *Bufkor-Pelzner Div.* [16] involved similar issues although it arose in a different setting. Thus, that case was before the Board on a motion for summary judgment in an 8(a)(5) proceeding in which the employer was contesting a certification of representative in the underlying representation case. In affirming the trial examiner's finding of a violation, the Board stated that the union was not responsible for the conduct of an employee who made a threat to her fellow employees that the union would not permit employees who did not vote or join the union to work for the employer. In so holding, the Board observed that the employee was neither an officer nor an employee of the union. Moreover, the Board noted that the employee was not a union member at the time in issue and concluded that she was acting as an employee in furthering the interests of herself and other employees as she saw them. Thus, the Board said that it was

[14] *Urban Telephone Corp.*, 196 NLRB No. 6. Members Fanning and Jenkins, with Chairman Miller dissenting See also *White-Knight Mfg Co*, 195 NLRB No 195.

[15] Chairman Miller dissented, stating that it is the atmosphere in which the Board's elections are held which is the decisive factor. Since he was of the view that there might be enough evidence in the case to justify setting aside the election, Chairman Miller would have remanded the case for a further hearing in order that the employee who was alleged to have made the threats could be subpenaed to testify

[16] 197 NLRB No. 140. Members Fanning, Jenkins, and Penello, with Chairman Miller and Member Kennedy dissenting separately

unable to infer that the union either authorized the employee's solicitation activities or ratified the conduct in question.[17]

In *Heath Co.*[18] a few weeks before the election the employer's personnel department solicited a number of persons for the purpose of tape recording antiunion speeches for broadcast by the employer over its public address system. Of the 12 speeches that were taped, 6 were played over the system: 5 were speeches by supervisors and 1 was by a nonunit employee.

After listening during worktime to the broadcast of the antiunion speeches, several employees asked whether they could use the system to reply to these testimonials. They were denied access to the system on the ground that only management was entitled to use it and, in any event, they were told other means were available for contacting the prounion employees. The Board held that the employer did not engage in objectionable preelection conduct by soliciting its five supervisors to make noncoercive, otherwise unobjectionable antiunion testimonials over the system while denying prounion employees the right to reply over the same medium.[19] The employer's conduct in broadcasting the one nonunit employee's speech was deemed to have a *de minimis* impact on the election and to constitute insufficient grounds for setting it aside in light of the facts that that speech was of less than a minute's duration, was noncoercive in nature, and the employer approved the prounion employees' request to use the plant cafeteria during lunchtime to present their views.

About 1 month before the election in *Glamorise Foundations*,[20] the employer sponsored a contest in which employees were invited to guess the number of "no" votes which would be cast in the election. Supervisory personnel distributed flyers which read "IT IS IMPORTANT TO VOTE, HERE'S A CONTEST TO INTEREST YOU TO VOTE ON ELECTION." It also stated "We all know that the employees will reject the [union]. But who can give us the score?" The winning entry was to be identified by a numbered receipt which the

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[17] Chairman Miller and Member Kennedy filed separate dissents Chairman Miller stated that, while he agreed that there was insufficient proof to support a finding that the employee was an agent of the union, he would deny the motion on grounds that the threats prevented the conduct of a fair election Thus, inasmuch as the employee was the principal contact between the union and the employees, Chairman Miller concluded that the threat uttered by her would be treated as credible by the employees

Member Kennedy's dissent was based on the view that the union was responsible for the employee's conduct Inasmuch as the employee was the sole person soliciting employees' signatures on union authorization cards and had been authorized to do so, Member Kennedy would have found that she was a union agent. Although the union did not specifically authorize the threats, Member Kennedy concluded that the activities of the employee were within the scope of her agency

[18] *Heath Co , Wholly Owned Subsidiary of Schlumberger Technology Corp ,* 196 NLRB No 29

[19] Citing *General Electric Co ,* 156 NLRB 1247 (1966)

[20] 197 NLRB No 108

employee was to retain and, after the entries were placed in a box near the plant's timeclocks, the box was sealed and not to be opened until after the election results were known. A $50 bond and a $25 bond were to be given to the two employees who came closet to guessing the total.

The Board concluded that, although the contest was not a poll of the individual voter's preferences, it did call for an estimate by voters of the number of "No" votes they thought would be cast in the election and thus, was a poll of sentiment as to which choice would obtain a majority of the votes cast. The Board found that here, as in *Offner Electronics*,[21] the contest intruded on the Board's responsibility to resolve the question concerning representation in the carefully regulated secret ballot election it conducts. The Board further found that such a contest tends to commit employees, in advance of the election and in a carnival-like atmosphere, to a position as to a choice which should be made only under the safeguards the Board has developed for its elections; it also is susceptible to abuse by the employer and has an inherent tendency to jeopardize a proper election atmosphere without having any offsetting salutary effect on the Board's election processes. Accordingly, the Board sustained the petitioner's objection and set the election aside.

D. Unit Clarification Issues

Petitions for clarification of a bargaining unit are provided for in section 102.60(b) of the Board's Rules and Regulations. While the Board will entertain requests for clarification of units established by voluntary recognition and contract as well as for units established by Board certification,[22] if the Board finds that the petition raises a question concerning representation, it will deny clarification of the existing unit, thereby requiring an election to resolve the issue.[23]

In one case decided during the year, the Board held that it would not entertain a petition seeking to use the clarification procedure, midway during the term of a current contract, to clarify a unit which was clearly defined in the agreement. In *Wallace-Murray*,[24] the employer requested that certain employees referred to as "guards" be excluded from the existing contractual unit. The record showed that when the union's predecessor was certified by the Board in 1937, "watchmen" were specifically excluded from the unit. However, since 1943 the parties had specifically included "watchmen" and since 1967 these

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[21] 127 NLRB 991 (1960), Twenty-fifth Annual Report (1960), p. 53.

[22] *Brotherhood of Locomotive Firemen & Enginemen, Grand Lodge Employees Assn.*, 145 NLRB 1521 (1964), Twenty-ninth Annual Report (1964), p 57 Compare *Springfield Discount, Inc*, 195 NLRB No 157

[23] *Gas Service Co.*, 140 NLRB 445 (1963).

[24] *Wallace-Murray Corp, Schwitzer Div*, 192 NLRB No. 160.

"watchmen" were referred to as "guards." The regional director clarified the unit to exclude the guards because a mixed unit of guards and nonguard employees contravenes congressional policy. The Board held, however, that it would not serve the purposes of the Act to use the unit clarification procedure to modify a unit which is clearly defined in the current bargaining agreement. The Board dismissed the employer's petition, without prejudice to the filing of a clarification petition at an appropriate time, stating that to do otherwise would be disruptive of a bargaining relationship voluntarily continued by the employer when it executed the existing contract with the union.[25]

In another unit clarification proceeding decided during the year, *Ron Wiscombe*,[26] the Board refused to clarify a unit covered by an agreement which had been applied, in effect, on a "members only" basis. The employer in that proceeding, although apparently not a member of the local area painting and decorating contractors' association, signed an agreement binding it to the terms of the association's contract. This agreement covered employees engaged in certain types of work. The employer sought a determination by the Board that its "in plant" work was not covered by the agreement and the three employees whom it hired to perform this work should be excluded from the unit. The record showed, however, that the employer had refused to pay any assessments for pension, health, and welfare coverage for these three employees, who were not union members and who were not referred to the employer through the union's hiring hall, since at least 1970—despite the fact that the contract required such payments. Moreover, there was no indication that these employees had received any other benefits to which they would be entitled under the contract. On the other hand, the employer had paid assessments under the contract on behalf of "union men" who had been referred to the employer by the union. Therefore, the Board found that the agreement had been applied on what was tantamount to a members-only basis, and stated that it is well settled that a members-only contract does not afford the kind of representation nor establish the type of bargaining unit which the Act contemplates.[27] Thus, the Board will not afford contract-bar quality to it. The Board stated that, by parity of reasoning, it would not effectuate the policies of the Act to make the Board's procedures available to clarify a unit covered by an agreement which has been applied on a members-only basis.

In *Wisconsin Electric Power Co.*,[28] the Board granted clarification

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[25] Cf. *Peerless Publications*, 190 NLRB No 130 (1971), where the unit clarification petition was filed shortly before the expiration of the collective-bargaining agreement

[26] *Ron Wiscombe, d/b/a Ron Wiscombe Painting & Sandblasting Co*, 194 NLRB No 153

[27] *Crucible Steel Castings Co*, 90 NLRB 1843 (1950) Sixteenth Annual Report (1951), p 103

[28] 193 NLRB No 46 Members Fanning and Jenkins, with Member Kennedy dissenting.

of two separate bargaining units following the employer's reorganization of its administrative divisions. As a result of that reorganization, employees with identical or related occupations, who were represented by two different local unions, had been placed together in the same administrative division under the same immediate supervision. In its petition, the employer sought to have the Board determine which of the two unions should represent these employees. Each of the unions involved contended that all of the employees should be included in its unit, each arguing that the employees previously represented by the other union constituted an accretion to the unit each represented. As an alternative to this position, one of the unions contended that there was a functionally related rational basis for a division of the employees, with the employees performing the technical and sales functions being included in the unit represented by the other union and the dispatchers, stores personnel, analysts, and accounting and office employees being included in the unit it represented.

The Board noted that the number of employees in the new division coming from each unit was virtually identical. The employees coming from each unit had previously performed and continued to perform essentially the same functions except that more employees performing technical and sales functions came from one unit while employees coming from the other were primarily employed in the day-to-day functions necessary to the distribution of electrical power. Thus, the Board concluded that the technical and sales employees had a closer community of interest with the employees represented by one of the unions, and the remaining employees in issue had a closer community of interest with the employees represented by the other. Accordingly, the Board ordered that the units be clarified in the manner mentioned above, finding that such a result would not seriously affect the administrative viability of the employer's consolidated operation.[29]

E. Amendment of Certification Issues

Petitions or motions for amendment of certification normally tend to raise less complex issues than petitions for unit clarification. In general, petitions for amendment involve changes which result from circumstances which occurred after the issuance of the certification. Amendment of certification is intended, among other things, to permit changes in the name of the bargaining representative, not a change in

[29] Member Kennedy dissented. In his view, there was a question concerning representation, both unions having sought recognition from the employer as bargaining representative of the new division and neither group predominating. He would, therefore, have afforded the employees of the new division the opportunity to select their bargaining representative through the Board's election procedure.

the representative itself.[30] As in the case of clarification petitions, where the filing of a petition to amend a certification is found to constitute an attempt to raise a question concerning representation, it is dismissed.[31] The principles were applied by the Board in a number of cases during the year; the following are representative examples.

In *Bunker Hill* [32] an independent union representing the employer's employees had first been certified by the Board in 1960. This independent was again certified in 1970 when it defeated an international union in a Board-conducted election. Thereafter, following negotiations with the international, the members of the independent voted to merge with the international. The merger was approved and, after the independent's constitution was amended to provide authority for a merger, the international union designated the independent as its local union. Following the employer's refusal to accept the name change until it had been approved by the Board, the newly created local of the international filed a petition seeking to substitute its name for that of the independent which appeared on the certification. The Board held that, in view of the 1970 Board election, which was held within the year preceding the petition and which involved a contest between the independent and the international seeking the support of the employees in the unit, the amendment was barred under the rule of the Board's decision in *Gulf Oil Corp.*[33] inasmuch as it sought to raise a question concerning representation which may only be resolved on the basis of a Board-conducted election. The Board noted that, were it to grant the amendment it would, for all practical purposes, be overturning the results of that Board election in which the very labor organization which had chartered the petitioner was rejected by a majority of the employer's employees in a secret ballot election.[34]

Under similar circumstances, the Board refused to amend the certification in *Uniroyal.*[35] There, 2 weeks after being selected bargaining representative by the employer's employees in a Board-conducted election, the independent union called a membership meeting to discuss affiliation with an international union. Thereafter, an election was conducted in which the independent's members were to vote on whether they wished to be represented by the independent or by one of two international unions on the ballot. The results were in favor of one of

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[30] *Missouri-Beef Packers,* 175 NLRB 1100 (1969), Thirty-fourth Annual Report (1969), p. 49.

[31] *North Electric Co.,* 165 NLRB 942 (1967)

[32] *Bunker Hill Co.,* 197 NLRB No. 62

[33] 109 NLRB 861 (1954), Twentieth Annual Report (1955), p 16.

[34] Cf *Emery Industries (Dice Road),* 148 NLRB 51 (1964), and *Minnesota Mining & Mfg Co.,* 144 NLRB 419 (1963), in which amendments to certification were granted in recognition of an independent union's affiliation with another union, but wherein such other union had not previously been defeated by the independent in a Board-conducted election.

[35] *Uniroyal, Coated Fabrics Plant,* 194 NLRB No. 39.

the two international unions. A short time later, the successful international union filed a petition in another case seeking to amend the independent's certification to reflect its affiliation with the international. The regional director, however, dismissed the petition concluding that it raised a question concerning representation.

When the international was notified of this action by the regional director, it took no steps to seek review of his decision by the Board, but instead conducted another election among the unit employees in which a majority of the voters elected representation by the international, and the international again filed a petition with the Board. The Board held, however, that the petition presented a question concerning representation and must be dismissed because, if the Board were to amend the independent's certification as requested, the employees in the appropriate unit covered by the certification would in effect become part of the existing multiplant unit covered by the petitioner's master agreement with the employer. The Board stated that by thus enlarging the unit of employees represented, without the safeguards guaranteed by a Board-conducted election, it would be undermining the majority-rule concept established by the express language in section 9 of the Act.

On the other hand, in *F. W. Woolworth* [36] the Board granted a petition to amend the certification of one local union to reflect its merger into another local of the same international union. In that case, the record showed that the two local unions had maintained a close working relationship with the international's district council. Thus, the secretary-treasurer of the district council had negotiated the last two collective-bargaining agreements with the employer on behalf of the employees in the unit involved in the proceeding, and this same individual had "served" the certified local when that organization decided not to employ a business representative due to financial considerations. The district council also furnished assistance to the petitioning local union in collective-bargaining matters. It also appeared that the certified local would have representatives on the merged executive board of the petitioning local. Moreover, the procedures for the handling of contract proposals, negotiations, and ratifications were handled the same as they were before the merger; i.e., they were handled by the members of the various separate bargaining units represented by the merged local. Upon this evidence, the Board concluded that a substitution of the petitioning union for the certified union would not constitute any real change of bargaining representative and, thus, the petition did not raise a question concerning representation.

In another case involving the merger of two locals of the same international union, however, the Board dismissed the petition. Thus, in

[36] *F. W Woolworth Co Store 1370,* 194 NLRB No 186.

Factory Services,[37] one of the local unions won a Board election conducted in the unit of the employer's employees. Two days before the Board issued its certification, the officers of this local agreed to merge into another, larger local of the international. None of the unit employees was sent a notice of the meeting or allowed to participate in the merger vote because, according to the union, they were not union members since no bargaining agreement between the smaller local and the employer had been executed at the time of the merger vote. The larger local (the petitioner in the case before the Board) attempted to demonstrate that its motion to amend the certified local's certification reflected the desires of the unit employees by introducing into evidence authorization cards designating itself as bargaining representative and which ostensibly were signed by 19 of the 32 to 35 unit employees. A minimum of eight of these cards, however, were not properly authenticated, thus negating both the petitioner's claimed status as a majority representative and its contention that the cards indicated that the union employees approved of the merger. Moreover, the petitioner further sought to show such approval by a "Statement of Employees" which was signed by 17 of the unit employees and which declared that the signers of the statement had knowledge of the merger and wished to be members of the petitioner and to have it act as their bargaining representative. The Board found, however, that since the petitioner's business agent who gave the statement to the unit employees represented that "it came from the Labor Board," and "the Labor Board wanted it signed," the manner in which the signatures were obtained militated against concluding that the document represented a free, or clear, expression of the employees' desire or approval. Accordingly, the Board denied the petition to substitute the petitioner as the certified representative.

[37] 193 NLRB No 102.

VI

Unfair Labor Practices

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

This chapter deals with decisions of the Board during the 1972 fiscal year which involved novel questions or set precedents that may be of substantial importance in the future administration of the Act.

A. Employer Interference With Employee Rights

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

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

1. Scope of Protected Concerted Activity

The rights guaranteed to employees by section 7 of the Act include the right "to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection. . . ." Several cases decided during this report year further defined the sphere of concerted activity protected by section 7.

In *Congoleum Industries* [2] the Board found that employees were engaged in protected activity when they refused to cross a picket line established at their employer's plant by unions representing employees of a contractor engaged in construction work at the plant. Applying established Board precedent,[3] the Board found no merit in the employer's contention that the employees' conduct was unprotected because it was motivated by fear of reprisals from the pickets. The Board construed past decisions as regarding the nature of the activity itself, rather than the employees' motives, to be determinative of whether the activity was protected.[4] Concluding that the employer had not met his burden of proving business justification for the dicharge of the employees who refused to cross the picket line, the Board found that the discharges were in violation of section 8(a)(1) of the Act.

Normally, repeated work stoppages during a portion of a day are not considered to be protected activity. The Board reasons that employees cannot properly seek to maintain the benefits of paid employee status while refusing to perform the work they are paid to do. However, in *Polytech, Inc.*,[5] the Board held that employees' refusal to work overtime on a single occasion was protected concerted activity within the meaning of the Act. Relying on *Washington Aluminum* and *First National Bank of Omaha*,[6] the Board distinguished the present case from the factual situation in *John S. Swift Co.*,[7] in which the Board held unprotected a concerted refusal by employees to work overtime even though the employees had not previously engaged in such conduct. The distinguishing factor in *Swift* and other

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[2] 197 NLRB No 52 Members Fanning and Jenkins, with Chairman Miller dissenting, were of the opinion that the only object of the employees' conduct was to force their own employer to stop doing business with the contractor so that he would be pressured into a settlement of his dispute with his employees, and that this secondary action was not statutorily protected activity.

[3] *Redwing Carriers,* 137 NLRB 1545, 1546–47 (1962), enfd. *sub nom Teamsters, Chauffeurs & Helpers Loc 79 v N.L.R.B.,* 325 F.2d 1011 (C A D C, 1963), cert denied 377 U.S. 905 (1964)

[4] *Cooper Thermometer Co ,* 154 NLRB 502, 505 (1965)

[5] 195 NLRB No. 126

[6] *N L R B v Washington Aluminum Co ,* 370 U.S 9 (1962) ; *First National Bank of Omaha,* 171 NLRB 1145 (1968), enfd 413 F 2d 921 (C A. 8, 1969)

[7] 124 NLRB 394, 396 (1959), enfd. 277 F 2d 641 (C.A. 7, 1960).

similar cases was that the employees' refusal to work overtime occurred during bargaining negotiations and affirmed the employees' previously announced intention to embark on a partial strike as a bargaining tactic. In the present case, as in *Washington Aluminum* and *Omaha* cases, there was no evidence of previous work stoppages; the employees were unrepresented and they did not have the benefit of structured procedures to protect them from what they considered undesirable and fatiguing working conditions. In addition, the work stoppage was not preceded by any specific demands upon their employer for a change in working conditions; and their decision to walk out was made for that single day and included no discussion of future plans. Accordingly, the Board concluded that the presumption that a single concerted refusal to work is protected concerted activity was not rebutted by a showing that the stoppage was part of a plan or pattern of intermittent action inconsistent with a general strike or genuine performance of work normally expected of them by their employer.

In *General Electric Co.*,[8] the Board found the refusal by unrepresented clerical employees to perform work of striking production employees was protected concerted activity. The Board concluded, however, that the employer did not violate 8(a)(1) by laying off these employees for the duration of the economic strike. Unlike the situation in *Congoleum Industries*, *supra*, the Board found that the employer's decision to rotate all office clerical duties and production work was motivated by "legitimate and substantial business considerations" and not by any desire to punish or retaliate against the employees. The Board concluded that those office clericals who refused to do the assigned work placed themselves in the position of sympathy strikers and were entitled to no more protection than the strikers themselves.[9]

In *St. Regis Paper Co.*,[10] the Board had occasion to decide whether an employer's statements to two employees in response to their complaints about its planned shutdown for adjustment and maintenance work constituted an unlawful threat of discharge for engaging in protected concerted activity. The employer told the employees that if they had a complaint, they should use the contract grievance procedure. The employer further stated that he would assign them the machine adjusters' work and if they could not do it, they would be terminated. The Board found unobjectionable the employer's request that they use the grievance procedure.

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[8] *General Electric Co (Coshocton, Ohio Plant)*, 193 NLRB No 56
[9] Cf. *Cooper Thermometer Co , supra* at fn. 4
[10] 192 NLRB No 87

However, the Board found a retaliatory threat for engaging in protected concerted activity in the employer's comment that the employees would be assigned the adjusters' work accompanied by the clear possibility of discharge if they improperly performed the work, which they were not able to perform. Accordingly, the Board concluded that the threat of discharge for protected concerted activity violated section 8(a)(1).[11]

In *The Emporium* [12] the Board found unprotected, the picketing and boycott activities of two employees conducted during nonworking time at their employer's premises. The employees distributed handbills stating that the store was "racist" and calling for boycott of the store "until black people have full employment and are promoted justly." The evidence indicated that the union representing the employer's employees was endeavoring to adjust all cases of discrimination in every way available to it under the collective-bargaining agreement. The Board found that the employee's conduct in abandoning the grievance procedure of the existing agreement and seeking to negotiate directly with the employer was in derogation of the union's status as duly designated exclusive bargaining representative of the store's employees. The Board distinguished the present case from *Tanner Motor Delivery* [13] in which the concerted activity had as its object the hiring of minority group employees. Unlike the present case, there the Board was unable to find that the employees were acting in derogation of the position of their established bargaining agent.

Aero-Motive Mfg. Co.[14] presented a novel 8(a)(1) issue involving the right to refrain from protected concerted activity, as well as the right to engage in such activity. Overruling two prior cases to the extent inconsistent with the present case, the Board found an employer's poststrike payment of a special cash bonus to employees whose chose to refrain from protected concerted activity and nonpayment to those who engaged in such activity tended to interfere with the free exercise

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[11] Chairman Miller and Member Kennedy, dissenting, found that the record showed only an honest effort by the employer and the union to require a chronic complainer to utilize the orderly processes of the collective agreement for processing bona fide employee complaints.

[12] 192 NLRB No. 19. Member Jenkins, dissenting, would have found a violation on the ground that a union's obligation under the Act is to refrain from actions which permit discrimination on arbitrary or invidious grounds, and that therefore the protest of racial discrimination in employment cannot be in opposition to or at cross-purposes with the union's position Member Brown agreed with Member Jenkins that the employer violated sec. 8(a)(1) by discharging the employees, though not his rationale in its entirety.

[13] 166 NLRB 551 (1967).

[14] 195 NLRB No. 133

of employees' statutory right to engage in strike action.[15] The Board found no merit in the employer's defense that the payments were neither announced nor made during the strike and that their purpose was to compensate the nonstrikers for the special risks which were involved in view of the violence which took place during the strike. The Board found the principal impact of such payments would be to discourage employees from engaging in protected activity in the future. The Board concluded that employer actions which have this impact are violative of section 8(a)(1).[16]

Missouri Farmers Assn.,[17] decided by the Board during the report year, reaffirmed prior decisions[18] that an employer violates section 8(a)(1) by excluding from its insurance plan employees who, as a group, have exercised their section 7 right to self-organization and bargaining "through representatives of their own choosing." The employer in the present case maintained a voluntary, contributory disability and accidental death group insurance plan for its employees which made ineligible any employee who was "covered under any form of collective bargaining." The Board found that the employer thereby deprived a segment of its employees of benefits otherwise available to them had they not exercised their statutory rights.[19]

2. Limitation on Employees' Access to Information

Limitations on solicitation and distribution activities by employees during nonwork time in nonwork areas are presumptively invalid absent special circumstances. However, "an employer may validly post his property against nonemployee distribution of union literature if reasonable efforts by the union through other available channels of

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[15] *Assn of Motion Picture Producers*, 79 NLRB 466 (1948); *Columbia Pictures Corp.*, 82 NLRB 568 (1949), in which the bonus was related to a strike settlement agreement, and also was, in part, to compensate employees for having worked outside their normal jurisdiction The Board overruled the decisions in those cases to the extent that they carried the implication that bonuses not announced prior to the end of the strike cannot form a basis for an 8(a)(1) finding

[16] Chairman Miller and Members Fanning and Jenkins, Member Kennedy, dissenting, was of the opinion that any tendency of the employer's bonus payment to nonstrikers to discourage employees from striking was so slight as to be *de minimis* and not to justify a finding of an 8(a)(1) violation

[17] 194 NLRB No 82.

[18] *Goodyear Tire & Rubber Co.*, 170 NLRB 539 (1968), enfd as modified 413 F.2d 158 (C A. 6, 1969), *Kroger Co*, 164 NLRB 362 (1967), enfd in pertinent part 401 F.2d 682 (C.A 6, 1968), cert. denied 395 U.S. 904 (1969).

[19] The Board found, however, that the General Counsel had not proved by a preponderance of the evidence that respondent employer violated sec 8(a)(3) of the Act as alleged, and declined to issue a remedy requiring the employee to make the companywide insurance plan available to all bargaining unit members since the parties had agreed to a substitute plan covering them

communication will enable it to reach the employees with its message and if the employer's notice or order does not discriminate against the union by allowing other distribution.[20] Applying this yardstick in *Monogram Models*,[21] the Board held that the employer did not violate section 8(a)(1) by denying nonemployee union organizers access to its plant parking lot. The Board concluded upon consideration of the record as a whole that, while the plant location presented some obstacles to easy contact with employees on their way to and from work, such contact was not foreclosed and the union's efforts did reach many employees. The Board rejected the claim that because the employees involved lived in a large metropolitan area, they were just as inaccessible as those employees who live and work wholly on an employer's property. The Board found it neither wise nor proper to adopt "a big city rule" and a different "small-town rule" in applying *Babcock & Wilcox*, *supra*, or to attempt to determine how big a city must be to justify the proposed differing application.

In *Falk Corp.*,[22] which involved the same issue, the Board also dismissed 8(a)(1) allegation even though the union was unable effectively to distribute literature to employees who drove to work. The Board found that the union could reach 25 percent of the employees who did not use that mode of transportation and that the union had the opportunity through reasonable diligence to compile a comprehensive mailing list of employees, and that all the other methods of communication listed by the Supreme Court in *Babcock & Wilcox*, *supra*, were available to the union.

However, in *Scholle Chemical Corp.*,[23] a divided Board found an 8(a)(1) violation based on the interference with nonemployee organizers engaged in distribution activity. The employer refused to permit nonemployee union organizers permission to distribute leaflets and handbills and to solicit employees within the employer's premises. The only means of access to the plant was via a road owned by another company located in the same industrial tract. All employers located in the tract had permission from the owner to use the road. When the union organizers began to distribute union literature in that area, the employer told them it was a private road and that distribution was prohibited on it. The Board found that because of the location of the employer's plant in the industrial tract, the union had no reasonable means of reaching the employees through the only access road. The Board majority found that the union had no reasonable alternative

[20] *N.L.R.B.* v. *Babcock & Wilcox Co.*, 351 U.S. 105, 112 (1956).

[21] 192 NLRB No 99, Chairman Miller and Members Fanning and Kennedy, with Members Brown and Jenkins dissenting.

[22] 192 NLRB No 100, Member Brown dissenting

[23] 192 NLRB No. 101, Members Fanning, Brown, and Jenkins, with Chairman Miller and Member Kennedy dissenting in part.

means of communicating with the employer's employees. Chairman Miller and Member Kennedy, dissenting in part, agreed that the employer could not restrict distribution on the road used by others and as to which it had no ownership interest, but found no violation in the employer's refusal of access to its own property on the ground that there was no showing that access to said property was the only reasonable means of reaching the employees.

In *Sioux City & New Orleans Barge Lines*,[24] the Board had occasion to apply *Babcock & Wilcox* principles in an election context. The Board held that the employer violated section 8(a)(1) and interfered with employees' free choice in the election by denying nonemployee union organizers access to its towboats for organizational purposes. The Board found that, except for the boats which were both the working and living quarters of most of the unit employees for a substantial portion of the preelection period, no adequate means existed for direct communication between the employees and the union's organizers. The Board found no merit in the employee's claim that exclusion of the organizers from the towboats was necessary to prevent interference with its operations and avoid liability for injuries that might be sustained because of the potential hazards aboard the boats. The Board also found that the union's failure to assert the right of access by employees to nonemployee organizers during the preelection conference, and the absence of an express provision therefor in the stipulation, did not constitute a "clear and unmistakable" waiver of employees' statutory section 7 right of self-organization.

Passing on an employee's no-distribution rule, the Board, in *Magnavox Co. of Tennessee*,[25] found a prohibition on employee distribution of literature on the employer's property to be presumptively invalid under the standards declared in *Stoddard-Quirk Mfg. Co.*[26] As applied to employees' distribution of organization literature in nonworking areas on nonworking time, the Board found that the rule was not justified by any extraordinary operational or disciplinary needs of the employer. In addition, the employer claimed that the union had contractually waived any objections it might have had to the rule. The Board found it was necessary to reach that issue in view of the finding that, while the collective-bargaining contract between the parties did not mention the rule, the union's acquiescence in the maintenance and enforcement of the rule in the circumstances was implicit. However, the Board in this case decided to adhere to the basic premise of *Gale Products* [27] that an overly broad no-distribution rule hampers

[24] 193 NLRB No. 55.
[25] 195 NLRB No. 40, Member Fanning concurring separately
[26] 138 NLRB 615, 621 (1962).
[27] *Gale Products, Div. of Outboard Marine Corp*, 142 NLRB 1246 (1963), enforcement denied 337 F.2d 390 (C.A 7, 1964).

section 7 rights of individual employees to select bargaining representatives even though that rule is sanctioned by a union-employer agreement. Reexamining *Gale Products* in the light of subsequent court decisions,[28] the Board modified the remedy announced in that and related cases by limiting the prohibition to rules barring distribution by or on behalf of members of an "incumbent labor organization" which pertains to: (1) the employees' selection or rejection of a labor organization as the bargaining representative of the employees; or (2) other matters related to the exercise by employees of their section 7 rights. The Board reframed its remedial order in the present case accordingly.[29]

3. Maintenance of Racially Discriminatory Working Conditions

Although the U.S. Court of Appeals for the District of Columbia enforced, *in toto*, the Board's order remedying violations of section 8(a)(1) and (5) of the Act in *Farmer's Cooperative Compress*,[30] the court nonetheless remanded the proceeding to the Board for the purpose of determining whether the employer-respondent had a policy and practice of discrimination against its employees as a result of their race or national origin and, if so, to devise an appropriate remedy. The court, citing the principles first established in the *Steele* [31] case, concluded that an employer's maintenance of racial discrimination in its employment practices would violate section 8(a)(1) of the Act because it creates an "unjustified clash of interests" among the employees which tends to reduce their ability to work in concert toward their legitimate goals, and because it creates among its victims "an apathy or docility which inhibits them from asserting their rights in the employment relation." In its decision on remand, [32] the Board found that the employer had an affirmative antidiscrimination policy and concluded that the evidence did not support a finding that the employer had maintained a policy or practice of discriminating against black employees and workers of Mexican origin.

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[28] *Armco Steel Corp.* v. *N.L.R.B.*, 344 F.2d 621 (C.A. 6, 1966); *General Motors Corp* v. *N.L.R.B.*, 345 F.2d 516 (C.A. 6, 1965).

[29] Member Jenkins had heretofore expressed his disapproval of the two-sided remedy fashioned in *Gale Products* in his dissenting opinion in *General Motors Corp.*, 147 NLRB 509, 514 (1964). In the present case, Chairman Miller and Member Kennedy agreed with Member Jenkins' position Member Fanning, referring to his dissent in *Stoddard-Quirk, supra*, disagreed with the order only insofar as it might be used to prohibit distribution of literature in a work area where no work was being performed.

[30] 169 NLRB 290 (1968); 416 F.2d 1126 (1969); cert. denied 396 U.S. 903.

[31] *Steele* v *Louisville & Nashville Railroad Co.*, 323 U S. 192 (1944)

[32] *Farmers' Cooperative Compress*, 194 NLRB No. 3; Chairman Miller and Members Fanning and Kennedy, with Member Jenkins dissenting

Member Jenkins, dissenting, indicated his full agreement with the principle that invidious racial discrimination in employment is a violation of section 8(a)(1) of the Act. He noted that the employer's "education and qualification" job standards resulted in racial minorities being placed in disproportionate numbers in the least desirable jobs, there was no evidence relating the job standards to performance of the jobs, and the same sort of disproportion as to racial groups existed in other practices of the employer such as transfers and the retirement program. He concluded that under Supreme Court decisions, and particularly *Griggs* v. *Duke Power Co.*, 401 U.S. 424 (1971), such evidence established racial discrimination in violation of the Act, even in the absence of any motive or intent by the employer to discriminate against the racial minorities, and despite the absence of "deliberate" discrimination which, according to Member Jenkins, the majority held to be necessary for a violation to be found.

4. Refusal to Permit Employee to Have Representative at Interview

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

Previously in *Texaco* [33] the Board considered the question of whether an employer violated its obligation to bargain under section 8(a)(5) by denying an employee's request that a union representative be present during an interview conducted for the purpose of perfecting a case against the employee. The Board held that such a denial violated section 8(a)(5) of the Act, but the reviewing court disagreed holding that the interview was merely investigative in nature. The Board has since refused to find 8(a)(5) violations under circumstances involving purely investigatory interviews.[34]

None of those cases presented a situation where an employee or his representative had been disciplined or discharged for requesting, or

[33] *Texaco, Inc*, 168 NLRB 361 (1967), enforcement denied 408 F 2d 142 (C.A. 5, 1969).

[34] *Chevron Oil Co*, 168 NLRB 574 (1967); *Jacobe-Pearson Ford*, 172 NLRB No. 84, (1968), *Texaco, Los Angeles Sales Terminal*, 179 NLRB 976 (1969)

insisting on, union representation in the course of an interview. In fact, the section 7 right of individual employees to act in concert "for mutual aid and protection" was not directly considered in those cases. Rather, those cases involved a determination of whether the right of the union to bargain collectively was such that an employer could not legally deny its request to participate in the interview.

During the report year, the Board had occasion to rule on the issue left open by the above cases. In *Quality Mfg. Co.*,[35] the Board held that the employer violated section 8(a)(1) by discharging an employee for insisting on union representation at a meeting which the employer demanded, and which related to disciplinary offenses. The Board found that the employee had reasonable grounds to believe that disciplinary action might result from the employer's investigation of her conduct, and therefore the employee had a reasonable basis for desiring union representation. The Board concluded that while the employer's denial of such a request may not derogate the bargaining rights of the union, in violation of section 8(a)(5), in the case of a purely investigatory interview, the employer may not, under section 8(a)(1), discipline the employee for demanding representation, nor may the employer insist that the interview be held without the presence of the employee's representative,[36] if the interview concerns possible disciplinary actions. Member Kennedy, dissenting in part, was of the view that any right of an employee to union representation at such an interview with the employer must be based on the collective-bargaining contract, rather than a section 7 right to engage in concerted activities for mutual aid or protection, and should be the subject of the collective-bargaining process.

In *Mobil Oil Corp.*,[37] which involved the right to union representation during an investigatory interview, the Board found that the employer violated 8(a)(1) by refusing two employees' requests for union representation, but did not violate section 8(a)(1) with respect to two other employees who failed to request union representation prior to or during their respective interviews. The Board found that the two employees who requested union representation had reasonable grounds to fear that they were suspected of theft of company property and therefore that the interviews could adversely affect their employment status. The Board concluded that the employer's insistence that the interviews be conducted without the presence of a union representative denied the two employees their right to representation and interfered with, re-

[35] 195 NLRB No 42, Member Kennedy dissenting in part.

[36] The Board deemed it unnecessary to determine whether the discharge also violated sec. 8(a)(3), as such additional finding would not affect the remedial order.

[37] 196 NLRB No 144, Member Kennedy dissenting for the reasons set forth in *Quality Mfg., supra.*

strained, and coerced them in the exercise of their section 7 rights. Because the other two employees each failed to request union representation, the employer's action in proceeding with their interviews did not violate section 8(a)(1).[38]

In *Service Technology Corp.*,[39] the Board found no 8(a)(1) or (3) violations in the employer's refusal to permit the union steward to be present during an interview seeking to develop facts concerning alleged threats made to two other employees. The Board relied on the fact that the steward himself was personally involved in, and the subject of, the incident giving rise to the interviews. Although the employer told the steward that he might be discharged because of his insistence on being present, the Board found the alleged threat was no more than a heated statement, not designed to interfere with the employees' rights to representation in general, but rather to enforce the exclusion of the steward, which was not an unlawful objective.[40]

5. Other Issues

Among other significant cases decided by the Board during the report year was *Cameron Iron Works.*[41] In that case, the Board held that the employer violated section 8(a)(1) of the Act by requiring the union steward to resign said office or be demoted from his position as leadman. The employer contended that the employee's duties as leadman required that he devote his full time to his work and that his duties as union steward precluded him from doing so. The record showed, however, that the employee did in fact satisfactorily perform his work as a leadman. Although the collective-bargaining contract between the parties did not provide for any use of working time for the performance of union steward duties, there was a practice permitting stewards to utilize working time for such purposes. In these circumstances, the Board found that in the absence of any efforts by the parties to explore what other solutions might be available, the employer could not arbitrarily restrict the right of the employees and their union to be represented by the individuals they desired to have represent them.

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[38] In another 8(a)(5) case, the Board again found no refusal to bargain in the employer's refusal to permit a union representative to be present at a meeting during which an employee was interrogated by a management official concerning the employee's alleged theft of company property In that case, the only request for representation was made by the union The Board found, therefore, that there was no question of an independent 8(a)(1) violation, and the collective-bargaining contract did not give the union the right to be present during an interrogation which was part of an investigation *Lafayette Radio Electronics Corp*, 194 NLRB No 77.

[39] 196 NLRB No 121

[40] Member Kennedy concurred in the result because of the view that an employee has no statutory right to union representation when asked to an interview with the employer, particularly an investigatory one, and that any such right must be based on contract.

[41] 194 NLRB No. 23.

The Board distinguished the present case from *Warner Gear Div., Borg-Warner Corp.*,[42] in which the Board held that the employer did not violate section 8(a)(3) and (1) by refusing to promote a union steward to a more responsible job which would have required full attention to his duties. In that case, the contract expressly provided that union stewards could perform union duties up to 5 hours a week without loss of pay, and the Board found that union stewardship necessarily involved taking time out from normal working time for the performance of union functions. The Board noted that in the present case, there was no such contractual requirement, and there was room for seeking an accommodation between the employer's legitimate interest in the effective utilization of working time, and the employees' statutory interest in the designation of their representatives for purposes of collective bargaining.[43]

The Board had occasion in *Central Merchandise Co.*[44] to rule on the validity of an employer's postelection poll of the employees whose ballots were challenged in the election. The Board held that the private polling of challenged voters in a Board-conducted election necessarily had the effect of undermining the integrity of the Board's election processes. The Board found that the employer's stated interest in polling the challenged voters, to minimize its legal expenses, did not outweigh the very real threat that such a poll presents to the continued secrecy of the Board's election ballot, even though the election had been held.[45]

B. Employer Assistance to Labor Organizations

1. Recognition With Knowledge of Competing Claim

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."

Under the Board's *Midwest Piping doctrine*,[46] an employer faced with conflicting claims of two or more rival unions which give rise to a real question concerning representation violates section 8(e)(2) and (1) if he recognizes or enters into a contract with one of those

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[42] 102 NLRB 1223 (1953).

[43] Member Kennedy, dissenting, found the present case indistinguishable from *Warner Gear*, and, in absence of evidence of union animus or discrimination, would have dismissed the complaint.

[44] 194 NLRB No. 125.

[45] Chairman Miller agreed that the poll violated sec 8(a)(1), but for the reason that the employer had committed other violations of sec 8(a)(1) prior to its poll, which caused the poll to take place in a coercive atmosphere Cf. *Struksnes Construction Co*, 165 NLRB 1062 (1967)

[46] *Midwest Piping and Supply Co.*, 63 NLRB 1060 (1945).

unions before its right to be recognized has finally been determined under the special procedures provided in the Act.

During the report year, the Board was presented with what it called "a classic example of the evils which the rule enunciated in *Midwest Piping*, *supra*, was designed to prevent." In *Playskool, Div. of Milton Bradley Co.*,[47] the Board determined that a real question concerning representation existed when the employer recognized the Retail, Wholesale & Department Store Union, AFL–CIO, and executed a union-security contract with that union, and therefore the employer violated section 8(a)(2) of the Act. The Board found that when the employer recognized the RWDSU, it was well aware that the Furniture Workers Union, which had unsuccessfully attempted to organize the employer's employees since 1952, had a continued interest in representation of its employees. Yet, the employer agreed to a card check with the RWDSU to be conducted by the state department of labor without informing that department of the Furniture Workers' continued interest in the employer's employees. The Board held that, in these circumstances and as Furniture Workers' claim "wasn't clearly unsupportable and lacking in substance," the card check made by the state department of labor was not an accurate barometer of the employees' sentiments,[48] particularly as a number of employees had signed authorization cards for both unions. The Board concluded that the investigation and resolution of the question concerning representation was not attended by appropriate safeguards.[49]

2. Honoring of Dues Checkoff Authorizations

In *Miller Brewing Co.*,[50] a different kind of alleged employer assistance to a union was presented to the Board in a dues checkoff situation. The Board found no 8(a)(2) violation in the employer's continuing to deduct union membership dues from the wages of employees for 6 months after receipt of their checkoff revocation requests. The Board found that the checkoff authorization cards were ambiguous, as they were irrevocable for a year "from the date hereof," but contained no dates. The Board found that the employer acted reasonably and in good faith in construing the cards and the collective-bargaining contract, and in treating the period of irrevocability of the

[47] 195 NLRB No 89

[48] *Intalco Aluminum Corp*, 169 NLRB 1034 (1968), enfd. in part and set aside in part 417 F 2d 36 (C A 9, 1969).

[49] The Board also found that the RWDSU violated sec. 8(b)(1)(A) of the Act by accepting exclusive recognition and entering into a collective-bargaining agreement with the employer at a time when there existed a real question concerning representation of the employees

[50] 193 NLRB No 88

undated cards as commencing on the date it received such cards. The Board noted its policy of not imposing on the parties its interpretation of an ambiguous contract checkoff provision as implemented by employees' authorization cards where, as in the present case, a respondent acted reasonably and in good faith.[51]

In *Industrial Towel & Uniform Service*,[52] the Board found that the employer violated section 8(a)(2) and (3) of the Act by deducting union dues from wages of a rehired employee who had left her job with the employer 3 years previously. The dues were not deducted pursuant to the employee's execution of a new checkoff authorization. The Board found that when the employee left her job, she had completely severed her employment relationship. Applying its ruling in *Idarado Mining Co.*,[53] the Board found that the employee's severance of her employment severed her obligation under the checkoff authorization which she had executed during her previous employment with the employer, and her obligation would not be revived until she signed a new authorization. The Board concluded that the checkoff of dues under these circumstances constituted unlawful assistance in violation of section 8(a)(2) and would encourage membership in the union in violation of section 8(a)(3).[54]

3. Assistance to Disqualified Representative

In *Medical Foundation of Bellaire*,[55] the Board had occasion to pass on the issue of whether a union, by reason of an inherent conflict of interest in its relations with the employer, was not competent under the Act to represent any of the employer's employees. The Board found that such a conflict existed, and that the employer violated section 8(a)(2) of the Act by giving assistance and support to the union's organizational activities at a time when the employer's employees were represented by the incumbent union. The Board found that the rival union's conflict of interest resulted from substantial membership of its representatives on the employer's board of trustees and the employer's heavy reliance for its revenue on the union's welfare fund. The Board held the employer responsible for the organizing activities of the rival union, as the employer's board of trustees tacitly approved or acquiesced in its organizing campaigns. Under these cir-

[51] *Morton Salt Co*, 119 NLRB 1402 (1958).

[52] 195 NLRB No. 187.

[53] 77 NLRB 392 (1948), in which the Board found that the severing of the employment relationship also severed the employee's obligation to remain a member and that he had the status of a new employee who would assume the obligation of membership only if he voluntarily rejoined the union.

[54] The Board also found that the union's causation of such a deduction of dues was violative of sec. 8(b)(2) of the Act

[55] 193 NLRB No. 11.

cumstances, the Board concluded that the employees could have reasonably believed that the rival union's solicitors were acting for and on behalf of the employer and that therefore in signing authorization cards for the rival union, the employees did not have the complete freedom of choice which the Act contemplates.

In *United Mine Workers of Amer. Welfare & Retirement Fund*,[56] the Board found that a local union was not disqualified from representing employees of the employer by reason of the relationship between the employer and the local's parent organization. The Board concluded, however, that the employer, in violation of section 8(a) (2) of the Act, interfered with the administration of the local and contributed financial and other support to it. As to the disqualification issue, the Board found that only one of the three trustees of the employer was appointed by the parent union and was directly responsible to that union. With respect to the unlawful assistance, the Board found that some of the employer's supervisors had held the position, and had carried out the duties, of corresponding secretary in the local; had called, participated in, conducted, and presided at its meetings; had solicited and procured memberships and checkoff authorizations for that union; and had voted in its elections.[57]

C. Employer Discrimination Against Employees

Section 8(a) (3) prohibits an employer from discriminating against employees "in regard to hire or tenure of employment or any term or condition of employment" for the purpose of encouraging or discouraging membership in any labor organization.[58] Many cases arising under this section present difficult factual, but legally uncomplicated, issues as to employer motivation. Other cases, however, present substantial questions of policy and statutory construction.

During the report year, the Board had occasion to consider the applicability of the principles laid down by the Board and the courts

[56] 192 NLRB No 120.

[57] In the view of Members Fanning and Jenkins, in which Member Brown concurred, the record contained no evidence to support the trial examiner's conclusion that the local was disqualified to represent the employer's employees on the ground that the director-trustee was inherently subject to the continuing influence of the parent organization in the performnace of her functions because she was jointly selected by the employer operators and the parent organization Chairman Miller and Member Kennedy would have affirmed the trial examiner's finding that on this evidence it was sufficient to find that the local was disqualified from representing the employer's employees.

[58] However, the union-security provisions of sec. 8(a) (3) and 8(f) create exceptions to this blanket prohibition which permit an employer to make an agreement with a labor organization requiring union membership as a condition of employment, subject to certain limitations

in lockout situations.[59] In *Ottawa Silica Co.*,[60] the Board held that the employer did not violate section 8(a)(3) by locking out bargaining unit employees following the expiration of its collective-bargaining agreement with the union which represented them, and by using nonunit employees and supervisors as temporary replacements to perform their work for the duration of the lockout. The Board found, however, that the employer did violate section 8(a)(1), (3), and (5) by refusing to award vacation and holiday pay to the locked-out employees until after the parties had completed negotiations on a new contract.[61] Members Kennedy and Penello viewed the lockout as having been used solely in support of the employer's legitimate bargaining position. They concluded that the resulting harm to employee rights by the lockout and continued operation by use of temporary replacements was comparatively slight; that there was insufficient evidence of improper motivation; and that antiunion motivation could not be inferred solely from the application of economic pressure during the bargaining dispute. Chairman Miller concurred in the result on the basis of the total circumstances, including the fact that the employer utilized only its own nonunit personnel in carrying out its operations during the lockout; the union had refused to provide any assurance of continued operations; and there was some evidence of good-faith business justification for the employer's actions. Members Fanning and Jenkins were of the view that the case was controlled by *Inland Trucking Co.* Thus, the use of replacements to continue partial operations was inherently destructive of the rights of the regular employees, and violated section 8(a)(1) and (3) of the Act. *N.L.R.B.* v. *Great Dane Trailers*, 388 U.S. 26 (1967). Noting that Chairman Miller agreed that *Inland Trucking*, *supra*, correctly set forth the applicable legal principles, they rejected the factors relied on by him for finding the lockout legal because they considered them insufficient to overcome the inherently destructive character of the employer's conduct. They further observed that *American Ship Building*, *supra*, and *Brown Food Stores*, *supra*, on which Members Kennedy and Penello relied, were not applicable because the Supreme Court limited its holding to a classic lockout situation and expressed no view as to the legality of an employer continuing operations with replacements for the locked-out employees.

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[59] *Inland Trucking Co. & Wesley Meilahn Co-Partners d/b/a Oshkosh Ready-Mix Co.*, 179 NLRB 350 (1969), enfd 440 F 2d 562 (C A 7, 1971); *American Ship Building Co* v *N L.R B.*, 380 U S. 300 (1965); *N.L R.B.* v *Brown, et al. d/b/a Brown Food Store*, 380 U S. 278 (1965); *N.L R.B.* v *Truck Drivers Loc 449, Teamsters [Buffalo Linen]*, 353 U.S 87 (1957).

[60] 197 NLRB No 53.

[61] The Board dismissed that portion of the complaint which alleged that the employer violated 8(a)(1), (3), and (5) by unilaterally deviating from the terms of a recently expired contract with the union in withholding guaranteed workweek pay.

In *B. F. Goodrich Co.*,[62] the Board found that the employer violated section 8(a)(1) of the Act but did not violate section 8(a)(3) by granting participation in its stock purchase and savings plan to its unorganized employees while withholding participation from its represented employees. Applying the principles set forth in *Shell Oil Co.*,[63] the Board concluded that the granting of new profit-sharing benefits to unorganized employees but not to represented employees, is not, standing alone, prohibited discrimination, and in the absence of a discriminatory motive in withholding this benefit from represented employees, the employer did not violate section 8(a)(3) by granting the benefit only to unrepresented employees.[64] However, the employer's actions violated section 8(a)(1), as the union had not waived its right to be consulted about the institution of this type of benefit during the parties, negotiation of the existing collective-bargaining agreement. By thereafter instituting the plan for its unorganized employees while unlawfully refusing to bargain with the union as the statutory representative of its represented employees, the employer deprived the represented employees of their right to bargain collectively with respect to obtaining this additional benefit, and thereby violated section 8(a)(1).

In *Meredith Corp.*[65] the Board found no 8(a)(3) violation in the employer's refusal to pay represented employees for the day on which they failed to report to work following employer's announcement that the plant would be closed because of a snowstorm, even though the employer did compensate unrepresented employees who similarly failed to report to work. The Board based its decision on the lack of evidence that union animus or a desire to discourage union activity motivated the employer in denying unrepresented employees' compensation. The Board found that whether or not payments which the employer made to both represented and unrepresented employees for the time lost on previous similar occasions were required by the collective-bargaining agreements then in effect, the terms of the collective-bargaining agreement in effect on the occasion in question were not decisive of the present case, and the evidence did not establish a pattern of conduct which would assure uniformity of pay for represented and nonrepresented employees. The Board found no merit in

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[62] 195 NLRB No 152

[63] 77 NLRB 1306, 1310 (1948), where the Board stated *"Absent an unlawful motive,* an employer is privileged to give wage increases to his unorganized employees, at a time when his other employees are seeking to bargain collectively through a statutory representative Likewise, an employer is under no obligation under the Act to make such wage increases applicable to union members, in the face of collective bargaining negotiations on their behalf involving much higher stakes "

[64] See also *Missouri Farmrs Assn* , 194 NLRB No. 82, *supra,* p. 87.

[65] 194 NLRB No 103

the General Counsel's contention that it was inherently discriminatory to withhold or to grant payment for time not worked because of the snowstorm on the basis of whether the employees are represented by a union and working under a union contract.[66]

In *Claremont Polychemical Corp.*,[67] the Board considered the legality of an employer's refusal to reinstate strikers who, notwithstanding section 8(b)(7)(B), strike for recognition within 12 months of a valid election. The Board held unprotected the act of picketing but not the strike. Accordingly, the Board found that the employer's refusal to reinstate employees who struck but did not picket violative of section 8(a)(1), but found no 8(a)(1) or (3) violation in the employer's refusal to reinstate employees who picketed during the union's strike for recognition. The Board held, "It is the resort to picketing for recognition within 1 year of the holding of a valid election, an activity specifically interdicted by Section 8(b)(7)(B) of the statute, upon which we ground our action." The Board found that the picketing in the present case was contrary to the express provisions of section 8(b)(7)(B), and concluded therefore that the employees participating in the picketing were not entitled to reinstatement and backpay. Member Fanning, dissenting in part, would have found that the strikers who picketed did not thereby lose their employee status. In his view, the only impediment to peaceful picketing provided by section 8(b)(7)(B) is against unions and carries no employee penalty.

In *Bogart Sportswear Mfg. Co.*, 196 NLRB No. 1, the majority of a panel, Chairman Miller and Member Kennedy, reversed the trial examiner's findings of 8(a)(3) discrimination by the employer against 10 individual employees, on grounds that the General Counsel had failed to sustain his burden of proving that these employees had been discriminatorily selected for a layoff, itself predicated on economic considerations. Contrary to usual practice in such cases, Member Jenkins dissented at length, asserting after reviewing the facts and the inferences drawn by the trial examiner and the majority that the majority, in the case of six discharges, had departed from the proper standard of proof, preponderance of the evidence. He considered them to be relying on inadvertent and trivial mistakes in the trial examiner's decision, ignoring the cumulative and total thrust of the evidence, and in effect refusing to accept preponderant evidence because it was circumstantial—the only kind of evidence ordinarily available in discrimination cases.

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[66] Cf. *Radio Officers' Union [Gaynor News Co.]* v. *N.L.R.B.*, 347 U.S. 17 (1954); *N.L.R.B* v *Erie Resistor Corp.*, 373 U S 221 (1963); *N.L.R.B* v. *Great Dane Trailers*, 388 U.S. 26 (1967); *N L.R.B.* v. *Fleetwood Trailer Co*, 389 U.S 375 (1967).

[67] *Loc 707, Highway & Local Motor Freight Drivers, Dockmen & Helpers, Teamsters*, 196 NLRB No. 75.

D. The Employer Bargaining Obligation

An employer and the representative of its employees, as designated or selected by a majority of employees in an appropriate unit pursuant to section 9(a), have a mutual obligation to bargain in good faith about wages, hours, and other terms and conditions of employment.[68] An employer or labor organization respectively violates section 8(a)(5) or 8(b)(3) if it does not fulfill its bargaining obligation.

1. Obligation to Recognize on Demand

An obligation to recognize a labor organization, in the absence of Board certification, may now be established as a matter of settled law, in certain circumstances.[69] In its 1969 decision in *Gissel* the Supreme Court held that authorization cards were a valid basis for determining whether a union represented a majority, but that a Board-conducted election was the preferred method. That decision also recognized the Board's departure from its so-called *Joy Silk* doctrine.[70] Under *Joy Silk* it had been necessary, and sufficient, to find that an employer which refused to recognize a majority union on a claimed doubt of its majority status had not done so in good faith before finding an unlawful refusal to bargain.

The Court broadly outlined three standards governing bargaining orders.[71] A bargaining order is required where the unfair labor practices are "so coercive that, even in the absence of a § 8(a)(5) violation, a bargaining order would have been necessary to repair the unlawful effect . . . ." If the union has had a majority at one point, the Board in its discretion may issue a remedial bargaining order in "less extraordinary cases marked by less pervasive practices which nonetheless still have the tendency to undermine majority strength and impede the election processes." Finally, the Court noted a third category where the unfair labor practices, "because of their minimal impact on the election machinery, will not sustain a bargaining order."

In the absence of independent unfair labor practices, an employer normally may refuse to accept any evidence of a union's majority other

[68] The scope of mandatory collective bargaining is set forth generally in section 8(d). It includes the mutual duty of the parties "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, neither party is compelled to agree to a proposal or to make a concession

[69] *N L R B.* v *Gissel Packing Co*, 395 U S 575.

[70] *Joy Silk Mills*, 85 NLRB 1263 (1949), enfd. as modified 185 F.2d 732 (C A.D C., 1950).

[71] *Gissel, supra*, 614–615.

than a Board-conducted election. In *IDAK Convalescent Centers*,[72] the Board affirmed the trial examiner's finding that the employer had not unlawfully refused to bargain by insisting on a Board-conducted election instead of accepting the union's offer to prove its majority on the basis of signed authorization cards. An allegedly unlawful increase in wages and benefits had been decided on before the employer was aware of the union's interest and even before any organizing activities. Another allegation, that the employer had negotiated directly with its employees, was found to be based on the employer's attempt to explain its preexisting benefits; no changes in benefits and no negotiations were involved. The employer had not engaged in any independent unfair labor practices and, therefore, its refusal to bargain was not unlawful even though the union had a card majority.

However, even where an employer's unlawful conduct does not necessarily preclude a fair election, an employer's actions may nonetheless warrant a bargaining order. Thus, where an employer engaged in an unlawful campaign to thwart a union's organizing campaign, and then unilaterally polled its employees to determine their union sentiments, and thereby attained evidence of the union's majority, the Board ordered it to bargain with the union.[73] The employer, which in proper circumstances could have insisted that such a determination be made by the Board, could not, having taken the burden on itself, repudiate the route it had selected.[74] *Gissel* [75] was distinguished on the ground that it applied to cases where majority is dependent on authorization cards and the issue is whether the cards or an election would be a more reliable test of employee wishes.

2. Obligation to Bargain Where Unfair Labor Practices Preclude a Fair Election

As indicated, an employer need not accept a union's claim of majority status or offer to prove that status by some means other than a Board-conducted election. However, if an employer engages in unlawful conduct the Board will examine that conduct to determine the likelihood that a true picture of employee sentiment can be obtained through the election process.

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[72] *IDAK Convlescent Centers, d/b/a North Shore Convalescent Home*, 195 NLRB No 138

[73] *Nation-Wide Plastics Co*, 197 NLRB No 136

[74] Citing *Snow & Sons*, 134 NLRB 709 (1961), where the Board held that an employer which had agreed to a check of the union's authorization cards that revealed a union majority could not thereafter insist on a Board-conducted election

[75] *N L R B.* v. *Gissel Packing Co*, 395 U S 575.

In *Claremont Polychemical*[76] the Board determined that the employer's violations did not preclude a free and fair election even though its president had unlawfully threatened to close the plant and predicted that the union would bankrupt the company in separate conversations with two employees, as well as promising both of them individual benefits. The more serious incident, the threat of closing, was laughed at when related to other employees and an election could not have been held for at least 5 months after the violations, since the union had lost an election 7 months earlier. The Board noted that the employer had not interfered with that election and concluded it was not likely that its conduct would be repeated.

However, bargaining was ordered in one case where a series of threats—including plant closure, layoff, and discharge—was found to have made a reliable election unlikely.[77] In making this determination, the Board considered the seriousness of the conduct, the probable impact on future elections, and the effectiveness of alternative remedies. Although the threat to close, the most serious, was made to only 1 of 32 employees, the Board concluded that in view of its seriousness it would inevitably be discussed among employees, and there was testimony to conversations among employees about the probable employer response to a union victory. The Board held that while such a threat might not be disseminated, that was unlikely, and the burden of proving it lay with the employer.

3. Obligation to Furnish Information

Section 8(d) defines the obligation to "bargain collectively" imposed by the Act as requiring that bargaining be carried on in "good faith." This has been interpreted to include a duty on the employer's part to supply information requested by the bargaining representative which is "relevant, material, and necessary" to the intelligent performance of the representative's collective-bargaining functions. The Board has considered a variety of cases during the year in which the scope of this duty has been examined.

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[76] *Claremont Polychemical Corp*, 196 NLRB No 75. Member Fanning dissenting in relevant part In addition to the violations found by the majority, which he considered to be more serious, he would have found that two company bulletins interfered with employee rights and constituted an anticipatory refusal to bargain and would also have found that the employer violated section 8(a)(5) by refusing to recognize the union.

[77] *General Stencils*, 195 NLRB No. 173. Chairman Miller, dissenting, distinguished employer actions and threats In his view, cases involving threats require an analysis of the actions threatened, whether, in the circumstances, they are likely to be taken seriously, and the extent to which they are disseminated While he agreed with the majority on the seriousness of the threat of plant closure and the respect it would be granted by employees, he was unwilling to presume that it would be disseminated and would have placed the burden of proof in that respect on the General Counsel

An employer, which bargained to a stalemate over its proposal that wages be reduced so that it might remain competitive, was found to have violated section 8(a)(5) when it denied the union access to its books and unilaterally reduced wages.[78] Although an employer may take unilateral action once impasse has been reached, here the stalemate was contributed to by the employer's refusal to furnish the financial data requested. The employer having relied on its financial status as the basis for its bargaining position, the union was entitled to the information requested. The Board also adopted a trial examiner's decision holding that an employer, in proper circumstances, has the duty either to permit a union to audit a noncontributory pension fund at its own expense or to furnish the union basic data on the status of the fund. Among other factors leading to this result was union's inability, in the absence of such data, to determine its position on the proper relationship between wages and pension benefits. The employer had furnished a summary of alleged assets and subtotals in general categories such as "bonds" and "common stocks," but it had no right to insist that the union accept an allegedly expert opinion on the value of the fund in lieu of the basic data requested.[79]

In two other cases the Board upheld a union's right to information concerning employees which was relevant to its bargaining obligation. However, a union is not necessarily entitled to such information in the exact form or on the terms requested. It is sufficient that the information be provided in a reasonably clear and understandable form. If substantial costs are involved, the parties must bargain in good faith concerning their allocation; but, in any event, the union is entitled to access to records from which it can reasonably compile such relevant information.[80]

4. Subject Matters for Bargaining

The Act requires both an employer and its employees' statutory representative to bargain collectively with respect to "wages, hours, and other terms and conditions of employment." [81] Either party may insist on the other's agreement to its proposals concerning these areas. In addition to these mandatory subjects the parties may bargain about other matters. But neither party may insist that the other agree on such nonmandatory or permissive subjects, nor may a party condition performance of his mandatory bargaining obligation on agreement to nonmandatory bargaining proposals. The Board is frequently re-

[78] *Palomar Corp*, 192 NLRB No 98.
[79] *Curtis-Wright Corp.*, 193 NLRB No. 142
[80] *Food Employer Council*, 197 NLRB No. 98, *United Aircraft Corp.*, 192 NLRB No. 62.
[81] Sec. 8(d) of the Act

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

In one such case, the Board held that the allocation of the costs of preparing information, to which the union is entitled, in the precise form and at the intervals the union desires, is a mandatory subject which the parties must bargain about in good faith.[82] Of considerably greater significance and impact, however, was a case in which the Board held that, although an employer must bargain concerning the effects of a decision to sell a business, the underlying decision is not a mandatory bargaining subject. The Board reasoned that decisions involving significant investment or withdrawal of capital, which will affect the scope and ultimate direction of an enterprise, are essentially financial and managerial. They lie at the core of entrepeneurial control and are not the types of subjects Congress intended to commit to the bargaining process. *Fibreboard* [83] was distinguished on the ground that it involved subcontracting, not a sale.[84]

5. Bargaining Obligation of Successors

The Supreme Court has held, in agreement with the Board, that a successor which takes over an unchanged bargaining unit and hires a majority of employees, who are represented by a recently certified bargaining agent, is required to bargain with the incumbent union. It did not, however, accede to the Board's view that absent special circumstances such a successor was bound by a preexisting, unexpired contract.[85] The Board itself since its original decision in *Burns* [86] had found with some frequency that the circumstances in particular cases precluded application of the predecessor's contract to the successor.

In *G.T. & E. Data Services* [87] an employer took over the data processing department of a sister corporation which, like itself, was a subsidiary of General Telephone & Electronics. All the predecessor's employees save one transferred to the new employer. The new employer was basically engaged in providing data processing and not telephone services like its predecessor. However, the Board in determining continuity in the "employing industry" attaches greater signif-

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[82] *Food Employer Council,* 197 NLRB No 98.

[83] *Fibreboard Paper Products Corp.* v *N L.R B ,* 379 U S. 203 (1964).

[84] *General Motors Corp., GMC Truck & Coach Div ,* 191 NLRB No. 149 Chairman Miller and Members Jenkins and Kennedy, with Members Fanning and Brown dissenting Although conceding that *Fibreboard* was limited in scope, they noted that the Supreme Court had made no other pronouncements in the area They would have adhered to the Board's development of the *Fibreboard* principles, especially as set out in *Ozark Trailers,* 161 NLRB 561 (1966) In *Ozark* the Board held that an employer's refusal to bargain over the decision to close one of its facilities violated the Act.

[85] *William J. Burns Intl. Security Services* v. *N.L.R.B.,* 404 U.S. 822.

[86] *William J Burns Intl Detective Agency,* 182 NLRB 348 (1970).

[87] *G.T. & E. Data Services Corp.,* 194 NLRB No. 102.

icance to facts demonstrating the continued employment of the particular employees than to the source of employment. When, as in *G.T. & E.*, a new employer takes over a portion of an enterprise and continues its operations without hiatus and with substantially the same employees, it is a successor as a matter of industrial reality. It does not follow, however, that such a successor is *ipso facto* required to adopt its predecessor's contract even under the Board's *Burns* doctrine. The *G.T. & E.* contract covered some 3,000 operations and maintenance employees, less than 1 percent of whom were involved in the transfer, and did not separately distinguish the data processing employees. The whole contract was not applicable and the Board would not attempt to apportion it on *pro tanto* basis, since it would then be making a new contract for the employees.

The flexibility necessary to conform Board policies to industrial realities in this, as in other areas, was highlighted in a case where a trial examiner, in finding successorship, had focused narrowly on the facts at the time of transfer.[88] As part of the transaction the new employer had agreed to finish any of its predecessor's work still in progress and to this end had hired a number of its predecessor's employees. However, the record clearly showed that this was only to enable it to comply with its agreement; its plans for the permanent operation were quite different. The Board held that the crucial inquiry in successorship was continuity of employment, but that the determination must be made on the basis of all relevant facts, not just the situation at the moment of transfer. The Board found that the continuity of employment was merely temporary and that, since a change in the nature of the operation was imminent and certain at the time of transfer, there was no successorship.

6. Withdrawal From Multiemployer Bargaining

In the absence of unusual circumstances, an employer may not withdraw from multiemployer bargaining after negotiations have started unless the union acquiesces. Such acquiescence may be found even in the face of union protests to the withdrawal and the contemporaneous filing of unfair labor practice charges with the Board. Thus, when an employer notified a union midway through multiemployer negotiations that it was withdrawing and the union protested and notified the employer it was filing unfair labor practice charges, but nonetheless agreed to, and did, meet and negotiate on a single-employer basis, the Board held that the union had acquiesced.[89] However, while a labor

[88] *Galis Equipment Co*, 194 NLRB No. 124.
[89] *Hartz-Kirkpatrick Construction Co*, 195 NLRB No. 154.

organization's protests to an employer's withdrawal does not preclude a finding of acquiescence, the absence of such a protest, without more, is not sufficient to establish consent.[90]

7. Other Issues

During the year the Board also held that an employer did not violate the Act by refusing to bargain with a union which had not been designated or selected as the exclusive representative of the employees as required by section 9(a), but only represented its own members. The Board noted that members-only recognition does not satisfy statutory norms.[91] In another case the Board held that an employer's refusal to engage in consolidated bargaining over a companywide benefit plan with representatives of 19 distinct bargaining units was not unlawful. Theretofore, both traditionally and because of separate Board certifications, the units had bargained individually. Parties may not unilaterally force an enlargement, alteration, or merger of established units.[92]

Obie Pacific presented the issue of whether an employer may attempt to erode a union's bargaining position by polling employees to determine their views. The Board concluded that an employer's obligation to bargain with the employees' exclusive agent requires that it accept and respect that exclusivity. Although an employer may, if appropriate, explain its position, it may not determine for itself the degree of support the stated position of its employees' bargaining agent enjoys.[93] In *Red Cab* the Board held that an employer's unilateral change, lowering the commission rate below that which it offered the union during negotiations, following rejection of the contract by the union's membership, was an unlawful refusal to bargain despite the fact that it might have been designed to provide leverage in eventually concluding an agreement.[94]

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[90] *Fairmont Foods Co.*, 196 NLRB No. 122, Members Fanning, Jenkins, and Penello, with Chairman Miller dissenting. In his opinion the employer's position on a single issue had barred successful negotiations and its withdrawal permitted meaningful negotiations thereafter. In these circumstances he would have found that the union's failure to protest was intended to signify acquiescence.

[91] *Don Mendenhall*, 194 NLRB No. 151.

[92] *Shell Oil Co.*, 194 NLRB No. 166.

[93] *Obie Pacific*, 196 NLRB No. 64. Chairman Miller and Member Jenkins; Member Kennedy, dissenting, was of the view that the employer had not intended to undermine the union, had not done so, had continued to bargain, eventually acceded to the union position, and, in any event, no remedy was necessary.

[94] *Red Cab*, 194 NLRB No. 71. Members Fanning and Jenkins; Chairman Miller, dissenting in relevant part, believed that the majority position represented a failure to perceive the realities of collective bargaining. In his view, the employer had only engaged in a tactical maneuver which hastened eventual agreement.

E. Union Interference With Employee Rights

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

1. Imposition of Internal Penalties

The Board faces a continuing problem of reconciling the prohibitions of section 8(b)(1)(A) with the proviso to that section. It is well settled that a union may enforce a properly adopted rule reflecting a legitimate interest if it does not impair any congressional policy imbedded in the labor laws. However, a union may not, through fine or expulsion, enforce a rule which "invades or frustrates an overriding policy of the labor laws. . . ." [95] Thus a union may not cite and fine a member on a pretext where as a reprisal for the member's intraunion activities in opposition to incumbent union officials. Although the policies which the union sought to frustrate were embodied in the Labor-Management Reporting and Disclosure Act of 1959, not the National Labor Relations Act, that distinction was not critical. The Board must consider all congressional labor policies in determining the legality of a union fine.[96]

Although the Board recognizes that fines are inherently coercive, the enforcement of legitimate union rules by means of fines against members has not been found unlawful, largely because of the proviso to section 8(b)(1)(A) protecting the right of a union to prescribe its own membership rules. But, if a union levies a fine against a nonmember, which has a coercive effect even if ultimately it is not collectible, the proviso is not brought into play and such action is an unfair labor practice.[97] Applying this principle during the year, the Board held

[95] *Scofield* v *N L R B.*, 394 U.S. 423, 429 (1969); *N L R.B* v *Industrial Union of Marine & Shipbuilding Workers of America*, 391 U S 418 (1968)

[96] *Carpenters Loc 22 (Graziano Construction Co)*, 195 NLRB No 5 Member Fanning dissented on the facts In his view the fine was motivated by a violation of union rules and the assigned reason was not a pretext

[97] *Booster Lodge 405, Intl Assn. of Machinists (Boeing Co.)*, 185 NLRB No 23 (1970), enfd in pertinent part 459 F.2d 1143 (C.A.D C.). Member Brown, dissenting in pertinent part, was of the view that since the employees were nonmembers, and the fine was thus uncollectible, it was not coercive

that a union's fine was unlawful even though the employees' attempted resignation from the union did not comply with the requirements of the union's constitution. The Board held that the right to withdraw had been so restricted as to constitute a denial of a member's right to leave the union and that, at least where a member has attempted to sever the relationship, the imposition of a fine in such circumstances is an unfair labor practice.[98] However, where a union's constitution is silent on resignation, leaving a member free to resign at will, a failure to clearly convey an intent to do so, being ineffective, does not insulate a member from union discipline.[99]

2. Union Threats and Responsibility Therefor

In addition to the imposition of formal penalties through intraunion procedures in an unlawful manner or for an unlawful purpose, a union may also violate section 8(b)(1)(A) if it threatens reprisals against employees for exercising their rights under the Act. The Board has held that a union violates the Act when it threatens to cancel its contract with an employer, and to deprive the employees of the benefits it provides, unless employees sign checkoff authorizations. This is so because the employees have the right to determine for themselves whether or not they wish to authorize a checkoff for their union dues.[1]

F. Coercion of Employers in Selection of Representative

Section 8(b)(1)(B) makes it an unfair labor practice for a union to coerce or restrain an employer in the selection of its representatives for the purposes of collective bargaining or the adjustment of grievances. It has been generally summarized as prohibiting unions from disciplining supervisor-members for performing duties in the interest of their employers.[2] In *Wisconsin Electric Co.*,[3] the Board applied this principle in holding that a union committed an unfair labor practice

[98] *Intl Union, United Automobile, Aerospace & Agricultural Implement Workers, UAW, & Loc 647 (General Electric Co.)*, 197 NLRB No. 93.

[99] *Dist. Lodge 99 & Lodge 2139, Intl. Assn. of Machinists (General Electric Co.)*, 194 NLRB No. 163. Chairman Miller dissenting in part. Although he agreed with the majority in other respects, he would not have found an 8(b)(1)(A) violation in the union's suspension of individuals who had made a timely withdrawal from the union, and he would not have required the suspensions to be rescinded. In his view, even though the membership relationship has been terminated, a union retains the power to make its benefits unavailable to individuals who have acted against its best interests.

[1] *Intl Union of United Brewery, Flour, Cereal, Soft Drink & Distillery Workers of America (Miller Brewing Co)*, 195 NLRB No 143.

[2] *Toledo Locs 15–P & 272, Lithographers & Photoengravers Intl Union (Toledo Blade Co.)*, 175 NLRB 1072 (1969), enfd 437 F.2d 55 (C.A. 6, 1971).

[3] *Loc 2150, IBEW (Wisconsin Electric Power Co.)*, 192 NLRB No. 16.

by disciplining supervisor-members for performing struck work. The Board reasoned that the supervisors had been performing work at the employer's direction and in its interest and that the underlying dispute was between the employer and the union, not the union and the supervisors. The Board in *Toledo Blade*, *supra*, had noted that an employer was entitled to a supervisor's undivided loyalty; in *Wisconsin Electric* it concluded that if the fines were found to be lawful it would permit the union to drive a wedge between supervisor and employer. The Board was careful to point out, however, that it was not completely barring unions from disciplining supervisor-members, but only from imposing discipline which stems from a dispute between an employer and a union.[4] The underlying principles were reaffirmed, and a like violation found, in a companion case where similarly based discipline was meted out to foremen who were required to be union members, even though the employer had informed them that, while it would like them to work during the strike, the decision was theirs.[5]

In other cases the Board filled in some, though by no means all, of the remaining gaps. Thus the Board specifically held that an employer's acquiescence to retention of union membership by supervisory personnel is not a defense, and that an employer may be restrained or coerced by actions directed at supervisor-members who play no role with respect to the unit which the respondent union represents.[6] The Board has also required a union which violated section 8(b)(1)(B) to read the notice to its members in order to dissipate the coercive effects of the unfair labor practices on its membership. The same case held that the employer's cost in providing its expelled supervisor with substitute benefits in lieu of those provided by the union were too remote to require reimbursement by the union.[7]

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[4] Member Fanning dissented for the reasons set forth in his dissent to *IBEW, Loc 134 (Illinois Bell Telephone Co)*, 192 NLRB No. 17, *infra*

[5] *IBEW, Loc 134 (Illinois Bell Telephone Co), supra* Member Fanning, dissenting on historical and legal grounds, would have construed the statute's prohibition more narrowly In his view both the legislative history and the plain wording of sec 8(b)(1)(B) make it clear that it is aimed only at union conduct which coerces or restricts an employer with respect to the selection of representatives for the adjustment of grievances or collective bargaining and that union discipline not aimed at these functions does not violate sec. 8(b)(1)(B). As the discipline was not imposed because of the manner in which these protected functions were performed, Member Fanning would have held that the supervisors were not coerced or restrained in that regard, and consequently their employer was not coerced or restrained in the selection of representatives for such purposes

[6] *IBEW System Council U–4 (Florida Power & Light Co)*, 193 NLRB No 7, Member Fanning dissenting for the reasons set forth in his dissent to *Illinois Bell Telephone Co , supra*

[7] *Loc 261, Lithographers & Photoengravers Intl Union (Manhardt-Alexander)*, 195 NLRB No 80, Member Fanning concurring, distinguished the case from *Wisconsin Electric* and *Illinois Bell, supra,* on the ground that he did not view the work involved, shutting down equipment for a strike, as struck work Member Fanning also approved of having the notice read to the membership, but not for the reason given by the trial examiner In his view members were not coerced or restrained, but, since they had ratified the discipline imposed, he believed that it would serve an educational purpose

In *Continental Oil*[8] the Board held that a union's action in disciplining members for accepting appointments as temporary supervisors during the course of strikes at sister plants violated the Act. The replacements were found to be supervisors within the meaning of the Act in view of their authority and the fact that the naming of temporary supervisors was a longstanding company policy to establish an intermediate hierarchy of supervision. Regular supervisors had been dispatched to perform rank-and-file work at the struck plants and the union believed that the temporary replacements had been appointed to take the place of these "strikebreaking" supervisors. However, there was no record evidence supporting the union's claim that its members were being used as strikebreakers once removed; therefore, the Board did not rule on the propriety of union discipline in such circumstances. Even where the union's ultimate objective is lawful, its conduct may come within the statute's prohibition if its effect is felt in the protected area. Thus a union was found to have violated the Act when it picketed an employer because ship officers, who were employer representatives, had not been selected from among its members, although the union contended that its objective was the preservation of work formerly performed by its members.[9]

G. Union Causation of Employer Discrimination

1. Referral and Employment Practices

Collective-bargaining provisions establishing a referral preference for qualified employees based on experience are not unlawful when administered without discrimination. However, where a union entered into an agreement with a multiemployer association requiring hiring preference for employees with experience in the industry, and only experience with a signatory employer was taken into account, the union was found to have violated section 8(b)(1)(A). Application of the requirement coerced and restrained employees in their right under section 7 of the Act to bargain collectively through representatives of their own choosing by penalizing employees who had chosen not to be represented by the union in the past while rewarding those who had selected the respondent.[10]

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[8] *Teamsters Loc. 663, Intl Brotherhood of Teamsters,* 193 NLRB No. 84.

[9] *Intl. Organization of Masters, Mates & Pilots, Intl. Marine Div., (Marine & Marketing Intl. Corp*), 197 NLRB No. 69.

[10] *Intl. Photographers of the Motion Picture Industries, Loc. 659, Intl Alliance of Theatrical Stage Employees & Moving Picture Machine Operators of the U S & Canada (MPO–TV of California),* 197 NLRB No. 134. Chairman Miller, dissenting, would have reinstated a settlement agreement set aside by the regional director In his view, a settlement agreement should be honored in the absence of lack of compliance or further unfair labor practices and he would not have found, as the majority did, that there was no meeting of the minds.

Similarly, where the agreement between a union and an employer provided only that the employer notify the union in the event of vacancies and give nondiscriminatory consideration to applicants it referred, the Board nonetheless found the Act had been violated. In practice the parties operated an exclusive hiring arrangement whereby no applicant was hired unless referred or cleared by the union and the union had refused to clear an applicant who had been expelled for violating its bylaws.[11] The Board noted that it was not finding the union's disciplinary action improper, but that a union violation resulted from conditioning hiring on the union status of an applicant under an exclusive arrangement.[12] In a somewhat analogous situation the Board held that a union's insistence that an employee be discharged, because she was not qualified as a journeyman as defined in the contract, violated section 8(b)(1)(A) and 8(b)(2). The contract provided that only journeymen could perform work within the union's jurisdiction and, as a practical matter, defined journeyman to require that an applicant possess a union card identifying him as such. Reliance on a union card as the only test for establishing an applicant's qualification for employment was found to be tantamount to requiring union membership as a condition for hiring.[13]

The Board also held during the year that a union violated section 8(b)(1)(A) and 8(b)(2) when it had an employee transferred to a lower paying job because he was not a citizen. Lack of citizenship is not a legitimate reason for such action and transferring or terminating an employee to satisfy a union in such circumstances encourages union membership and is therefore unlawful. Examining the reasonable tendency of the union's job referral system, which gave preference to United States citizens or those who had declared their intention to become citizens, the Board concluded that it too violated the Act. Union membership was open only to the same class and, therefore, the referral system encouraged union membership in violation of section 8(b)(1)(A) and 8(b)(2).[14]

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[11] Sec. 8(b)(2) makes it an unfair labor practice for a union to cause or attempt to cause an employer to discriminate against an employee in violation of sec. 8(a)(3) or to discriminate against an employee whose membership has been denied or terminated for some reason other than failure to tender uniform periodic dues or initiation fees

[12] *Chicago Loc 245, Lithographers & Photoengravers Intl. Union (Alden Press)*, 196 NLRB No. 97.

[13] *Kalamazoo Typographical Union Loc 122, Intl. Typographical Union (Booth Newspapers, d/b/a Kalamazoo Gazette)*, 193 NLRB No. 159.

[14] *Intl Longshoremen's Assn, Loc 1581 (Manchester Terimnal Corp.)*, 196 NLRB No. 180.

2. Other Aspects

In another case the Board held that no distinction is warranted between that portion of uniform and periodic dues allocated to the costs of collective bargaining and that used for other legitimate institutional expenses in determining the propriety of union discipline pursuant to a valid union-security agreement. Under section 8(a)(3) uniform periodic dues may be required as a condition of membership, if such sums are not devoted to some purpose otherwise contrary to public policy. In reaching this result, the Board distinguished *RCA Service Co.*,[15] involving an admitted "assessment," 90 percent of which might never have reached the union treasury, where it had concluded that the "assessment" did not constitute "periodic dues" within the meaning of the union-security proviso to section 8(a)(3).[16]

The Board also held that a union had not violated section 8(b)(2) by picketing to gain adherence to a contract containing a union-security clause, even though it lost the majority necessary to validate such conduct. This loss of majority was not within the union's knowledge until this fact was established at an unfair labor practice hearing. In addition, the Union had and maintained majority status during a substantial portion of the time it was picketing but eventually lost it because of fluctuations in the size of the unit. The Board concluded that the union, in those circumstances, had a right to presume that its conduct continued to be lawful absent evidence to the contrary. Where the same conduct which was originally lawful continues and becomes unlawful only because of a change in circumstances, the union should have some notice of that change before its conduct is found violative of the Act.[17]

H. Union Bargaining Obligation

A labor organization no less than an employer has a duty imposed by the Act to bargain in good faith about wages, hours, and other terms and conditions of employment.[18] If it does not fulfill this bargaining obligation it violates section 8(b)(3).

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[15] *Loc. 959, Teamsters*, 167 NLRB 1042 (1967).

[16] *Detroit Mailers Union 40, Intl. Typographical Union (Detroit Newspaper Publishers Assn)*, 192 NLRB No. 107. Member Jenkins, dissenting, found no warrant for the distinction of *RCA Service Co.*, where the Board had considered the legislative history and concluded that the union-security proviso to sec 8(a)(3) was intended only to eliminate "free riders" by permitting apportionment of the costs of collective bargaining.

[17] *Retail Clerks Union Loc 870, Retail Clerks Intl. Assn. (White Front Stores)*, 192 NLRB No 33. Chairman Miller concurring separately agreed with his rationale, but declines to pass on the majority's additional reasoning based on "accretion."

[18] See sec. 8(d) which generally set forth the scope of mandatory collective bargaining.

1. Disclaimer of Interest in Bargaining

Despite section 8(b)(3)'s requirement that a union bargain in good faith, a union, which makes a good-faith disclaimer of any interest in representing a group of employees, does not violate that section by refusing to enter into a collective-bargaining agreement with their employer.[19] Similarly, employers which have lawfully withdrawn from a multiemployer unit cannot compel a union, through application of section 8(b)(3), to bargain with them on an individual basis against the wishes of the employees the union represents.[20]

2. Withdrawal From Multiemployer Bargaining

On the other side of the coin, a union violated section 8(b)(1)(B) and 8(b)(3) by refusing to deal with employers through their chosen representative, a multiemployer association, after the start of negotiations, and striking and threatening to strike to secure individual contracts with the separate employers. The remedy posed a difficult choice between nullification of the individual contracts with possible consequent instability in the industry and denial of the employers' right to the collective-bargaining benefits of association membership. The Board, concluding that the employers should be free to accept or refuse the benefits of association membership without coercion, ordered the union not to give effect to the individual contracts and to bargain with the association upon request.[21] Absent unusual circumstances or mutual consent, parties to multiemployer or multiunion bargaining may not withdraw after the start of negotiations. Thus, a union's withdrawal from multiemployer, multiunion bargaining, after an exchange of initial proposals found to constitute the start of negotiations, was held to be untimely and its subsequent picketing to force individual bargaining to be 8(b)(1)(B) and 8(b)(3) violations.[22]

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[19] *Sheet Metal Workers Intl Assn. Loc. 11 (Corrugated Asbestos Contractors)*, 192 NLRB No. 8.

[20] *Loc. 44 & Washington State Assn of Plumbers*, 195 NLRB No. 27. Member Kennedy, dissenting, was of the opinion that, since the individual units were appropriate for collective bargaining, the majority decision was inconsistent with the treatment of employers under sec. 8(a)(5) in the converse situation and was an unwarranted application of a double standard

[21] *Loc 1205, Intl Brotherhood of Teamsters (N.Y Lumber Trade Assn.)*, 191 NLRB No. 147.

[22] *Brotherhood of Teamsters & Auto Truck Drivers Loc 70 (Granny Goose Foods)*, 195 NLRB No. 102

3. Other Aspects

During the year the Board also held that a pooled "ratification" vote, rejecting a company's wage increase proposal conditioned on premature extension of the contract for 1 year, by employees in historically separate bargaining units at different plants, did not violate section 8(b)(3). The employer alleged that the union was attempting to require it to bargain on the basis of a single combined unit against its will. The Board affirmed the trial examiner's decision which had found that both plants performed substantially interchangeable work; that substantive provisions of both contracts were nearly identical; that there was a close community of interest; that the company's proposal was limited in scope; and that the pooled vote was decided on by the authorized representatives of both units for a specific and legitimate union objective. The purpose of the pooled vote was to insure that the expiration date of the contracts in both units would continue to be the same in order to deprive the employer of the advantage it might gain by transferring work from one plant to the other in the event of a strike arising from contract negotiations. In dismissing the complaint the trial examiner relied on the Fifth Circuit's decision in *U.S. Pipe & Foundry Co.* v. *N.L.R.B.*,[23] where the court held that insistence by three unions during separate contract negotiations on a common expiration date did not violate the Act because of its "vitally important connection" with mandatory bargaining subjects which overrode the apparent expansion of the bargaining unit.[24]

It is well settled that no party to a contract may unilaterally alter, or require another party to bargain about changes in, its provisions during the term of the contract; nor change past practices, on which the contract is silent, without affording the other party an opportunity to bargain. In *Rochester Telephone* [25] the Board held that a union had violated section 8(b)(3) when its membership adopted a rule prohibiting acceptance of positions as temporary supervisors. Such appointments had long been a subject of contention; however, during 1967 contract negotiations the union had agreed to withdraw its demand that the practice be abolished in return for a letter of commitment which the company later provided. The agreement, therefore, became part of the contemporaneous bargain the parties had made in executing the contract. Since the union did not renew its demand in 1968 negotiations, the company had a right to assume its rights were

[23] 298 F.2d 873 (1962).

[24] *United Steelworkers of America, Loc. 2566 (Lynchburg Foundry Co.)*, 192 NLRB No 110

[25] *Communication Workers of Amer., Loc. 1170*, 194 NLRB No 144.

unchanged. In these circumstances the union's action was found to be an attempt to unilaterally alter the existing contract in violation of section 8(b)(3), and, although the union might request discussion, the employer was not required to bargain about changing the existing agreement in mid-term.[26]

I. Prohibited Strikes and Boycotts

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

1. Situs of Primary Dispute

In several cases presenting situations involving picketing at common situs locations, where business is carried on by both the primary employer and neutral employers, the Board had occasion to determine whether *Moore Dry Dock* standards [27] applied so as to shield a union's picketing activities.

Operating Engineers, Loc. 675,[28] presented the Board with the question of whether a union violated secondary boycott provisions of the Act by picketing a construction site at a time when the primary employer had no employees on the site. Members Brown and Jenkins found that the general contractor and primary employer, Peacock, was

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[26] The Board distinguished *Brotherhood of Painters, Decorators & Paperhangers of America (Westgate Painting & Decorating Corp.)*, 186 NLRB No. 140 (1970) (Member Fanning dissenting), which the trial examiner had relied on in finding a violation of section 8(b)(3) and ordering the union to notify the employer and provide it with an opportunity to bargain There too the contract was silent; however, in that case it was because bargaining had not resulted in agreement.

[27] *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 pressures 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.

[28] *Intl Union of Operating Engineers, Loc 675 (Industrial Contracting Co)*, 192 NLRB No. 175.

engaged in business despite the absence of its employees from the situs at all material times. To them, the facts suggested the primary employer was "playing a 'cat and mouse' game by absenting its employees in such a way that the Union really had no certainty when Peacock's employees would or would not be working." Noting that the picketing conformed in all respects to requirements set forth in *Moore Dry Dock*, *supra*, and was therefore presumptively valid, Members Brown and Jenkins dismissed the section 8(b)(4)(i) and (ii)(B) allegations of the complaint. Member Fanning joined in this result on the ground that the subcontractors of Peacock were not engaged in work unrelated to the normal operations of the primary employer, Peacock, and that, accordingly, the inducement of the employees of the subcontractors was not unlawful secondary conduct within the meaning of section 8(b)(4)(B).[29] In the view of Chairman Miller and Member Kennedy, dissenting, the fact that Peacock may have had property on the construction site did not legalize picketing. The minority would hold that Peacock was engaged in its normal business at the site only when its employees were present and, accordingly, in the circumstances of the case, would find that the union's picketing violated section 8(b)(4)(i) and (ii) of the Act.

In *Teamsters Local 294*[30] the gravamen of the complaint was that the union, representing mechanics of Leaseway of Eastern New York, engaged in an illegal secondary boycott by picketing parked equipment at the premises of Montgomery Ward & Co., with the object of forcing neutral Ward to cease business with the primary employer, Leaseway, during a labor dispute the union had with Leaseway. Members Jenkins and Kennedy agreed with the trial examiner who, primarily on the basis of a lease between Leaseway and Ward, dismissed the complaint. Under the terms of the lease, or at least the practice under the lease, Leaseway repaired and maintained leased automotive equipment and permitted it to be parked and housed on Ward property. The trial

[29] See the dissenting opinion in *Bldg & Construction Trades Council of New Orleans (Markwell & Hartz)*, 155 NLRB 319, 330 (1965)

[30] *Loc 294, Intl Brotherhood of Teamsters (Montgomery Ward & Co.)*, 192 NLRB No 26 A motion for reconsideration, filed by Ward, was subsequently denied at 194 NLRB No 185 as lacking in merit A review of the facts satisfied Members Jenkins and Kennedy that the union was justified in viewing the Ward docks as a normal work situs for Leaseway employees and that individuals employed by Leaseway continued to work there during the picketing Member Jenkins and Kennedy stated that a different situation would have been presented had it appeared either that (1) During the prestrike period, time restrictions were in fact imposed on the access of Leaseway employees to the premises for equipment maintenance functions, or (2) such restrictions were imposed during the strike and made known to the union so that the union could regulate its picketing of Leaseway accordingly That, however, was not the case here Chairman Miller again concurred, based on undisputed evidence that some Leaseway trucks were driven from the Ward lot during the picketing by Leaseway management officials.

examiner found that Leaseway was carrying on its regular normal and routine equipment business with Ward 24 hours per day on and off Ward's property. He said the union was engaged in direct, primary picketing of the struck employer's business of leasing automotive equipment to Ward and maintaining that equipment on the lessee's property as required or permitted under the lease agreement. Concurring with Members Jenkins and Kennedy in dismissing the complaint, Chairman Miller would do so for one reason alone—undisputed evidence showed that some Leaseway trucks were driven from the Ward lot during the picketing by Leaseway management officials.

In *Broadcast Employees, Loc. 25* [31] the Board, in agreement with the trial examiner, ruled the union did not violate the Act when its members picketed public entrances to the municipal auditorium immediately preceding and during broadcasts of hockey games of the Buffalo Sabres. At the relevant time, the union was on strike against Taft Broadcasting Co. (WGR Radio) which had a contract to broadcast the Sabres' home games. The trial examiner found that one Soisson, the color commentator during the hockey broadcasts, was an employee of WGR, the primary employer, rather than of the Sabres. In his judgment when WGR's microphones and transmission lines were activated during the hockey games, the broadcast booth became an extension of WGR's radio station. Thus, he concluded, peaceful picketing of the public entrances to the auditorium by members of the union was primary picketing and as such was protected. Moreover, the trial examiner held, even if the auditorium were considered a secondary situs, the broadcasts would be analogous to a roving and ambulatory situs. In these circumstances, he would still find the picketing was protected and lawful.

2. Prohibited Objectives

The objectives which a union may not lawfully seek to achieve by inducement or encouragement, defined by clause (i) of section 8(b)(4), or by threats, coercion, or restraint, defined by clause (ii) thereto, are set forth in subparagraphs (A), (B), (C), and (D) of that section. Several cases decided during the report year involved section 8(b)(4)(B) which prohibits pressure on "any person" and is intended to prevent the disruption of business relationships by proscribed tactics.

In *Sheet Metal Workers, Loc. 223*,[32] the Board held the union threatened, coerced, and restrained Gelfand Roofing Co., Union Air

[31] *Loc 25, Natl. Assn. of Broadcast Employees & Technicians (Taft Broadcasting Co.)*, 194 NLRB No. 11.

[32] *Sheet Metal Workers Intl Assn. Loc 223 (Continental Air Filters Co.)*, 196 NLRB No. 12.

Conditioning, and United Sheet Metal Co. in violation of section 8(b)(4)(ii)(B) of the Act by demanding monetary penalties in exchange for permitting its members to install nonunion label products. The Board noted that Gelfand, Union Air, and United had no legal obligation to pay the sums and did so only under duress imposed by the union in furtherance of its unlawful secondary objectives; namely, a dispute limited to the labor relations of the manufacturers or distributors of the nonunion label products. Commenting further, the Board stated that the case is distinguishable from *United Assn. of Pipe Fitters Loc. 455* (*American Boiler Manufacturers Assn.*) [33] in that here the union imposed monetary penalties not for the sole primary object of preserving unit work, but for the secondary object of boycotting the materials herein because of the absence of union labels. The union was ordered to cease the conduct found unlawful and to reimburse Gelfand the sum of $150 and union Air the sum of $670, being payments unlawfully exacted from them.

Contrary to the trial examiner, the Board, in *Iron Workers, Loc. 272*,[34] found that the union committed illegal secondary conduct by threatening to picket and then picketing a prime contractor, Miller & Solomon Construction Corp., to force the prime to assume delinquent payments owed to the union's pension, health, and welfare funds by a defunct subcontractor, Sethro Steel Co. When Sethro went out of business for financial reasons, Miller and Solomon attempted to complete the steel job. The Board said that because of Sethro's default, the union was entitled to bring civil suit against Sethro; it could resort to other legal action to compel payment of the indebtedness; and it could enforce whatever lien rights were available against the property owner. But it was not entitled to picket Miller & Solomon to become the guarantor of Sethro's debt. Miller & Solomon was a neutral independent contract or entitled to be free of secondary action designed to enmesh it in the union-Sethro dispute, the Board concluded. The union was ordered to cease the unlawful conduct.

3. Unit Work Preservation Issues

The Board has long held, with court approval, that a union's strike to preserve the work of employees in the bargaining unit represented by it is primary action within the protection of the provision of section

[33] 154 NLRB 285 (1965), enfd in part and remanded in part 366 F 2d 815 (C A. 8, 1966); Supplemental Decision and Order 167 NLRB 602 (1967), affd. in pertinent part 404 F.2d 547 (C A 8, 1968).

[34] *Loc 272, Intl Assn. of Bridge, Structural & Ornamental Iron Workers (Miller & Solomon Construction Corp.)*, 195 NLRB No 188.

8(b)(4)(B),[35] notwithstanding that it may also have a secondary impact.[36] It is equally well established, however, that a similar strike to preserve the work of union members generally exceeds the legitimate interests of the union in the bargaining unit and, therefore, constitutes secondary activity prohibited by section 8(b)(4)(i) and (ii) of the Act.

The Board had the occasion during the year to draw this line in several cases, including *ILA Local 1248*,[37] in which the union sought to perform work which had always been performed by employees in another unit. There, the union sought to force neutral shipping and stevedoring companies to cease doing business with the U.S. Naval Supply Center, thereby bringing pressure to bear on the supply center to hire ILA members to displace its own employees who handled break-bulk cargo and containers at the supply center. Noting that ILA members had never handled either break-bulk or container cargo at the supply center, the Board concluded the union's conduct was not aimed at work preservation but at acquisition of work historically performed by employees in another work unit. That restrictive provisions in the ILA contract with the employer association, on which the unions relied, might in other circumstances have valid work preservation objectives, did not mean that they could be used as a shield for work acquisition here, the Board stated. The Board decided that the Navy was the primary employer because ILA demands could only be met if the Navy were to replace its own employees represented by the Machinists with ILA members. Thus, pressure on neutral shipping and stevedoring companies was declared illegal secondary activity and the unions were ordered to cease the illegal conduct.

In another case, *Asbestos Workers, Loc. 12*,[38] the union sought to perform work which its members had never before performed on the equipment in issue. Local 12's members were employed by Johns-Manville Sales Corp. J-M was under a service contract with Westinghouse Electric Corp. to perform, at Consolidated Edison's Astoria, New York, powerhouse jobsite, insulation and other tasks not completed at the Westinghouse plant. Preinsulated work on the gas turbines traditionally and historically had been performed by employees at the Westinghouse plant. Local 12 contended that its members had

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[35] The provision reads as follows: "*Provided,* That nothing contained in this clause (B) shall be construed to make unlawful, where not otherwise unlawful, any primary strike or primary picketing"

[36] E.g., *Intl. Assn. of Heat & Frost Insulators (Houston Insulation Contractors Assn.)* 148 NLRB 866 (1964), enfd. in part *sub nom Houston Insulation Contractors Assn.* v. *N.L.R.B.*, 357 F.2d 182 (C.A. 5, 1966), affd. 386 U.S. 664 (1967).

[37] *Intl Longshoremen's Assn., Loc. 1248 (U S Naval Supply Center)*, 195 NLRB No. 41.

[38] *Intl. Assn of Heat & Frost Insulators & Asbestos Workers, Loc 12 (Westinghouse Electric Corp.)*, 193 NLRB No. 4.

for more than 80 years done all insulation work on steam turbines in the New York area and that it was seeking to preserve its traditional insulation work when gas turbines were introduced into the area. The Board agreed with the trial examiner that Local 12 violated the Act by inducing and causing a work stoppage at Con Ed's Astoria, New York, jobsite. In rejecting work preservation as a defense, the Board agreed with the trial examiner's findings that the stoppage arose out of the union's primary dispute with Westinghouse, but was illegally directed against two neutrals, J-M and Con Ed, to force them to cease using preinsulated gas turbines made by Westinghouse in the New York area. The union was ordered to cease the conduct found unlawful.

J. Jurisdictional Dispute Proceedings

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

An unfair labor practice charge under this section, however, must be handled differently from a charge alleging any other type of unfair labor practice. Section 10(k) requires that parties to a jurisdictional dispute be given 10 days, after notice of the filing of the 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 the dispute and make an affirmative assignment to the disputed work.[39]

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

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[39] *N L R B.* v *Radio & TV Broadcast Engineers Union, Loc. 1212* [*CBS*], 364 U.S. 573 (1961), Twenty-sixth Annual Report (1961), p 152.

1. Voluntary Method for Settling Disputes

Of interest among decisions made by the Board during the report year were several in which the Board considered whether to dismiss section 10(k) proceedings based on the contention that the disputing parties had contractual provisions to settle work assignment disputes voluntarily.

In *Bricklayers, Loc. 1*,[40] the employer contended that it ceased to be bound by the decisions of the National Board for Settlement of Jurisdictional Disputes when that entity expired in September 1969. A new Joint Board was constituted without participation by the Associated General Contractors, which represented the Associated Building Contractors of Colorado. The employer was a member of ABC. The employer asserted that since it had not agreed to the provisions of the new Joint Board agreement, either directly or through ABC or AGC, the new Joint Board did not constitute an agreed-upon method for the voluntary settlement of a dispute which arose between Carpenters and Bricklayers who sought to perform construction work for the employer. The Bricklayers contended that the Employer, through ABC's agreements with the Carpenters and Bricklayers, contractually agreed to have a new Joint Board determine jurisdictional disputes and that the agreement applied to the new Joint Board. The contractual agreements on which the Bricklayers relied specifically referred to the Joint Board as a means of settling jurisdictional disputes, but were executed prior to the inception of the new Joint Board. The NLRB found that the employer had not agreed by contract to settle jurisdictional disputes by the new Joint Board so that the dispute involving the Carpenters and Bricklayers was properly before the NLRB for determination. After considering all relevant factors the Board made an award of the work to employees represented by the Carpenters. Member Fanning dissented, relying on *Paul Jensen*,[41] which the majority overruled. The contrasted arbitration which he considered contrary to section 10(k)'s endorsement of the result with that reached in *Collyer*, 192 NLRB No. 150, which deferred to arbitration in an 8(a)(5) case despite the congressional preference expressed in section 10(a) for the exercise of the Board's authority in other unfair labor practice cases. In his view, the parties involved had agreed to be bound by a decision of the Joint Board despite the reorganization and reformation of the Board after a hiatus. Accord-

[40] *Bricklayers, Masons & Plasterers' Intl. Union, Loc 1 (Lembke Construction Co.)*, 194 NLRB No. 98.

[41] *Intl Assn of Heat & Frost Insulators & Asbestos Workers, Loc. 28*, 186 NLRB No. 20 (1970).

ingly, Member Fanning would have quashed the notice of hearing. In joining the majority, Member Jenkins indicated that he had never subscribed to the position set forth in *Paul Jensen*.[42]

In a similar case the employer was a party to a collective-bargaining agreement with the Laborers and was also a party to a collective-bargaining agreement which the Associated Builders Contractors of Colorado had with the Carpenters. Unlike the prior case, the employer was not a member of ABC. Both contracts contained a provision for settlement of jurisdictional disputes by the National Joint Board for the Settlement of Jurisdictional Disputes. Both of the contracts were signed prior to the date on which the Associated General Contractors, representing ABC, withdrew. Relying on the prior case, the NLRB held that the new Joint Board did not constitute an agreed-upon method for resolving jurisdictional disputes. In so holding, the Board noted as in the earlier case that the makeup of the Joint Board was different at the time the employer signed its agreement than at the time of the dispute and that the employer did not agree to be bound by determinations of the new Board. After considering the case on its merits the NLRB made an award of the work to employees represented by the Carpenters.

Marble Masons Union 3,[43] involved an employer who reexecuted a contract after a Joint Board expired and was reconstituted. The contract contained a clause by which the parties agreed to submit jurisdictional disputes to a Joint Board. Despite the employer's contention that it was not committed to decisions of the Joint Board, the NLRB found that the employer had failed to delete a provision from its contract by which the employer agreed to abide by Joint Board decisions and that the contract was signed after the new Joint Board came into existence. Thus, because the parties had an agreed-upon method for voluntary adjustment of the jurisdictional dispute involved in the case, the Board quashed the notice of hearing.

Die Sinkers, Lodge 110,[44] presented the issue of whether a pending section 301 suit constituted an agreement upon a method for the voluntary adjustment of a jurisdictional dispute. The UAW contended that a pending section 301 suit, filed by the Die Sinkers in U.S. district court seeking to enjoin the employer from assigning the disputed work to UAW-represented employees, was an agreed-upon method to which the Board should defer. The Board found that the parties had not ad-

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[42] *Bricklayers, Masons & Plasterers' Intl Union, Loc. 1 (Rocky Mountain Prestress)*, 195 NLRB No. 88.

[43] *Marble Masons, Terrazo Workers and Tile Layers Subordinate Union No 3 of Kansas City, Bricklayers, Masons and Plasterers (Winn-Senter Construction Co.)*, 194 NLRB No 74

[44] *Intl Die Sinkers' Conference & Lodge 110 (General Motors Corp.)*, 197 NLRB No. 173

justed the dispute or agreed upon a method of adjusting it voluntarily. In so holding the Board noted that the Die Sinkers never agreed to be bound by the original award of the umpire on which the section 301 unit was based; the Die Sinkers contract with the Employer did not provide for arbitration; and there was no evidence that any party agreed to an *ad hoc* arbitration suggested by the district court. The Board noted that its action is particularly appropriate where, as here, the court has deferred its decision pending a determination by the Board. Deciding the merits of the dispute, the Board concluded the work should be awarded to employees represented by the Die Sinkers.

2. Other Aspects

During the report year the Board considered several cases in which work claims were based on contract or practice. Where the respondent union in a 10(k) proceeding claims the disputed work under a contract with the employer, the Board will find that the union is entitled to the work only if the contract provides for the assignment of work to the union "in clear and unambigous terms".[45]

In *Sheet Metal Workers, Local 28*,[46] a dispute arose over construction of walls or enclosures surrounding air-conditioning fans and other unit components to be installed in an office building. Masonary materials were specified in the construction contract pertaining to the work. Sheet Metal Workers refused to install air-conditioning fans because the walls enclosing them were to be made of masonry. According to the Sheet Metal Workers, its collective-bargaining agreement with a subcontractor, Federal, provided that no air-conditioning work would be accepted unless sheet metal casings were to be used. The Sheet Metal Workers further asserted that there was no evidence of competing unions seeking particular work since it did not claim masonry work and the Bricklayers did not claim sheet metal work. In opposition, the Bricklayers contended that a jurisdictional dispute existed by virtue of the demands of the Sheet Metal Workers that sheet metal be substituted for masonry in the construction of casings and plenums since this would cause one subcontractor, La Sala, and its employees represented by the Bricklayers, to be replaced by another subcontractor, Federal, and its employees represented by the Sheet Metal Workers. The Board agreed with the Bricklayers that competing claims for work by two contesting unions existed. The fact that the Sheet Metal Workers' demand stems from objections to the use of masonry rather

[45] See *Theatrical Protective Union 1 (CBS)*, 124 NLRB 249 (1959); *Paperhandlers' & Straighteners' Union 1 (News Syndicate Co.)*, 124 NLRB 738 (1959).

[46] *Sheet Metal Workers Intl. Assn., Loc. 28 (Diesel Construction)*, 194 NLRB No. 18.

than sheet metal casings does not detract from the nature of the jurisdictional dispute, the Board said, since the effect of the Sheet Metal Workers demand for work would be to force the indirect assignment of work from employees of one employer to employees of another. The Board also found without merit the Sheet Metal Workers claim that no jurisdictional dispute existed because it was merely protesting Federal's purported violation of its collective-bargaining agreement with the Sheet Metal Workers, since an alleged breach of contract by Federal did not alter the nature of the dispute. After considering the merits of the dispute, the Board awarded the casing and plenum work to employees represented by the Bricklayers.

National Maritime Union[47] presented an issue of whether a jurisdictional dispute existed between two unions, each of which claimed referral privileges under existing collective-bargaining agreements. The work in dispute involved the assignment of unlicensed seamen aboard the employer's vessels which were being transferred from the employer's east coast to its west coast fleet. The National Maritime Union refused to man and sail vessels to the west coast without a prior commitment from the employer that the vessels when relocated would be manned with NMU members rather than with members of the Seafarer's International Union. The NMU contended that no jurisdictional dispute existed because the dispute was not between groups of employees, but between the Employer and the NMU. The Board found that the employer's collective-bargaining agreement with NMU, which covers all unlicensed seamen, appeared to be restricted to the employer's east coast operations. The Board further found that the employer maintained a two fleet concept; that the jobs of the unlicensed personnel in the west coast fleet were assigned to the SIU and in the east coast fleet to the NMU; and that NMU members had never held jobs on the employer's west coast vessels. Before the dispute, the Board noted, vessels were transferred from one coast to another with a resultant change in crews and unions. In rejecting NMU's work preservation argument, the Board concluded that NMU was not attempting to protect work which had traditionally been performed by its members, but was attempting to expand its traditional domain to acquire work which it never performed. After considering the merits of the dispute the Board awarded the disputed work to employees represented by SIU.

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[47] *Natl Maritime Union of North America (Prudential-Grace Lines)*, 1904 NLRB No 190

K. Union Requirement of Excessive Fees

Section 8(b)(5) makes it an unfair labor practice for a union to charge employees covered by a valid union-security agreement a membership fee "in an amount which the Board finds excessive or discriminatory under all the circumstances." The section further provides that "In making such finding the Board shall consider, among other relevant factors, the practices and customs of labor organizations, in the particular industry, and the wages currently paid to the employees affected."

The prohibition against excessive and discriminatory membership fees was involved in a case decided during the past year, *Loc. 749, Boilermakers.*[48] In that case the Board found the union violated the Act by charging an employee, Louis Daniel, an excessive reinstatement fee and requesting the employer to discharge him for failure to pay the fee. Daniels was required by union bylaws to pay a $250 reinstatement fee, $100 above the original initiation fee. In finding a violation, the Board, in agreement with the trial examiner, relied on these circumstances: (1) the reinstatement fee was used as a form of penalty; (2) the $250 fee was equal to about 2 weeks' take home pay for at least some employees, a higher percentage of take home pay than was required by other unions in the area, including sister locals of the respondent union; and (3) nine other unions, including four sister locals, in the industry and in the general area of the union's location, had lower reinstatement fees than the union and had reinstatement fees no higher than their original initiation fees although their members' rates of pay were the same. The union was ordered to cease the illegal activity, refund $100 to each employee who for a certain period was required to pay the excessive reinstatement fee, and pay Daniels any sum he may have paid in excess of dues required of him to maintain membership in the union as a condition of employment.

L. Recognitional Picketing

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 for "an object" of "forcing or requiring" an employer to recognize or bargain with it, or employees to accept it, as the bargaining representative, unless the labor organization is currently certified as the employees' representative. But a union which has not been certified is barred from such picketing in the three general areas delineated in subparagraphs (A), (B), and (C) of section 8(b)(7).

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[48] *Loc. 749, Intl. Brotherhood of Boilermakers (Calif. & Blowpipe & Steel Co.)*, 192 NLRB No. 58.

Recognitional or organizational picketing is prohibited under the three subparagraphs of section 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." This last subparagraph (C) has two provisos: The first provides that if a timely petition is filed, the representation proceeding shall be conducted on an expedited basis; the second provides, however, that picketing for informational purposes as set forth therein is exempted from the prohibition of that subparagraph unless it has the effect of inducing work stoppages by employees of persons doing business with the picketed employer.[49]

In *Longshoremen's, Loc. 8*,[50] Waterway Terminals Co. and the Inland Boatmen's Union, which represented Waterway's employees, filed charges alleging that Longshoremen, Local 8, had violated section 8(b)(7)(A) of the Act by engaging in certain proscribed activity with an object of forcing Waterway to assign disputed work of loading and unloading railcar freight to former employees of Interstate Carloading Co. who were represented by Local 8. The Board, in agreement with the trial examiner, found that Waterway's decision to discontinue the services of Interstate (thereby, in effect, requiring termination of Local 8's members) and to assume the performance of railcar loading tasks using its own employees was based solely on considerations of economy. In further agreement with the trial examiner, the Board found that the picketing, which sought mass displacement of IBU-represented employees in favor of Local 8 members, had an immediate recognitional object and was not for the sole purpose of gaining "reinstatement" of employment for Local 8 members. Notwithstanding Local 8's claim that its picketing was not "recognitional," the trial examiner noted that there existed at all relevant times a collective-bargaining agreement valid on its face and of reasonable duration, in which Waterway recognized IBU as the bargaining representative of its employees. In these circumstances, no question con-

[49] The second proviso to sec. 8(b)(7)(C) states "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"

[50] *Intl Longshoremen's & Warehousemen's Union Loc. 8 (Waterway Terminals Co.)*, 193 NLRB No. 65.

cerning representation could appropriately be raised and the Board ordered Local 8 to cease its unlawful conduct.[51]

In *Claremont Polychemical Corp.*,[52] Chairman Miller and Member Kennedy agreed with the trial examiner that employees who picketed contrary to the express provisions of section 8(b)(7)(B) of the Act were not entitled to reinstatement and backpay. This conclusion was grounded on the employees' act of picketing for recognition within 1 year of the holding of a valid election, an activity specifically interdicted by section 8(b)(7)(B) of the statute. In the opinion of the majority, where, as here, the activity engaged in by the employee is the participation in an activity which contravenes the policies of the Act, the employee has forfeited the right to invoke other provisions of the same statute to restore him to his job with backpay. Member Fanning, noting that section 8(b)(7)(B) is specifically concerned with unfair labor practices and says nothing about strikers who engage in picketing proscribed by it, saw no reason for the Board to construe that section as if it contained a specific provision withdrawing employee status from picketing strikers. Member Fanning stated that the majority forgot that this was a case involving a legitimate organizational campaign resulting in a proven majority and a conventional request for recognition. Member Fanning further stated that picketing was not a part of the campaign, but followed it and, in his view, was a result of unfair labor practices. In such circumstances Congress did not mean to penalize employees who engaged in peaceful picketing, Member Fanning observed.

In *Carpenters Dist. Council*[53] the Board reversed the decision of a trial examiner and found the union violated the Act by picketing Shepard Marine Construction Co. with an object of organizing or gaining recognition for a unit of the company's employees, although a valid election had been conducted for such employees within the 12 months preceding the picketing. The union contended that the election was held in an inappropriate unit so that picketing after

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[51] In so holding the Board stated that it regarded an earlier 10(k) proceeding at 185 NLRB No. 35 (1970), involving the same parties, only as background to the issues of the case and that it did not rely on the trial examiner's findings in the earlier case in reaching the decision in the later case. The earlier 10(k) proceeding was initiated pursuant to charges filed by Waterway and IBU, alleging that Local 8 had violated sec. 8(b)(4)(D) by picketing Waterway. The Board issued a decision and order quashing notice of hearing in which it found that the picketing of Local 8 directed against Waterway was solely for the object of preserving the disputed carloading work for the employees who had been doing it and who had selected Local 8 to represent them. The Board further found that the dispute was not the type of controversy Congress intended the Board to resolve pursuant to sec. 8(b)(4)(D) and sec. 10(k). Chairman Miller and Member McCulloch dissented from the opinion of the Board majority.

[52] *Loc. 707, Highway & Local Motor Freight Drivers, Intl. Brotherhood of Teamsters (Clarement Polychemical Corp.)*, 196 NLRB No 75.

[53] *Carpenters Dist. Council of Detroit, Wayne & Oakland Counties, United Brotherhood of Carpenters (Shepard Marine Construction Co.)*, 195 NLRB No 97.

certification of that election involved no violation of section 8(b)(7)(B). The Board rejected this argument, noting that appropriately the issue should have been raised in the earlier representation proceeding, that the issue might also have been raised initially in the 8(b)(7)(B) proceeding but instead was raised by amendment of the answer, and that the contention was not supported by an offer of proof in lieu of testimony. In these circumstances the Board saw no basis for invalidating the election and accordingly found that the union's recognitional picketing within 12 months of the election violated section 8(b)(7)(B) of the Act.

Operating Engineers, Loc. 4[54] involved five unions which successively picketed Seaward Construction Co. for a recognitional object. The picketing exceeded 30 days without an election petition being filed, but no single union picketed for more than 30 days. Members Fanning and Jenkins agreed with the trial examiner that while evidence showed an understanding among the unions for successive picketing of Seaward, the coordination thereafter among the unions was minimal, consisting of travel to the project by union officials in one automobile. In these circumstances Members Fanning and Jenkins agreed with the trial examiner that the 8(b)(7)(B) complaint should be dismissed. Chairman Miller, dissenting, would find that the five unions were engaged in a joint venture in picketing a Seaward work project and that such picketing violated the Act. He noted the picketing was conducted with each union beginning when its predecessor ceased. Signs, he said, were the same, with each union merely changing the name thereon as it began picketing. To countenance such "relay" picketing, the Board would permit unions with a common purpose effectively to evade the strictures of section 8(b)(7) of the Act, he reasoned. In this regard, he pointed out that the five unions "all of [which] were protesting Seward's nonunion status, would together be permitted almost 5 months of picketing, which far exceeds the statutory limit of 30 days."

M. Hot Cargo Clauses

Section 8(e) makes it an unfair labor practice for an employer and a union 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. It also provides that any contract

[54] *Intl Union of Operating Engineers, Loc. 4 (Seaward Construction Co.)*, 193 NLRB No. 87.

"entered into heretofore or hereafter containing such an agreement shall be to such extent unenforceable and void." 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 had occasion to determine whether various contract clauses came within the purview of section 8(e). The standard for evaluation of such clauses has been clarified by the Supreme Court in *Natl. Woodwork Manufacturers*,[55] where the Court held that section 8(e) does not prohibit agreements made between an employee representative and the primary employer to preserve for the employees work traditionally done by them and that in assessing the legality of a challenged clause "[t]he touchstone is whether the agreement or its maintenance is addressed to the labor relations of the contracting employer *vis-a-vis* his own employees." [56]

1. Fairly Claimable Unit Work

Union efforts to obtain contract provisions protecting the work or the work standards of the employees in the units they represented were the subject of Board consideration in several cases decided during the report year. In *Teamsters, Local 282* [57] the full Board ruled unlawful a union "high rise" clause which required, essentially, that the driving of all trucks to, from, or on construction sites be performed by employees represented by the union. The Board found that members of Local 282 in the relevant work units did not perform, and had not previously performed for their employers, a substantial portion of the work which the union assertedly sought to safeguard for them. Thus, for several of the employers, employees of the supplier or contractors, rather than employee-members of Local 282, drove suppliers' trucks "entering or leaving" the employers' construction sites for the purpose of making deliveries. Members of Local 282 also did not drive subcontractors' trucks to transport personnel, tools, and materials to, from, and on the employers' construction projects. The Board concluded that the clause was intended to benefit all Local 282 members within the geographic area of the union's jurisdiction and that the object of the high rise clause was not limited to the labor relations of the contracting employers *vis-a-vis* their own employees, but was

[55] *Natl. Woodwork Mfrs. Assn.* v. *N.L.R.B.*, 386 U.S 612 (1967); Thirty-second Annual Report (1967), p. 139.
[56] *Id* at 645.
[57] *Loc. 282, Intl. Brotherhood of Teamsters (D. Fortunato, Inc.)*, 197 NLRB No. 124.

to make sure subcontractors and suppliers employed Local 282 drivers. In holding that the work sought was neither unit work nor fairly claimable, the Board limited its findings to the facts of the case before it, observing that it need not consider whether a properly drafted clause which is limited to onsite driving might not be appropriate.

In *IBEW, Loc. 1186*[58] the union and Pacific Electrical Contractors Association contracted that employees will be assigned to work only on material, equipment, and apparatus owned by their employers. A Board majority of Chairman Miller and Members Fanning and Brown agreed with the trial examiner that the contract terms violated section 8(e). The trial examiner found immediate objective of the clause involved was related to the ownership of the equipment and apparatus and was in essence aimed at nonsignatory employers who utilized nonunion employees to install the materials. Furthermore, in finding the construction industry proviso inapplicable, the trial examiner reasoned that the fixing of ownership of the material, equipment, and apparatus was not related to the contracting or subcontracting of work to be done at the site of construction. The Board, majority, in agreement with the trial examiner, concluded that a secondary objective of the contract clause was related to jobsite work, but that such objective was one step removed from the action required by the contract terms. The association and union were ordered to cease the unlawful agreement. Member Jenkins dissented. In his view the contract clause in question was a valid work protection clause. Member Jenkins noted electricians have historically and traditionally performed the work they now seek to preserve. He pointed out that the majority seemingly did not disagree with the proposition that the clause had a work preservation objective, but they deemed it unlawful because of the means by which the objective was to be accomplished. He viewed it as inconsistent to hold a clause to be a work protection one and also to be unlawful. Member Jenkins would conclude the General Counsel did not show the agreement was unlawful under section 8(e).

2. Exemption for On-Site Construction Work

The limitation of the construction industry proviso concerning "work to be done at the site of the construction" was construed by the Board in several cases during the past year. In agreement with the trial examiner, the Board, in *Southern Calif. Pipe Trades*,[59] found both the employers council and the union violated the Act by agreeing to a provision requiring employer-members of the employers council

[58] *Intl. Brotherhood of Electrical Workers, Loc 1186 (Pacific Electrical Contractors Assn.)*, 192 NLRB No. 43.

[59] *Southern Calif. Pipe Trades Dist Council 16 (Seefore Corp.)*, 193 NLRB No. 121.

to cease or refrain from purchasing prefabricated preinsulated loops from Seefore Corp., or other manufacturers or fabricators, for installation in underground distribution piping systems. Fabrication of preinsulated expansion loops was not work traditionally or historically performed on site by employees of the contractor-employer members of the employers council, it was found. Thus, the record showed that the loops in question had been installed by employer-members of the employers council and had been purchased from manufacturers who were not members of the employers council and who did not have a contract with the union. In *Natl. Woodwork* [60] the Supreme Court upheld a rule, to the effect that members would not handle any door which had been fitted before arriving at the jobsite, as intended to protect and preserve unit work of jobsite carpenters and hence not within the proscription of the Act. The trial examiner distinguished that case, observing that the court's reasoning was premised on evidence that the work had been historically done by on-site carpenters. In the instant case, the record precluded any finding that fabrication of preinsulated expansion loops was done historically by union members. The union and employers council were ordered to cease the unlawful activity.

In *Boilermakers, Loc. 92*,[61] the Board, with Chairman Miller concurring separately affirmed the conclusion of a trial examiner that the unions violated section 8(e) of the Act by entering into, maintaining, and giving affect to contract clauses requiring Macias-Farwell Co. to cease business with Bigge Drayage Co. The City of Los Angeles, which was constructing a hydro-electric generating plant near Custaic, California, contracted with Macias for the furnishings and installation at the Custaic project of sections of penstock, an imported construction material. Macias in turn contracted with Bigge for transportation of penstock from shipside to a storage area known as Custaic Junction. Bigge's employees were represented by the Teamsters. The Boilermakers, representing Macias' employees, sought by contract to acquire the work of loading and unloading penstock and other material at the Custaic Junction storage facility, which was ultimately to be installed at the Custaic jobsite, some 19 miles away. The trial examiner rejected the argument that the storage site established for the specific purpose of servicing the primary construction site was "on site" within the meaning of the construction industry proviso in section 8(e). The trial examiner concluded that the unions' contract provided that the loading and unloading at Custaic Junction be performed exclusively by Boilermaker employees of Macias and

[60] 386 U.S. 612, *supra*.
[61] *Intl. Brotherhood of Boilmakers, Loc. 92 (Bigge Drayage Co.)*, 197 NLRB No 34.

required Macias to cease business with Bigge. The Board further agreed with the trial examiner that the loading and unloading of penstock at Custaic Junction was not work traditionally or historically performed at the site or by Boilermaker employees of Macias. Chairman Miller would have found that the unions' claim for the work at Bigge's storage area resulted in a "reentry" of provisions in the unions' agreement whereby signatory employers were required to perform certain "offsite" work solely through employers also a party to a contract with the Boilermakers. In his view, the effect of this provision, and a joint panel award issued interpreting the provision, was to require Macias to cease doing business with Bigge and award the loading and unloading to a signatory employer. Chairman Miller concluded that the respondents violated section 8(e) by entering into, maintaining, and giving effect to the union-signatory agreement. Because of this conclusion, he found it unnecessary to reach the question of whether the work sought by the unions was fairly claimable. The unions were ordered to cease the illegal conduct.

3. "Persons" and "Employers"

The meaning of the term "any employer" in section 8(e) was considered in several cases which came before the Board during the report year. In *Newspaper Drivers, Loc. 921* [62] a Board panel majority affirmed the trial examiner's decision that the company's newspaper dealers are employees and on that basis dismissed the allegation that the employer and union violated section 8(e) of the Act by entering into an agreement with certain newspaper dealers. The relationship of an employer and his employees does not fall within the ambit of section 8(e). The trial examiner, whose decision Members Fanning and Jenkins affirmed, noted that while the dealers possess numerous attributes of independent contractor status, these were not uncommon in employment relationships in the newspaper industry, and were not decisive when viewed in the light of the company's control over the manner and means by which the result of their work was to be accomplished. In Member Kennedy's view, the trial examiner failed to give proper weight to numerous entrepreneurial aspects of the relationship between the dealers and the company. Member Kennedy would have found that the dealers were independent contractors and remanded the case for a determination on the merits.

The principal issue in *Lufthansa German Airlines* [63] was whether

[62] *Newspaper & Periodical Drivers' Helpers Union Loc. 921, Teamsters (San Francisco Newspaper Printing* Co), 194 NLRB No 4.

[63] *Intl Assn. of Machinists (Lufthansa German Airlines)*, 197 NLRB No 18.

Congress intended to outlaw hot cargo agreements only when they were executed by statutory labor organizations and employers. Machinists and Lufthansa contended that in amending the Act in 1959 to close loopholes in the secondary boycott provisions, Congress extended the Act's protection against secondary conduct to airlines but did not make various unfair labor practice prohibitions applicable to airlines or their employees. A 4 to 1 Board majority rejected this interpretation of legislative intent stating instead that Congress, in closing a multitude of secondary boycott provision loopholes, could not have intended that the Board create another loophole by reaching the result the Machinists and Lufthansa sought. Thus, the majority decided that the Machinists and Lufthansa violated the Act by entering into and giving effect to an agreement whereby Lufthansa agreed to cease business with Marriott In-Flite Services. Despite the use of the phrase "any employer," in section 8(e), rather than "any person" as used in section 8(b)(4)(B), the majority stated that Congress intended to enact in section 8(e) a ban on hot cargo agreements at least as encompassing as the ban envisaged by drafters of section 8(b)(4)(B). Otherwise, the conferees could not have determined that the language of section 8(e) was a duplication of the terminology contained in the proposed hot cargo amendment to section 8(b)(4)(B) which they deleted from the bill. Furthermore, as noted by the majority, had the Machinists induced Lufthansa's employees to strike to force the company to cease business with Marriott, the union would have violated section 8(b)(4)(B). The majority reasoned it would be illogical to find unlawful a strike by the Machinists to force Lufthansa to cease business with Marriott under section 8(b)(4)(B), while holding a contract executed by the parties designed to achieve the identical result was not proscribed by section 8(e). Member Fanning dissented, finding persuasive evidence in the language of section 8(b)(4) itself to indicate that the 1959 amendments were not intended to give broader reach to the words "any employer." He stated that internally section 8(e) supports the conclusion that "employer" as used in section 8(e) does not mean "person." In his view, a construction which gives operative words a meaning other than the carefully drawn statutory definition carries a heavy burden of proof which was not met in this particular case. It was also Member Fanning's view that section 8(e) applies either to all agreements between all unions and employers or only to those agreements between statutory labor organizations and statutory employers. He was convinced the latter construction is correct.

N. Prehire Agreements

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

Among cases considered by the Board during the report year in which section 8(f) was a consideration was *Irvin-McKelvy Co.*[64] In that case Chairman Miller and Member Jenkins and Kennedy found the employer violated the Act by ceasing recognition altogether of District 50, Allied & Technical Workers, and recognizing the United Mine Workers as representative of employees working on projects not yet completed where District 50 had majority status. However, the violations found were limited to those projects not yet completed and on which the employer employed District 50 members. In other respects the Board, with Member Fanning dissenting, found merit in the employer's contention that invocation of a "most favored nation" clause after District 50 entered into a "projects only" agreement with a competitor of the employer caused the employer's contract with District 50 to become a project agreement. Therefore, reasoned the Board, at the termination of each project on which it was then working, the employer was free to terminate its relationship with District 50. The Board added that termination of the District 50 contract left the employer free to enter into genuine prehire agreements on any later projects with any union it wished, so long as it did not employ at such projects a work force of which a majority were District 50 members. Member Fanning, dissenting in part, agreed with the majority's findings of violations as far as they went, but would have gone further. He did not agree with the majority that because of invocation of the MFN clause, the employer was free to change its long-term contract with District 50 to a project agreement and cease relations with District 50 upon completion of each project. Since the respondent

[64] *David F. Irvin & James B. McKelvy, Partners, d/b/a Irvin-McKelvy Co.*, 194 NLRB No. 8.

had a substantially stable work force, and all its construction workers were members of District 50, Member Fanning was of the opinion that under the majority holding the respondent could only continue employment of its current work force if its employees switched allegiance to the union recognized by the respondent on each project, in apparent violation of section 8(a)(3). The employer was ordered to cease the illegal activity, to withdraw recognition from UMW as representative of employees who were working on projects covered by the District 50 contract and who were compelled to join UMW for fees and dues, and to continue to bargain with District 50 and give effect to its contracts with District 50 until completion of any projects covered by that contract.

O. Remedial Order Provisions

During the report year, the Board was confronted in a number of cases with the task of designing a remedy appropriate to the circumstances presented by the violations found and capable of effectuating the purposes of the Act. Of particular interest among them are cases involving remedies for violations of the bargaining obligation.

1. Bargaining Obligation Remedies

In *Heck's, Inc.*,[65] the Board considered the Union's request for additional relief against a background of companywide aggravated and pervasive unfair labor practices. Conduct at a single store of the employee involved could no longer be viewed in isolation, but was to be viewed in its total context, the Board observed. Accordingly, the Board ruled that the order entered in the case, except as expressly limited, applied to all of the Employer's employees and all of its operations wherever located. The Board further decided the mere posting of notices by the employer at its operations was insufficient to dispel the lingering effects of its widespread and pervasive unlawful conduct. In order to dispel fully the effects of such illegal activity, it was necessary that employees be able to read the notices fully and carefully at their leisure without fear that their interests in the notices would be noted by the employer, the Board said. Thus, the employer was ordered to mail copies of the posted notices to each employee. The Board decided that it was also necessary that the union be given reasonable

[65] 191 NLRB No. 146, supplementing 172 NLRB No. 255 (1968), which was remanded by the U.S. Court of Appeals for the District of Columbia Circuit for further consideration of the union's request for additional extraordinary remedies, in light of the court's decision in *N.L.R.B.* v. *Tidee Products*, 426 F.2d 1243 (1970).

access for a 1-year period to the employer's bulletin boards and be given a list of the employee's names and addresses, which lists were to be kept current for a 1-year period. These two requirements, the Board said, were designed to insure that employees have an opportunity to become fully informed, in an atmosphere free of restraint and coercion, concerning all matters relevant to their choice of a bargaining representative. As for the union's request for monetary relief, a 4 to 1 Board majority held the Board lacked statutory authority to grant such relief, citing *Ex-Cell-O Corp.*[66] Moreover, assuming *arguendo* that the Board possessed such authority, the Board majority nevertheless concluded that this was not an appropriate case in which to exercise that authority because here the refusal to bargain did not rest on clearly meritless issues, in contrast to the issues in *Tiidee*,[67] which the court characterized as "patently frivolous." Member Brown disagreed with his colleagues and would have granted the *Ex-Cell-O* remedy in this case for the reasons stated in his dissent in *Ex-Cell-O*.

The Board devised additional remedies for the employer's refusal to bargain with the Electrical Workers in *Tiidee Products*.[68] In that case, the Board ordered the employer to pay to the Board and the union certain litigation costs and expenses in order to discourage future frivolous litigation. The Board found it proper and just that the employer should reimburse the Board and the union for their expenses incurred in the investigation, presentation, and conduct of these cases, including reasonable counsel fees, salaries, witness fees, transcript and record costs, printing costs, travel expenses, and per diem. Also, the Board ordered the employer to grant the union reasonable access, for the period of negotiations, to its bulletin boards and all places where notices to employees are customarily posted and to make available to the union a list of names and addresses of all employees and to keep the list current for a 1-year period. The Board viewed the additional remedies it devised as not theoretically perfect, but to be as far as the Board could go in the circumstances. The additional remedies would aid the union in rebuilding its strength so that it might bargain effectively and would discourage similar "brazen" refusals to bargain, the Board stated. Chairman Miller, concurring, stated that in his view the union was entitled to bulletin board use only as a remedy for interruption in communication between the union and employees which had been

[66] 185 NLRB No. 20 (1970).

[67] *N.L.R.B.* v *Tiidee Products*, 426 F.2d 1243 (C.A D C.).

[68] 194 NLRB No. 198, supplementing 174 NLRB 705 (1969), which was remanded by the U.S. Court of Appeals for the District of Columbia Circuit at 426 F.2d 1243 (1970) for further consideration of the Union's request for additional extraordinary remedies.

caused by the frivolous resort to litigation. For the same reason, he concurred in the order requiring the employer to furnish the union a current list of employee names and addresses. To the extent his colleagues indicated their purpose in providing the remedy was affirmatively to ally the Board with union reorganizational efforts, Chairman Miller disassociated himself from those views. The majority pointed out that all it was doing was restoring to the union an opportunity to achieve again what it had previously obtained by its own efforts, but then lost through frivolous litigation.

In a second *Tiidee*[69] case, the Board decided that the employer's illegal conduct was inextricably intertwined with the employer's refusal on frivolous grounds to bargain with the union in the earlier case,[70] and required the conclusion that it was part of the same pattern of patently frivolous litigation for the same unlawful object. The conduct found unlawful included the unilateral promulgation and implementation of work rules and the unilateral institution of a new hiring procedure. As part of the remedy, the Board ordered the employer to mail a signed copy of the notice accompanying the Board's order to each employee and to pay the Board and union costs and expenses incurred in the investigation, preparation, and presentation of the case. Member Kennedy, concurring, was of the opinion that the Court of Appeals for the District of Columbia, in remanding the case in light of the earlier *Tiidee* decision, was in essence finding that the instant case constituted frivolous litigation. Member Kennedy felt bound by the "law of the case" to order the employer to reimburse the Board and union for costs and expenses in the frivolous litigation. Chairman Miller dissented from that portion of the decision which awarded costs and attorneys' fees. He was unable to find the employer's defense was asserted frivolously. The dissenting Chairman observed that the majority relied on the extent of the employer's illegal activity and on the degree of union animus and hostility. He regarded the degree of employer hostility as having little to do with the frivolity of its defense.

Because reasons advanced by the employer to defend its refusal to bargain were found to be so insubstantial as to be frivolous, the Board, in *John Singer, Inc.*,[71] again issued remedies in addition to the conventional direction to bargain. All of the employer's offers to bargain were conditioned on preservation of its "right" to present to a court

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[69] *Tiidee Products*, 196 NLRB No 77, supplementing 176 NLRB 968, which was remanded by the U S. Court of Appeals for the District of Columbia, 440 F.2d 298, for further consideration of the union's request for additional extraordinary remedies.

[70] *Tiidee Products*, 194 NLRB No. 198, *supra*

[71] 197 NLRB No 7.

of appeals contentions attacking the validity of the Board's certification of Firemen & Oilers Local 125, it was noted. No meaningful bargaining can take place when at the same time the employer is contesting its bargaining obligation, the Board observed. Although a party may normally litigate issues to the full extent provided by law, the lack of substance to the employer's "defense" compelled the conclusion that its true motive was to delay enforcement of the determination that it had a statutory bargaining obligation. The grant of a remedy designed not only to correct the employer's past unlawful refusal to accord its employees' bargaining representative its statutory role, but to end that continuing conduct, was found necessary by the Board. Further, the remedy should provide a means of communication by the union with unit employees to facilitate the union's reclaiming the allegiance it enjoyed when selected by a majority in an election, the Board decided. Accordingly, the Board ordered the employer to grant the union, upon request, reasonable use of its bulletin boards, such access to continue through the period of negotiations, and make available to the union, upon request, a list of names and addresses of all employees currently employed and keep such a list current for 1 year following beginning of good-faith bargaining.

In *James Textile Corp.*[72] the Board, in light of the findings of the U.S. Court of Appeals for the Third Circuit and the record evidence, concluded that an order requiring the employer to bargain with Garment Workers Local 148–162 was appropriate. In its original decision, the Board found the employer did not violate the Act when it refused to recognize Local 148–162, which possessed authorization cards from a majority of employees, because the employer was awaiting a Board decision on its obligation to continue to bargain with a sister union, Local 62, which represented the employees in question before the removal by the employer of its plant. To find such a violation would be in derogation of its own processes, the Board reasoned. The court rejected the Board's conclusion that pending proceedings involving Local 62 sanctioned the company's refusal to recognize Local 148–162. The court noted that, on the date of the refusal, Local 148–162 unquestionably had been designated by a majority of the employees. The court further observed that the company had no dealing with local 62 for 5 years, and that a contract between an employer association and Local 62 had almost certainly expired by then. The court concluded that the purpose and motivation of the employer in denying union recognition were "grossly improper" and remanded the case to the Board for an appropriate remedy. In accord with the remand, the Board decided that the teaching of *Franks Bros. Co.* v.

[72] 197 NLRB No. 56, supplementing 184 NLRB No. 70 which was remanded by the U.S. Court of Appeals for the Third Circuit at 450 F.2d 462.

N.L.R.B.,[73] rather than *N.L.R.B.* v. *Fansteel Metallurgical Corp.*,[74] was applicable. In so deciding, the Board noted that in the case before it there was no evidence in the record of any unlawful conduct by the union or by its supporters which led to its loss of majority status. To the contrary, the Board said, in the case before it, as in *Franks Bros.*, loss of union majority occurred in the normal course of business at the same time the respondent was unlawfully refusing to recognize the union and at the time the Respondent was embarked on a "grossly improper" course of conduct to gain time to achieve employee disclaimer of the union. Accordingly, the Board concluded that a bargaining order was required to remedy the 8(a)(5) violation found by the court. The Board noted in passing that the employer's course of unlawful conduct would also warrant a bargaining order under the Supreme Court's holding in *Gissel Packing Co.*[75]

2. Plant Closing Remedies

In agreement with the trial examiner, the Board, in *Plastics Transport*,[76] found that the employer closed its Waterman, Illinois, terminal in retaliation for the union activity of its employees. The trial examiner found that Plastics Transport Inc. and Stafford Trucking Inc. were the same company and that Plastics' Waterman terminal was operated merely as one of the terminals of Stafford with half of its business consisting of interstate shipments under Stafford's authorization. Furthermore, noted the trial examiner, Plastics had ceased intrastate operations, but continued interstate operations using its Portage, Wisconsin, drivers operating out of the Portage terminal. The employer was ordered to cease the unlawful conduct, resume operations from the Waterman terminal, offer reinstatement to strikers who offered unconditionally to return, and bargain with the union upon request. Member Kennedy would have ordered the employer to offer reinstatement to the discriminatees by either reestablishing the Waterman terminal or offering reinstatement to the discriminatees at the Portage terminal, together with moving expenses.

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[73] 321 U.S 702 (1944). There, the Court held that where the loss of a union majority status cannot be attributable to any unlawful or unprotected conduct of the union supporters, but such loss occurs in the normal course of business during a time when the employer is embarked on a course of action in flagrant disregard of the statute and employee rights to union representation, a bargaining order will lie

[74] 306 U S. 240 (1939). The Court held that where loss of a union's majority status was attributable to the employees' misconduct, no bargaining order lies

[75] 395 U S. 575 (1969).

[76] *Plastics Transport,* 193 NLRB No 10.

Primary issues involved in *Summit Tooling* [77] were the employer's decision to close down its Summit manufacturing operation and the nature of the order to remedy the employer's unlawful act of refusing to bargain with the union concerning the effect on employees of the employer's decision. Members Jenkins and Kennedy found no unlawful refusal to bargain in the unilateral decision to close the Summit manufacturing operation. They noted that, although the employer's action could be characterized as a partial closing, the practical effect of closing that operation was to take the employer out of the business of manufacturing tool and tooling products. That part of the business which remained, performed by Ace Tool Engineering Co., had little relationship to the work which was performed by Summit, nor did it utilize skills of employees employed by Summit, the panel majority noted. Although the panel majority nonetheless found that the closing was discriminatorily motivated, in the circumstances of the case they concluded that practical considerations dictated against ordering reestablishment of the Summit operation. Member Fanning agreed that the closing of the Summit operation was a "partial closing," and, in view of what he considered controlling precedent cited by the trial examiner, would have found unlawful the employer's failure to afford the union an opportunity to bargain about its decision to discontinue the Summit operation. He also was of the opinion that the majority's order did not remedy the unlawful refusal to bargain, since its wage provisions applied only to employees who were discriminatorily discharged before the decision to close and not to employees affected by the unlawful refusal to bargain. For that reason and because the decision to close the Summit operation was not based on economic considerations, Member Fanning saw no practical considerations weighing against a recommendation of the trial examiner that the employer be ordered to reopen the Summit operation. The employer was ordered to cease the unlawful conduct, bargain with the union upon request concerning the effects of the closing of the Summit operation, establish a preferential hiring list, and, if operations at Summit are ever resumed in the South Bend area, offer reinstatement to Summit employees following the system of seniority as provided under the collective-bargaining contract.

3. Other Provisions

In *L.C.C. Resort* [78] an issue raised dealt with the computation of backpay for a discriminatee, Strum. Strum's gross backpay for the second quarter of 1966 was $2,000, interim earnings of $220 in that

[77] *Summit Tooling Co.*, 195 NLRB No. 91.
[78] *L.C.C. Resort, Inc. d/b/a Laurels Hotel & Country Club*, 193 NLRB No. 26.

quarter were offset by expenses, and therefore his net backpay for the second quarter was $2,000. For the third quarter of 1966, gross backpay was $3,000, interim earnings were $3,565, and therefore no net backpay was due. The interim earnings for the third quarter resulted from deferred compensation for Strum's employment during the second and third quarters of 1966. The Board, with Chairman Miller dissenting, found no merit in the employer's contention that Strum's earnings should be prorated between the second and third quarters or that Strum should be regarded as unavailable for work from the date on which his work in the second quarter began until the date on which the second quarter ended. Thus, the majority agreed with the trial examiner that, for the purpose of determining the quarter in which interim earnings should be credited, the determinative test is the date the wages are due and payable. Such a rule conforms not only to the practice under social security, but to the practice for income tax purposes as well, the trial examiner observed. Agreeing, the Board majority observed in a footnote that to accept the employer's argument would create difficult compliance problems for the regional offices by attemping to go behind social security reports and determine when wages were earned rather than received. Dissenting, Chairman Miller said the majority is "permitting a mechanistic application of a practice which, in this case, has been shown to operate unfairly and illogically." He thought it ill advised to treat as available for work a man actually working full time on a job, distinguished only by the fact that compensation would be deferred. In Chairman Miller's view, the Board in the instant case had all the facts necessary to make an appropriate adjustment as to Strum's earnings, and should not have hesitated to do so.

In *Iron Workers, Loc. 426*,[79] the Board agreed with the trial examiner that the union unlawfully attempted to cause, and caused, an employer to refuse to employ an individual because he was not a member of the union and did not have a work permit issued by it. The Board noted that the union's discriminatory policy was carried out by its business manager and steward, but that a letter sent to the employee was from the union's counsel rather than from the business manager or steward. It was further noted that the counsel's letter not only disclaimed that the union had done anything wrong, but also failed to indicate that the business agent, steward, and others responsible for carrying out union policies had been instructed to cease their discrimination. In view of the union's failure to inform its stewards and membership that work permits were not required, a failure which was a substantial factor in the union's continued maintenance and enforcement of its illegal work permit policy, the Board did not believe the

[79] *Reinforcing Iron Workers, Loc. 426 (Tryco Steel Corp.)*, 192 NLRB No 1.

union had unequivocally expressed willingness to cease its unlawful conduct. Accordingly, the union was ordered to cease the unfair labor practices, make the employee whole for any loss suffered by discrimination, and notify job stewards and the employer that it does not require work permits as a condition of employment.

In *Chalk Metal Co.*[80] the only issue before the Board was whether a broad remedial order against an employer representative in a personal capacity was justified. The employer's representative, Gladys Selvin, was found to have engaged in surface bargaining. While this was only the second case in which she has been named as a party, she had, as a labor relations consultant for various companies, repeatedly engaged in a pattern of bad-faith bargaining which resulted in numerous illegal refusal-to-bargain findings against employers she represented. An examination of those cases by the Board revealed Selvin's recurrent failure to approach bargaining with a genuine desire to reach agreement but, seemingly, with a strategy to avoid, delay, and frustrate meaningful bargaining with the union. The Board concluded that the findings of the present case, when viewed in conjunction with those of the many other decisions involving Selvin, demonstrated that Selvin has a proclivity to violate the Act, which required a broad remedial order. The employer was ordered to cease the illegal conduct, bargain with the union upon request, and offer reinstatement and backpay to various discriminatees. Mrs. Selvin was ordered to cease the unlawful conduct, bargain with the union upon request, and bargain in good faith with any union when she is agent for any employer subject to Board jurisdiction.

[80] 197 NLRB No. 175.

VII

Supreme Court Litigation

During fiscal year 1972, the Supreme Court decided five cases involving review of Board orders. It also decided one case involving the Board's authority to seek injunctive relief prohibiting state court action preempted by the Act.

A. Bargaining Obligation With Respect to Retired Employees

In *Pittsburgh Plate Glass*,[1] the Court[2] rejected the Board's conclusion that the benefits to be received by already retired employees are a mandatory subject of collective bargaining, and that therefore the company violated section 8(a)(5) and (1) of the Act by modifying, during the term of the collective-bargaining agreement, the health insurance plan provided therein for retirees without first bargaining with the union. The Court noted that the collective-bargaining obligation extends only to the "terms and conditions of employment" of the employer's "employees in the appropriate bargaining unit." It held that the definition of "employee" in section 2(3) of the Act could not be construed to include retirees, for the "inequality of bargaining power that Congress sought to remedy was that of the 'working' man, and the labor disputes that it ordered to be subjected to collective bargaining were those of employers and their active employees." It further held that retirees could not be appropriately included in the unit with the active employees because "they plainly do not share a community of interests [with the active employees] broad enough to justify [such] inclusion. . . ."

The Court also rejected the Board's alternative theory that, even if retirees were not bargaining unit employees, their benefits were

[1] *Allied Chemical & Alkali Workers of America, Loc 1* v *Pittsburgh Plate Glass Co., Chemical Div*, 404 U.S. 157, affg. 427 F.2d 936 (C.A 6), denying enforcement 177 NLRB 911.

[2] Justice Brennan wrote the opinion for the Court; Justice Douglas dissented

nevertheless a mandatory subject of bargaining because they "vitally affect" the employment conditions of active employees, influencing the value of their current and future benefits. The Court acknowledged that matters concerning parties outside the bargaining unit could be mandatory bargaining subjects if they "vitally affect" the terms and conditions of employment of bargaining unit employees. However, the Court found, contrary to the Board, that "the effect [which] . . . bargaining in behalf of pensioners would have on the negotiation of active employees' retirement plans is too speculative a foundation on which to base an obligation to bargain."

Finally, the Court held that the company, in making the change in retirement benefits, did not run afoul of section 8(d) of the Act, which requires that a party proposing a modification continue "in full force and effect . . . all the terms and conditions of the existing contract" until its expiration. In the Court's view, the provisions of section 8(d) bar only unilateral mid-term modification of contract terms covering mandatory subjects of bargaining, and not, as here, a contract term covering a permissive subject.

B. Board's Authority to Determine Jurisdictional Disputes Where Affected Employer is not a Party to a Voluntary Method of Adjustment

Section 8(b)(4)(D) of the Act makes it an unfair labor practice for a union to exert strike pressure for the purposes of forcing "any employer to assign particular work to employees in a particular labor organization or in a particular trade, craft, or class rather than to employees in another labor organization or in another trade, craft, or class. . . . " If such a charge is filed and deemed meritorious, the Act, instead of providing for the immediate institution of an unfair labor practice proceeding, suspends further action on the 8(b)(4)(D) charge pending an effort to resolve the underlying jurisdictional dispute. Thus, under section 10(k):

> . . . the Board is empowered and directed to hear and determine the dispute out of which such unfair labor practice shall have arisen, unless, . . . the parties to such dispute submit to the Board satisfactory evidence that they have adjusted, or agreed upon methods for the voluntary adjustment of the dispute.

In *Plasterers' Loc. 79*,[3] the Court[4] affirmed the Board's longstanding view that an employer, picketed to force reassignment of work, is a "party" to the "dispute" for purposes of section 10(k). Accordingly, unless the employer, as well as the two unions involved, has agreed on a voluntary method of adjustment, the Board must hear and determine the dispute under section 10(k).

The Court held that "[t]he phrase 'parties to the dispute' giving rise to the picketing must be given its common-sense meaning corresponding to the actual interests involved here." Finding that the resolution of the dispute would "practically, affect [the employers'] business in a radical way," the Court concluded that "Congress intended to protect employers and the public from the detrimental economic impact of 'indefensible' jurisdictional strikes. It would therefore be myopic to transform a procedure that was meant to protect employer interests into a device that could injure them."

Nor, in the Court's view, was a different conclusion required because the employer is not bound by the § 10(k) decision. "[T]he § 10(k) decision standing alone, binds no one. No cease-and-desist order against either union or employer results from such a proceeding; the impact of the § 10(k) decision is felt in the § 8(b)(4)(D) hearing because for all practical purposes the Board's award determines who will prevail in the unfair labor practice proceeding."

C. Extent to Which a Successor Employer is Required to Assume Bargaining Obligations of Predecessor Employer

In *Burns*, Wackenhut,[5] a company that provided plant protection services for a Lockheed Aircraft plant, had entered into a collective-bargaining agreement with the union certified by the Board as the majority representative of Wackenhut's guards. A few months later, Wackenhut's service contract with Lockheed expired, and Wackenhut was succeeded by Burns. Burns employed 27 of the 42 Wackenhut guards, but refused to recognize or bargain with the certified union or honor the collective agreement. The Court[6] sustained the Board's finding that Burns was a successor to Wackenhut and thus violated section 8(a)(5) and (1) of the Act by refusing to recognize and bargain with the union. The Court held that, "where the bargaining unit remains unchanged and a majority of the employees hired by the new employer are represented by a recently certified bargaining agent,"

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[3] *N.L.R.B.* v. *Plasterers' Loc 79, Operative Plasterers (Texas State Tile & Terrazzo Co.)*, 404 U.S. 116, reversing 440 F.2d 174 (C.A D.C.), denying enforcement 172 NLRB No. 77.

[4] Justice White wrote the opinion for a unanimous Court.

[5] *N.L.R.B.* v. *Burns Intl. Security Services*, 406 U.S. 272, affg. 441 F.2d 911 (C.A. 2), enfg. in part and setting aside in part, 182 NLRB 348

[6] Justice White wrote the decision for the Court. Justice Rehnquist, joined by Justices Brennan and Powell, and Chief Justice Burger, filed a separate opinion concurring in part and dissenting in part.

the new employer has an obligation to bargain with the union which represented the predecessor's employees.

The Court, however, rejected the Board's conclusion that the new employer further violated its bargaining obligation under the Act by refusing to honor the collective-bargaining agreement negotiated by the predecessor. In the Court's view, to impose the outstanding collective agreement on a successor employer would be contrary to the policy of free collective bargaining reflected in section 8(d) of the Act and the principles articulated in *H. K. Porter Co.* v. *N.L.R.B.*, 397 U.S. 99.[7]

Finally, the Court held that Burns had not violated its duty to bargain with the union by unilaterally establishing the initial terms of employment. "Although a successor employer is ordinarily free to set initial terms on which it will hire the employees of a predecessor, there will be instances in which it is perfectly clear that the new employer plans to retain all of the employees in the unit and in which it will be appropriate to have him initially consult with the employees' bargaining representative before he fixes terms. In other situations, however, it may not be clear until the successor employer has hired his full complement of employees that he has a duty to bargain with a union, since it will not be evident until then that the bargaining representative represents a majority of the employees in the unit as required by § 9(a) of the Act . . . ." The Court concluded that this case fell in the second category, since "Burns' obligation to bargain with the union did not mature until it had selected its force of guards late in June."

D. Union Solicitation on Company Property

In *Central Hardware*,[8] the company promulgated and enforced a rule baring union solicitation by nonemployees in the parking lots which surrounded its stores. The Board found that the company's action violated section 8(a)(1) of the Act, since the parking lots were "accessible to the public without limitation" and thus could not be closed to union organizers under the principles of *Amalgamated Food Employees Loc. 590* v. *Logan Valley Plaza, Inc.*, 391 U.S. 308.[9] The Court [10] held that *Logan Valley* was inapplicable. The shopping center there had the attributes of a "municipal 'business block' " and "First

[7] See Thirty-fifth Annual Report (1970), p. 72.

[8] *Central Hardware Co.* v. *N.L.R.B.*, 407 U.S. 536, vacating and remanding 439 F.2d 1321, enfg. 181 NLRB 491.

[9] In that case, peaceful picketing by union agents on a parking lot within a shopping center was held to be within the protection of the First Amendment. See Thirty-third Annual Report (1968), p. 136.

[10] Justice Powell wrote the opinion of the Court. Justice Marshall wrote a dissent, which was joined by Justices Douglas and Brennan.

and Fourteenth Amendment free-speech rights were deemed infringed under the facts of that case. . . ." The Court added that, "[b]efore an owner of private property can be subjected to the commands of the First and Fourteenth Amendments the privately owned property must assume to some significant degree the functional attributes of public property devoted to public use." The fact that the company's parking lots were open to the public did not satisfy this test, for "[s]uch an argument could be made with respect to almost every retail and service establishment in the country, regardless of size or location."

Accordingly, the Court concluded that the guiding principle for adjusting conflicts between section 7 rights and property rights is *N.L.R.B.* v. *Babcock & Wilcox*, 351 U.S. 105, where the Court held that "an employer may validly post his property against nonemployee distribution of union literature if reasonable efforts by the union through other available channels of communications will enable it to reach the employees with its message and if the employer's notice or order does not discriminate against the union by allowing other distribution" (*id.* at 112). The Court, noting that the Board had found that no reasonable means of communication with employees were available to the union organizers other than solicitation on the company's parking lots, remanded the case to the court of appeals to review that finding "in light of the principles of [*Babcock & Wilcox*]."

E. Scope of Protection Under Section 8(a)(4) of the Act

Section 8(a)(4) of the Act provides that: "It shall be an unfair labor practice for an employer to discharge or otherwise discriminate against an employee because he has filed charges or given testimony under this Act." In *Scrivener*,[11] the Court [12] held that section 8(a)(4) encompassed the discharge of employees because they had given statements to a Board agent investigating an unfair labor practice charge filed against the employer, not withstanding that they had neither filed the charge nor testified at the formal hearing thereon. The Court pointed out that: "The Act's reference in § 8(a)(4) to an employee who 'has filed charges or given testimony,' could be read strictly and confined in its reach to formal charges and formal testimony. It can also be read more broadly." The Court found the broad reading to be in conformity with the Board's consistent interpretation for over 35 years, and "the practicalities of appropriate agency action." To protect those who participate in the formal aspects of Board proceedings, but not those who participate in "the important developmental stages . . .

[11] *N.L.R.B.* v. *Robert Scrivener, d/b/a AA Electric Co.*, 405 U.S. 117, reversing and remanding 435 F.2d 1296 (C.A. 8), denying enforcement 177 NLRB 504

[12] Justice Blackmun wrote the opinion for a unanimous Court.

would be unequal and inconsistent protection and is not the protection needed to preserve the integrity of the Board process in its entirety." The Court remanded the case to the court of appeals to consider unresolved jurisdictional and evidentiary issues.[13]

F. Authority of the Board To Secure Federal Court Injunction Against State Court Order Regulating Conduct Preempted by the Act

In *Nash-Finch*,[14] the Court [15] held that "the National Labor Relations Board may, through proceedings in a federal court, enjoin a state court order which regulates peaceful picketing governed by the federal agency." In this case, a union charged the company with the commission of unfair labor practices during an organizational campaign. After the trial examiner issued his decision sustaining the union's charges, the union began picketing the company's stores and the company obtained a state court injunction enjoining the picketing activities. The Board upheld the trial examiner's decision in part,[16] and then brought suit in the Federal district court to restrain enforcement of the state court injunction on the ground that it regulated conduct governed exclusively by the Act. The district court held that it was precluded from granting relief by 28 U.S.C. sec. 2283, which prohibits a Federal court from enjoining state court proceedings except as authorized by Act of Congress, "or where necessary in aid of its jurisdiction, or to protect or effectuate its judgments." The district court, whose decision was affirmed by the court of appeals, rejected the contention that the Board was within the exception recognized in *Leiter Minerals* v. *N.L.R.B.*, 352 U.S. 220, for suits brought by the United States. The Supreme Court reversed.

The Supreme Court held that the Board has implied authority to obtain a Federal injunction against state court action preempted by the Act in order to prevent "frustration of superior federal interests." The Court further held that such an injunction falls within the *Leiter Minerals* exception to section 2283. The fact that the suit is brought by an administrative agency rather than by the Attorney General is "irrelevant." "The purpose of § 2283 was to avoid unseemly conflict between the state and federal courts where the litigants were private persons, not to hamstring the Federal Government and its agencies in the use of the federal courts to protect federal rights."

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[13] On remand, the court of appeals enforced the Board's order.

[14] *N.L.R.B.* v. *Nash-Finch Co., d/b/a Jack & Jill Stores,* 404 U.S. 138, reversing and remanding 434 F.2d 971 (C.A. 8)

[15] Justice Douglas wrote the opinion of the Court. Justice White dissented, joined in part by Justice Brennan.

[16] 175 NLRB 458.

VIII

Enforcement Litigation

Board orders in unfair labor practice proceedings were the subjects of judicial review by the courts of appeals in 341 court decisions issued during fiscal 1972.[1] Some of the more important issues decided by the respective courts are discussed in this chapter.

A. Court and Board Procedure

In *Wilder Mfg.*[2] the District of Columbia Circuit held that it had no jurisdiction to entertain an application for enforcement filed by the Board. The issue arose because the Board's application would not otherwise have been appropriately filed in that circuit under section 10(e) of the Act, but the Board alleged that such filing was proper in this instance, since the Board order under review had been entered following remand from that court, after the charging party union filed a petition for review.[3] The court held that by remanding a case to an administrative agency, the court relinquished jurisdiction, unless the judgment included "an explicit statement" retaining jurisdiction.

In another case,[4] the District of Columbia Circuit held that the Board erred by failing to draw an adverse inference from the employer's refusal to produce subpenaed records. The employer had defended a layoff as economically motivated, and the General Counsel had subpenaed the employer's hiring records to determine whether the laid-off employees had been replaced. In the court's view, requiring the Board to apply the adverse inference rule is consistent with the movement to free administrative agencies from exclusionary rules of evidence, since the effect of such a rule is to expand the evidence which may be considered. In addition, the court noted that section 10(b) of the Act requires that Board proceedings shall "so far as practicable, be conducted in accordance with the rules of evidence

[1] The results of enforcement and review litigation are summarized in table 19

[2] *N.L.R.B.* v. *Wilder Mfg. Co.*, 454 F.2d 995.

[3] *Textile Workers Union of America [Wilder Mfg. Co.]* v. *N L R.B*, 420 F.2d 635 (1969).

[4] *Intl. Union, United Automobile, Aerospace & Agricultural Implement Workers of America (Gyrodyne Co.)* v. *N.L.R.B.*, 459 F.2d 1329.

applicable" in the Federal district courts. The court observed that the adverse inference rule is all but universally recognized in the Federal courts and that there is nothing about the rule which makes it particularly burdensome for the Board to apply or ill suited for the Board's proceedings. Finally, the court regarded the rule as particularly appropriate where the employer had not simply failed to produce available evidence but had in fact suppressed the evidence when sought by subpena.

Two cases dealt with the limitations period in section 10(b) of the Act, which provides that no complaint shall issue based on any unfair labor practice occuring more than 6 months prior to the filing of a charge. In one case [5] the Board had applied its *Greenville* [6] rule, which precludes the consideration of conduct occurring more than 6 months before the charge in order to determine whether employees who sought reinstatement were unfair labor practice strikers and hence entitled to reinstatement even if permanently replaced. The Board further found, however, that whatever the character of the strike at its inception, it was converted to an unfair labor practice strike by the employer's conduct within 6 months of the filing of the charge and that employees who had not been permanently replaced before the latter conduct were entitled to reinstatement. The Ninth Circuit rejected the Board's finding that the employer's poststrike conduct was unlawful. The court also observed that the Board's *Greenville* rule was perhaps more restrictive than the Act requires, noting that the rule had been rejected by both the Sixth [7] and Eighth [8] Circuits which held that evidence of an earlier unfair labor practice can be used for the limited purpose of determining whether the strikers were unfair labor practice strikers. The court expressed an opinion that the latter position has much to recommend it if it can be reconciled with *Bryan Mfg. Co.*,[9] but determined that since the broader ground had not been urged on the court, it would not consider the question on its own initiative. In another case,[10] the District of Columbia Circuit affirmed the Board's refusal to consider conduct more than 6 months before the charge in determining whether an employer had dominated a union composed entirely of its employees, but found on the basis of subsequent conduct that the company had unlawfully assisted the union in violation of section 8(a)(2) and (1). Accordingly, the court approved the Board's order, which required the company to cease rec-

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[5] *N.L R.B.* v. *Los Angeles Yuma Freight Lines,* 446 F 2d 210 (C.A. 9).

[6] *Greenville Cotton Oil Co ,* 92 NLRB 1033 (1950).

[7] *Philip Carey Mfg. Co* v. *N L.R B ,* 331 F 2d 720, 732 (1964)

[8] *N L R.B* v *Brown & Root,* 203 F.2d 139, 146 (1953).

[9] *Loc. Lodge 1424, I A.M* v. *N L R.B.,* 362 U.S. 411 (1960).

[10] *Wine & Liquor Salesmen & Allied Workers Loc 95 [Brescome Distributors]* v. *N.L.R.B.,* 452 F.2d 1312.

ognizing the union unless it was certified as the representative of the employees following a Board election. The dissenting judge would have held that since the earlier conduct would have bearing only on the propriety of a disestablishment remedy—that is, an order prohibiting the employer from recognizing the union altogether—the limitation of section 10(b) should not have been imposed.

B. Representation Proceeding Issues

1. Unit Determination Issues

The Board's discretion in determining the appropriate unit for collective bargaining was contested in several cases before the courts. *Arizona Public Service Co.*,[11] involved a classification of employees known as system load supervisors who the employer claimed were supervisors within the meaning of section 2(11) of the Act, and hence not entitled to the protection of the statute. The Board concluded however that, although the individuals involved played an important role in the operation of the employer's electric utility, their responsibilities were routine and not supervisory in the statutory sense. The Board's decision was consistent with the position taken by it in other public utility cases where "load dispatchers" have been held not to be supervisors. The court of appeals reversed the Board, finding evidentiary support for the employer's contention that the system load supervisors had authority responsibly to direct other employees in a nonroutine manner. The court concluded that their jobs required the exercise of independent judgment and skill, and that the case was to be distinguished from ones where similar classifications of employees perform their jobs pursuant to detailed sets of rules and procedures.

In another case [12] the Ninth Circuit overturned the Board's determination that a unit was appropriate which included all warehouse employees employed at the employer's service facility in Los Angeles, California, but excluded workroom employees. The workroom employees were engaged at the facility in assembling, repairing, and reupholstering furniture, preparing custom draperies and carpets, altering men's clothing, storing furs, and making candy. The union seeking the election among warehouse employees, excluded the workroom employees from the petition. The employees at the service facility had never bargained collectively. However, another union, which had petitioned for an election 2 years earlier, which it lost, had included

[11] *Arizona Public Service Co.* v. *N.L.R.B.*, 453 F.2d 228 (C.A. 9).
[12] *May Department Stores Co.* v. *N.L.R.B.*, 454 F.2d 148.

the workroom employees in its petition, and the company did not object to their inclusion. Following selection by the warehouse employees of union representation, the employer refused to bargain, challenging the Board's certification of the bargaining unit because it excluded workroom employees. Before the court, the Board relied on the judicially established principle that there can be more than one appropriate bargaining unit, and urged that the evidence supported its determination that the unit petitioned for by the union was appropriate. The court, however, noting the inclusion of the workroom employees in the first election and their exclusion from the second, held that the Board had failed to heed the requirement in section 9(c)(5) of the Act that, in determining whether a unit is appropriate, the Board may not give controlling weight to "the extent to which the employees have organized." In the court's view, the Board had not given adequate explanation for finding a unit appropriate in the second election different from that found appropriate in the first. The court also held that the Board's unit determination in the second instance was inconsistent with results reached by the Board in other cases, that such inconsistencies had not been adequately explained, and, hence, that the Board's decision was arbitrary and unreasonable.[13]

Section 2(3) excludes from coverage of the Act "any individual having the status of independent contractor." The Third Circuit in one case[14] sustained the Board holding that newspaper truckdriver deliverymen were employees rather than independent contractors. Although the individuals involved had some of the indicia of independent contractors, such as owning their own trucks, not having social security and other taxes deducted, arranging their own vacations, and providing for substitute drivers, the court affirmed the Board's conclusion that the employer retained the "right to control the basic manner and means as well as the result" of the drivers' work. The District of Columbia Circuit considered the same issue in another case[15] in which it upheld the Board's finding that owner-operators of dump trucks were employees rather than independent contractors. The court held that the Board had properly applied the common law "right of control" test in finding an employment relationship between the dump truck drivers and contractors for whom they worked at various construction sites.

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[13] The Board has petitioned for Supreme Court review of the decision in the *May Department Stores* case.

[14] *News-Journal Co* v. *N L.R B*, 447 F.2d 69.

[15] *Joint Council of Teamsters No 42* [*J K. Barker Trucking Co.*] v. *N.L.R.B.*, 450 F.2d 1322.

2. Circumstances Requiring an Evidentiary Hearing on Post-election Issues

Judicial decisions have long recognized that the Board is not always required to hold an evidentiary hearing to resolve issues raised by objections to election conduct or challenges to ballots.[16] Section 102.69(c) of the Board's Rules and Regulations permits the disposition of such issues on the basis of an administrative investigation unless "substantial and material factual issues exist which can be resolved only after a hearing." Moreover, no hearing is required in an unfair labor practice proceeding on matters litigated in a representation proceeding, unless newly discovered or previously unavailable evidence is presented.[17] Among the court cases involving the propriety of resolving objections and challenges without an evidentiary hearing was *Duncan Foundry*,[18] where the Seventh Circuit evaluated the circumstances to consider whether an evidentiary hearing was required under the standard of the Board's rule. There, the employer challenged the ballots of 178 employees who were on strike, alleging that they had taken permanent jobs elsewhere and were therefore ineligible to vote. After an administrative investigation, the regional director overruled all but six of these challenges, and the Board denied the employer's request for review. The court agreed that there was no occasion to hold an adversary, evidentiary hearing because the regional director's judgments were uniformly based on undisputed facts about the striker's old and new jobs—including such factors as wages, seniority, and distance from home—and were well within the area of his discretion. The court emphasized that at no stage of the representation or unfair labor practice proceedings had the employer offered to show that the regional director's underlying factual findings were incorrect. The court also agreed that no hearing was required in connection with the employer's other contention, that the size of the bargaining unit had been permanently reduced since the beginning of the strike so that strikers had no expectation of returning to work. There was no evidence that during the strike the employer had in fact reduced the scope of his operations, for example, by selling machinery or subcontracting work. Instead, it appeared that the employer had experienced the overall reduction in business and production which is the normal and foreseeable result of a strike. Nor would the employer be permitted to show in the unfair labor practice phase of the proceedings that long after the strike had ended the company was still below pre-

[16] See cases discussed in Thirty-fifth Annual Report (1970), pp. 87–88
[17] *Pittsburgh Plate Glass Co.* v. *N.L.R.B.*, 313 U.S. 146 (1941).
[18] *Duncan Foundry & Machine Works* v. *N.L R.B.*, 435 F.2d 612 (1970).

strike levels of operation, since the decision on challenges had to be based on the evidence and probabilities as they existed at the time of the election.[19]

Two circuits reached a contrary result, however, in cases where the union's election victories would have been upset by a change in a single vote. In *Overland Hauling*,[20] the employer's numerous objections included allegations that the polls were opened late; employees who had been drinking heavily were allowed to vote; the union falsely accused the employer's general manager of threatening the employees; a union representative told several employees that a scar above his eye came from "trying to keep someone from crossing the picket line;" and the same representative "guaranteed" a raise of over 100 percent, stating that the employer would have "no choice" but to pay it. Acknowledging that it was the employer's duty to supply specific evidence of specific events or about specific people, the Fifth Circuit concluded that, in view of the closeness of the election, the employer's objections raised material factual issues regarding the validity of the election results, which should have been resolved after an adversary hearing. Similarly, in *G. K. Turner Associates*,[21] the employer charged that the union representatives had made seven separate materially false statements in the course of a conversation with employees 5 days before the election. These included statements about the employer's profits for the previous year; employee rights under the employer's profit-sharing plan; the possibility of a union-inspired sympathy strike; union fines for missing meetings; and the union's ability to force out supervisors whom the employees disliked. The Ninth Circuit concluded that the employer's affidavits relative to these allegations raised material issue of fact, and that the alleged actions, in their cumulative impact, might have significantly distorted the election process.

3. Election Propaganda

Under its well-established *Hollywood Ceramics* standard [22] the Board will set aside an election if there is a showing that one side's campaign propaganda contained material misrepresentations which the employees could not evaluate for themselves and to which the other side had no effective opportunity to make a reply. While the courts of appeals are frequently asked to review the Board's applica-

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[19] Two other cases approving the Board's refusal to grant an evidentiary hearing because there were no substantial and material issues of fact are. *N.L.R.B.* v. *Americana Nursing Home & Convalescent Center*, 459 F.2d 26 (C.A. 4), *N.L.R.B.* v. *Glover Packing Co.*, 80 LRRM 3456 (C.A 10).

[20] *N L.R B.* v. *Overland Hauling*, 461 F 2d 944 (C.A. 5).

[21] *N.L R B.* v. *G. K. Turner Associates*, 457 F.2d 484 (C.A. 9).

[22] *Hollywood Ceramics Co.*, 140 NLRB 221 (1962).

tion of this standard to particular fact patterns, one case decided during the report year [23] presented the issue of whether the *Hollywood Ceramics* standard itself transgresses the First Amendment. The court regarded as beyond dispute that outright misstatements or ommissions which have the effect of misstatements are not themselves constitutionally protected, but considered the further question of whether the incidental effect of the Board's regulating misrepresentations is impermissibly to chill speech which is constitutionally protected. In upholding the Board's standard, the court conceded that parties to a Board election may be reluctant to express themselves fully out of fear that an unintentionally false statement will cause the election to be set aside, and the court further recognized that in the political arena, to allow extra "breathing space" for debate on public issues, libelous statements are actionable only if made with knowledge of their falsity or with reckless disregard for their truth. However, the court held that the analogy of public elections to labor representation elections falls short of compelling similarity because of the more intimate relationship between the parties and the employees and the court stated that the incidental chilling effects of the Board's regulations must be weighed against the interest of the employees and the public in free, fair, and informed representation elections. The court held that just as the Securities and Exchange Commission may constitutionally prohibit any misleading statements in literature soliciting proxies for a corporate election, so the Board may constitutionally apply its *Hollywood Ceramics* standard to representation elections.

The Board's long-standing requirement that a party objecting to a misrepresentation show that it had no opportunity to make an effective reply was the subject of comment by the Fifth Circuit during the past year.[24] The court recognized that the Board's requirement grows out of a proper reluctance to police campaign propaganda, and the court further recognized that by discouraging needless postelection litigation, the Board's requirement has its proper place. But the court suggested that the overriding consideration must be the employees' freedom to make an unfettered choice, and the court held that the Board's strict application of its requirement in the case before it was too severe. The case arose out of efforts to organize oil well drilling contractors operating in western Texas and eastern New Mexico, and as is customary in that industry, many of the employees voting in the election worked for several different drilling contractors. The union falsely advised these voters that unless it won the election at the company, some of the other drilling contractors would take back the wage in-

[23] *Bausch & Lomb, Inc.* v. *N.L.R.B.*, 451 F.2d 873 (C.A. 2).
[24] *N L R B.* v *Cactus Drilling Corp*, 455 F.2d 871

creases which they had recently granted. The union did not identify the contractors supposedly involved, and the court found that it would have been futile for the company to attempt to rebut the union's claims regarding the intentions of unnamed contractors. Thus, even though the company was aware of the union's false claims some 5 days before the election, the court held that it did not have an effective opportunity to correct the misrepresentation.

4. Other Issues

Two cases decided by the Third Circuit during the report year consider the propriety of the Board's clarifying or amending its certification of a union. In one case a [24a] union which had been the certified representative of a multiplant unit for many years sought to have the Board clarify the existing multiplant unit to include two additional company plants at which the union was the recognized representative. Following a Board-conducted election in which a majority of the employees in the affected single-plant units voted in favor of the proposed clarification, the Board granted the union's petition. On review of the Board's dismissal of the related unfair labor practice case, the court sustained the Board's authority to merge the existing bargaining units in a unit clarification procedure, rejecting the contention that the Board had no power to use its unit clarification procedure in the absence of a 9(c) question concerning representation. The court noted that section 9(b) of the Act grants the Board broad powers to determine appropriate bargaining units and held that the existence of a dispute about the scope of a unit was a sufficient basis for invoking the Board's clarification procedure. The court also sustained the Board's authority to conduct an election in a UC procedure, even though this procedure involves no 9(c) question concerning representation. The court noted that employee views are relevant to the determination of the appropriate bargaining unit and held that the Act's broad grant of investigative powers impliedly authorized the Board to determine the employees' views by the most practical means available. However, the court held that an election permitting the employees to express their preference as to the scope of the unit is only proper where the Board has made a finding that two or more units are equally appropriate. Because in the court's view a majority of the Board had expressed no opinion on the appropriateness of the units involved, it remanded the case to the Board for further consideration.

In a second case [25] an independent union, certified by the Board in 1946, voted in a special membership meeting to affiliate with an inter-

[24a] *United Glass and Ceramic Workers [Libby-Owens-Ford Co.]* v. *N.L.R.B.*, 463 F.2d 31

[25] *American Bridge Div., U.S. Steel Corp.* v. *N.L.R.B.*, 457 F.2d 660 (C.A. 3).

national union. Thereafter, the union petitioned the Board to amend its certification to reflect this affiliation, and the Board granted the petition without requiring a Board-conducted election. On review the court held that the amendment was improper. In the court's view a clear question of representation was presented by the petition, since the result of the amendment was not merely a change of name but a radical change in the nature of the bargaining representative and the rights of the parties. Thus, the court observed that by virtue of its new affiliation the independent became subject to the international union's constitution, with the consequence that powers regarding contract negotiations, strikes, and grievances were transferred to that body. Further, the court found that the procedure used by the independent in affiliating with the international did not afford the members a fair opportunity to consider all the vital issues confronting them. The court noted that those opposed to affiliation had sought an opportunity to present their case to the membership well in advance of the vote, but, even though they satisfied all the Union's requirements for a special meeting, their request was denied, and the members voted on the matter of affiliation at the same meeting at which the issues were first discussed. Finally the court noted that the union's voting procedure did not afford its members an adequate opportunity to cast a secret ballot.

C. Unfair Labor Practices

1. Employer Interference With Employee Rights

A number of court decisions during fiscal 1972 raised questions as to whether certain employer conduct interfered with rights guaranteed to the employees under section 7 of the Act. Among these were cases involving the distribution of union literature, the exclusion of union organizers from the premises of a self-contained resort hotel, and the wearing of union buttons by sales personnel in a department store. Other cases related to the propriety of disciplining employees for refusals to cross picket lines of unions other than their own.

a. Limitations Upon Communication

In one case [26] where the distribution of union literature within the plant was covered by an existing collective-bargaining agreement, the Seventh Circuit sustained the Board's finding that the contents of a particular leaflet did not place its distribution outside the normally recognized privilege to distribute literature on the premises. Initially, the court found that the leaflet, which charged that the company had

[26] *Texaco, Inc.* v. *N.L.R.B.*, 80 LRRM 2283.

taken a position on nonrecognition of the union at various other locations and requested the employees to mutilate and surrender their credit cards, was not deliberately or maliciously false, contained no "disloyal" public disparagement of the employer's product, and did no more than to urge employees to put pressure on their employer to stop alleged antiunion activity by threatening to withhold their patronage as purchasers of their employer's products. "Certainly," the court stated, "the Act protects employees in appeals, by picketing or by the distribution of literature, to the public to withhold patronage from their employer in protest against his antiunion activity. It cannot be less acceptable for employees to take the less drastic step of threatening to withhold their own patronage for the same reason." [27] The court further found that the union's contractual commitment not to distribute "undesirable literature" was ambiguous. Noting that the Board and the courts have repeatedly held that a relinquishment of a protected right must be "clear and unmistakable," the court found that the contract clause could not be construed as waiving the otherwise protected right to distribute a recital of alleged antiunion activity coupled with a call for concerted action in protest against the employer's conduct.

In another case,[28] the Third Circuit rejected the Board's finding that the company, a self-contained resort hotel, violated section 8(a)(1) of the Act by refusing to allow access to its premises for union organizers. This case raised a substantial and recurrent question about the interpretation of *N.L.R.B.* v. *Babcock & Co.*,[29] wherein the Supreme Court recognized that a union is entitled to access to the premises where the inaccessibility of the employees makes ineffective reasonable attempts by nonemployees to communicate with them through the usual channels; i.e., "on streets or at home" or by "telephones, letters or advertised meetings." [30] In the Third Circuit's view, as expressed in the principal opinion, evidence in the instant case that the employees seldom left the premises, that lack of telephones and staggered shifts made communications difficult, and that the union was unsuccessful in generating face-to-face contact with the employees after being barred from the company's gates, was insufficient to warrant an order requiring the company to admit union organizers to its premises. The court held that before the Board can conclude, in applying the *Babcock* rule, that the usual channels of communication were closed, the union must show that it made reasonable efforts to communicate with workers through alternate means. Conceding that there was no substitute for face-to-face contact with employees, the court noted that there were

[27] *Id.* at 2285.
[28] *N.L.R.B.* v. *Tamiment, Inc.*, 451 F.2d 794.
[29] 351 U.S. 105 (1956).
[30] *Id.* at 111–112.

certain obvious and relatively inexpensive additional steps the union should have attempted to undertake, such as seeking a mailing list from the company, requesting permission to post notices on company property, and arranging meetings with the employees through those contracts already made or through radio or newspaper advertising. The court distinguished the *Grossinger's* case [31] on grounds that the union there had requested and was denied a mailing list of employees and had engaged in considerably greater organizing efforts.

The Fifth Circuit also reached a conclusion contrary to the Board in a case involving the wearing of a union button on the sales floor of a department store.[32] In finding that the company's ban of the button was a legitimate expression of its interest in protecting its business, the court relied on the size and bright color of the button, noting that "we believe for a fashionable department store's management to distinguish a small blue button from a large yellow and black campaign button takes on more indicia of reasonableness than in the normal case of this kind." [33] The court also relied on the company's longstanding dress code and the button's potential for causing conflict between employees, and also between employees and customers, on the sales floor. The court observed that the union's campaign had split the employees into prounion and antiunion factions and there was some animosity between these factions. Finally the court viewed the button itself as "more highly solicitious than the buttons involved in analogous cases." [34] The court emphasized that its holding was limited to the particular facts of the case and that there was no evidence of antiunion animus or contemporaneous unfair labor practices.

b. Discipline for Crossing Picket Line

It has been generally recognized by those courts in which the issue has arisen that employee refusals to cross picket lines established by unions other than their own constitutes protected activity within the meaning of section 7 of the Act.[35] In two recent cases, the dispositive issue was whether the union which represented the employees had contracted away or waived their right to refuse to cross such a picket line to carry out a work order.

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[31] *N.L.R.B.* v. *S. & H. Grossinger's*, 372 F.2d 26 (C.A. 2, 1967).

[32] *Davison-Paxon Co., Div. of R. H. Macy & Co.* v. *N.L.R.B*, 462 F.2d 364

[33] *Id.* at 368–369.

[34] *Id.* at 370.

[35] See, for example, *N.L.R.B.* v *Union Carbide Corp.*, 440 F.2d 54, 55 (C.A. 4); *N.L.R.B.* v. *Swain & Morris Construction Co.*, 431 F.2d 861, 863 (C.A. 9, 1970); *N.L.R.B.* v. *Alamo Express*, 430 F.2d 861, 868 (C.A. 5); *Teamsters Loc. 657* [*Chemical Express*] v *N.L.R.B.*, 429 F.2d 204, 205 (C.A.D.C., 1970); *N.L.R.B.* v. *Difco Laboratories*, 427 F.2d 170, 171 (C.A. 6, 1970); *N.L.R.B.* v. *Rockaway News Supply Co.*, 197 F 2d 111, 113 (C.A. 2, 1952), affd. 345 U.S. 71. Cf. *N.L.R.B.* v. *L. G. Everist*, 334 F.2d 312 (C.A. 8, 1964).

In the first of these cases,[36] the Eighth Circuit set aside the Board's finding that the company, a public utility, violated section 8(a)(1) of the Act by suspending eight employees for 30 days because of their refusal to cross a peaceful informational picket line set up at the worksite of another employer. The picketing union had no dispute with the company and was unrelated to the eight employees and to the union which had represented them under successive collective-bargaining agreements. The latest collective-bargaining agreement carried over from previous contracts a no-strike clause providing that "there shall be no collective cessation of work by members of the Union. . . . All such controversies shall be handled as provided for herein."

Other contract clauses provided for grievance and arbitration of disputes "respecting the interpretation, construction, intent or meaning of the provisions of this Agreement." A management prorogative clause reserved the company's right to employ, promote, discipline, and/or discharge employees and to manage the company, subject, however, to the full terms of the agreement. A newly negotiated picket line clause provided that "it shall not be cause for discharge if any employee or employees refuse to go through any authorized picket line of any Union." On adopting this clause, both parties indicated that they were not waiving any rights under applicable state or Federal laws.

On these facts, the court dismissed the Board's contention that a sympathetic refusal to cross a picket line was not a dispute "respecting the interpretation, construction, intent or meaning of the provisions" of the agreement barred by the no-strike clause and held that under the contract as a whole the union and its members waived any rights they might otherwise have had when confronted by the picket line. Observing that the Supreme Court frequently endorsed the congressional policy of favoring settlement of labor disputes through arbitration and has, in the *Lucas Flour Co.* case,[37] inferrred the existence of a no-strike clause in a contract which provided for binding arbitration, the court concluded that the lack of express contract language did not preclude a finding of waiver in the instant case. The court noted that the bargaining agreement reserved the right of management to discipline employees subject to the full terms of the agreement, the work stoppage and compulsory arbitration clauses were broad, and the interest in the performance of necessary work was recognized. The court further noted that the picket line clause in no way modified the obligations of the bargaining agreement with respect to the no-strike clause or the duty to settle grievances through arbitration or the right

[36] *Montana-Dakota Utilities Co.* v *N.L.R.B.*, 455 F 2d 1088

[37] *Loc. 174, Teamsters, Chauffeurs, Warehousemen & Helpers of America* v. *Lucas Flour Co*, 369 U S 95

under other provisions of the contract to discipline an employee for disobeying a legitimate work order.

In the second case,[38] the Sixth Circuit affirmed the Board's finding that the contract did not waive the employees' right to engage in a refusal to cross a picket line established by another union at their employer's premises. There was evidence that union officials publicly took the position that a sympathy strike was not permitted under the agreement. The court noted that the contract, by its terms, prohibited any member of the union from striking because of a dispute under the contract but that the no-sympathy-strike clause related only to work stoppages caused or sanctioned by the union. It therefore found nothing in the contract which prohibited the employees from crossing the picket line in question. Emphasizing its prior holding in *Timken Roller Bearing* [39] that the relinquishment of a statutory right must be expressed in clear and unmistakable language, the court further found that the interpretation of the contract as stated by union officials had no bearing on employee rights. The court recognized that such evidence had been considered by the Supreme Court in *Rockaway News* [40] and by the Court of Appeals for the District of Columbia in *News Union of Baltimore* [41] in ascertaining the intent of the parties, and stated (457 F.2d at 526):

> If only the broad no strike clause of Section 1101 were considered perhaps the extrinsic evidence offered would be sufficient to justify [a conclusion opposite to that reached by the Board], but in the light of the decision of this Court in *Timken Roller Bearing* v. *N.L.R.B.* . . . we find no need for extrinsic evidence. We, therefore, conclude that the employees in question were engaged in protected concerted activity within the meaning of Section 7 and Section 8(a)(1) of the Act.

c. Forms of Protected Activity

A number of cases decided by the courts involved the extent to which concerted activity by employees for the purpose of affecting terms and conditions of employment was protected by section 7 of the Act, so that the discharge of or warning to the employees for engaging in such activities violated section 8(a)(1), or 8(a)(3) and (1), of the Act. The Fifth Circuit found in two separate instances illegal discharges had resulted from employee protected conduct. In one case [42] the court held that a threatened walkout to protest future working conditions

[38] *Kellogg Co.* v. *N.L.R.B.*, 457 F.2d 519.
[39] *Timken Roller Bearing Co.* v. *N L R B* , 325 F.2d 746 (1963).
[40] *N.L R.B.* v. *Rockaway News Supply Co , supra*, 345 U S at 80
[41] *News Union of Baltimore* v. *N.L.R B* , 393 F 2d 673, 678 (1968).
[42] *Bob's Casing Crews, Inc.* v. *N L.R.B* , 458 F 2d 1301 (C.A. 5).

was protected by section 7. The court in so doing rejected the employer's contention that section 7 encompasses only employee activity which is in protest of then-existing conditions of employment. In another case,[43] the court considered the protection to be afforded employees engaged in a "sit down" strike to protest lawful discharges. Ninety-seven employees engaged in a sitdown strike to demand the reinstatement of six employees whom the company had previously discharged lawfully. The employees would neither return to work or vacate the premises when asked by the company. However, when the police arrived they left voluntarily. The company discharged all the protesters. The court held that, since there was no attempt to seize the plant or machinery, no violence or threats of violence, no damage to machinery, no interruption of work done by nonstrikers, and a vacation of the plant before the next strike, the employees' action could not be construed as an illegal forcible seizure of the plant. The court noted that in-plant protests are protected by section 7 of the Act and, absent some interference with a valid employer interest, will be granted the same protection afforded other concerted activity.

In another case,[44] the Tenth Circuit held, contrary to the Board, that an individual who "bugs" management for higher wages and better working conditions and speaks with fellow employees relative to this is not engaged in the kind of concerted activity protected by the Act. The court felt that the Board had "inferred" too much from a single employee's gripes about his own working conditions, and therefore company warnings to the employee to keep "his mouth shut" were not illegal.

The Seventh Circuit, in agreement with the Board, similarly did not find a violation of the Act in the discharge of an employee for the circulation of a letter urging a strike of the company and a boycott of its product.[45] The company and the union had a collective-bargaining agreement calling for an established grievance procedure and providing a no-strike clause. An employee who had filed several unsuccessful grievances wrote a letter to the company president asking for a personal interview. After the president ignored his request, the employee distributed 3,500 copies of the letter with an additional paragraph urging picketing of the company and boycotting of its products. The employee was then discharged. He subsequently picketed the company but it was a "one man demonstration." The court found that the employee had embarked on an independent effort to resolve his dispute with the employer in contravention of the union's express contract

[43] *N.L.R.B.* v. *Pepsi-Cola Bottling Co. of Miami*, 449 F.2d 824 (C.A. 5), cert. denied 407 U.S. 910.

[44] *N.L.R.B.* v. *Meinholdt Mfg.*, 451 F.2d 737.

[45] *James Moore* v. *Sunbeam Corp.*, 459 F.2d 811.

with the company not to strike. The court found that if the activity of the single employee was concerted, it was nevertheless in violation of the contract and as such not protected by the Act.

On the other hand, the Seventh Circuit found in another case [46] the individual protest of one employee sufficient to bring his actions within the protection of section 7 of the Act. The union, representing a group of apartment janitors, had secured a raise hike of $75 a month for its members. The employee in question, as well as the other janitors in his building, however, received only $27. He inquired as to the shortage and was told to "take it or leave it." He reacted by asking the union agent "Is there a pay off here?" When the company learned of his remark, it discharged him. The court reasoned that although the union did not have a collective-bargaining contract with the company, there was an understanding between the two. The court continued that individual activities involved in attempting to enforce a collective agreement may be deemed to be for concerted purposes even in the absence of such interest by fellow employees. The employee therefore was engaged in protected activity and any misconduct on his part by his verbal outburst was in the heat of and in the context of the protected activity and not so opprobrious as to remove his action from the Act's protection. His discharge therefore was in violation of the Act.

2. Employer Assistance to Labor Organization

In *Komatz Construction*,[47] the Eighth Circuit upheld the finding of the Board that the employer had unlawfully assisted an insurgent union when, during a strike called by the incumbent, it granted recognition to, and signed a contract with, the insurgents, claiming that the wishes of the bargaining unit had been established by frequent expressions of impatience and dissatisfaction with the strike and by the results of an informal poll taken at a meeting attended by less than a third of the employees. In enforcing the Board's order requiring dues reimbursement, however, the court excluded from the order those employees who had joined the insurgents before the contract with them was signed. The court also held that the Board's order that the employer bargain with the incumbent union was inappropriate, since the employer's poll and the expression of dissatisfaction were a sufficient basis for "serious doubt" as to whether the incumbent still commanded majority support. Finally, the court ruled that a contract negotiated by a multiemployer association, to which the employer belonged, did not have to be signed by the employer, since there was an insufficient

[46] *N.L.R.B.* v. *Ben Pekin Corp*, 452 F.2d 205
[47] *Komatz Construction Inc.* v. *N.L.R.B.*, 458 F.2d 317.

showing that the members of the association had intended to be bound by the negotiations of the association.

In another case,[48] the Eighth Circuit refused enforcement of a Board order requiring the employer to bargain with a certified union. Both the Sheet Metal Workers and the Automobile Workers had attempted to organize the employees at the employer's new plant, and the employees met to decide which union should represent them. The employees present voted overwhelmingly for the Sheet Metal Workers, whereupon the Automobile Workers adherents rescinded their authorization of that union. Following the meeting the Sheet Metal Workers demanded recognition and presented the employer with authorization cards from a majority of the employees. Shortly thereafter, the Automobile Workers filed a petition for an election, and the Board held that the contract subsequently entered into between the employer and the Sheet Metal Workers was not a bar to an election, because the employer was aware at the time recognition was extended that another union was seeking to organize the employees. The Automobile Workers subsequently won the election among an employee complement which had doubled since recognition was extended. The Eighth Circuit recognized that in these circumstances the Board must balance the employees' freedom of choice against the interests of stability in labor relations, but concluded that, under the circumstances, the balance should be struck in favor of an employer who in good faith bargained with a union which it properly and voluntarily recognized, even though another union was on the scene.

3. Employer Discrimination Against Employees

In *North Arkansas Electric Cooperative*,[49] the Eighth Circuit refused enforcement of a Board ruling that an employee, found previously to have been a "managerial employee," and hence excluded from the bargaining unit, was nonetheless an "employee" within the meaning of section 2(3) of the Act, so that his discharge for refusing to remain neutral during a union campaign violated section 8(a)(3) of the Act. The court noted that the Board had previously held that managerial employees were not entitled to the protection of the Act and that this policy had been approved by the courts. In the Eighth Circuit's view, the Board's earlier policy, overruled in this case, better reflected congressional intent, as evidenced by the legislative history.

In *Intl. Van Lines* [50] the Ninth Circuit held that the unlawful discharge of four employee strikers converted an economic strike, called

[48] *Modine Mfg. Co.* v *N.L.R.B.*, 453 F 2d 292
[49] *N.L.R.B.* v. *North Arkansas Electric Cooperative*, 446 F 2d 602.
[50] *N.L.R.B.* v. *Intl Van Lines*, 448 F.2d 905, cert granted 405 U.S. 953

to induce the employer to hold a consent election, into an unfair labor practice strike, so that the remaining strikers, who had not been permanently replaced, were entitled to reinstatement on application. The court further held that the discharged employees remained economic strikers and would not be entitled to reinstatement if the employer could show a legitimate and substantial business justification for refusing to reinstate them. The court, therefore, directed that the Board, on remand, consider the question of whether the employer had "legitimate and substantial business justifications" which would excuse his failure to reinstate economic strikers.

In another case,[51] the Third Circuit enforced a Board finding that striking employees were unfair labor practice strikers entitled to reinstatement, despite an attempt by the employer to link their strike with previous incidents which were clearly unprotected by the Act. After a concededly improper work stoppage, the employer had voluntarily reinstated strikers and ruled that there should be no reprisals taken; the employer nevertheless stopped dealing with the union and this precipitated a second strike. The employer claimed that continued slowdowns after the reinstatement nullified an apparent condonation of the employees' initial wrongful acts, and left the employees, once again, unprotected against removal with the ultimate consequence that the union no longer represented a unit of "employees" protected by the Act.

The court found the employer's evidence of a slowdown after the first strike to be completely unconvincing, so that it was not necessary to rule on the correctness of the employer's theory. The court added that, even if the employer's evidence had been convincing, it would have established a slowdown on the part of only a few workers, and, in the court's view, the possibility that some few workers might abuse their status as protected "employees" could not affect the union's status as bargaining agent. The strike called to protest the employer's refusal to deal with the union was, therefore, an unfair labor practice strike and the strikers were entitled to reinstatement.

4. Employer Bargaining Obligation

a. The Obligation to Recognize Upon Request

The Third Circuit decided two cases in the past year dealing with the obligation of employers to recognize, upon request, the bargaining representative of its employees. In *Broad Street Hospital*[52] that court extended its decision in *Frick*[53] and held that a bargaining relation-

[51] *N.L.R.B.* v *Cast Optics Corp.*, 458 F 2d 398, cert. denied 81 LRRM 2390 (1972)
[52] *N.L.R.B.* v. *Broad St. Hospital & Medical Center*, 452 F.2d 302.
[53] *N.L.R.B.* v *Frick Co.*, 423 F 2d 1327 (1970)

ship was established where an employer voluntarily recognized the majority status of a union even where the voluntary recognition was never reduced to writing. In that case, following an authorization card check, an administrator with authority to bind the hospital orally recognized the union as a bargaining unit for the hospital and negotiated a contract which was ratified by the employees. However, the hospital administrator died prior to formal acceptance by the hospital. Thereafter, hospital officials refused to meet with the union's negotiator and unilaterally raised wages and granted additional benefits to the employees. The Third Circuit, in enforcing the Board's order, held that an employer's bona fide recognition of the union's majority status, whether oral or written, is binding. For, in the court's view, "the inability of all parties to the collective-bargaining process to rely on such recognition would produce an uncertainty potentially generative of strife and discord in industrial relations." [54]

In another case the court, reversing the Board, held that the employer was required to recognize and bargain with the union representing its employees notwithstanding the pendency of a proceeding before the Board on the issue of whether the employer was bound by a multiemployer contract with another union. Five years earlier the employer had moved its business from New York to New Jersey precipitating an unfair labor practice proceeding which had not been fully resolved when the employer rejected the New Jersey local's request for recognition in May 1968.

The court recognized that if rival unions are asserting doubtful and conflicting rights to representation of the same employees at the same time, recognition of one union may prejudice or conflict with the proper disposition of the claim being litigated by the other. However, in the instant case, the court determined that the New Jersey local alone was the chosen bargaining representative of these employees in May 1968, while the proceeding involving the New York local could only determine whether a contract negotiated in 1963 had been binding on the employees originally, and such contract would have already expired. For these reasons the Third Circuit determined that the litigation pending before the Board was not a bar to an unfair labor practice finding and, therefore, remanded the case to the Board to determine an appropriate remedy.

The Third Circuit in the *Phelps-Dodge* case [55] declines to enforce a Board order based on the Board's finding that the unions sought to merge separate employer units into a single employerwide unit through insisting to impasse in bargaining sessions for each individual unit

[54] *Loc 148–162, Intl Ladies Garment Workers' Union, AFL–CIO* [*James Textile Corp.*] v *N.L.R.B.*, 450 F.2d 462

[55] *AFL–CIO Joint Negotiating Committee for Phelps-Dodge* v. *N.L.R.B.*, 459 F.2d 374.

upon demands for common contract expiration dates, a "most favored notion" clause, a limited no-strike clause, and simultaneous settlement of all contracts. The court pointed out that, although before negotiations the unions had requested companywide negotiations and concededly still had that objective, after the company rejected the demand, the unions bargained on a separate unit basis with no discussion by any unit of the contract of another unit. It emphasised that each of the issues as to which the union insisted to impasse was a mandatory subject of bargaining and there was no finding by the Board of bad-faith bargaining by the unions in the separate negotiations. In the court's view, absent such a finding the fact that there were parallel demands on mandatory subjects which might have had extraneous effects did not render the unions' actions unlawful.

In *Lynchburg Foundry* [56] the Fourth Circuit agreed with the Board that the union had not sought to unilaterally enlarge the certified bargaining unit when it pooled the ballots of the members of two locals, each separately certified as a bargaining unit at one of the company's two plants, where the vote was whether to approve a company offer to grant a wage increase, provided that labor contracts in effect at each plant would be extended for a period of 1 year. The Fourth Circuit found that this case was within the principle established in *U.S. Pipe* [57] in that the sole purpose of pooling the vote was to maintain common expiration dates for the labor contracts at each of the two plants.

b. Successor Employees

In *N.L.R.B.* v. *Burns Intl. Security Services*,[58] at p. 146, the Supreme Court held that: (1) when a bargaining unit remains unchanged and a majority of the employees hired by the new employer are represented by a recently certified bargaining agent, the Board may require the new employer to bargain with the incumbent union; and (2) a successor employer is not bound by the substantive provisions of a collective-bargaining agreement executed by a predecessor, to which the successor has not agreed or the obligations of which are not assumed.[59] The Fifth Circuit had occasion to apply the *Burns* principles in *Emerald Maintenance*.[60] Emerald was the successful bidder on a contract to perform maintenance of roads and grounds and to assign base housing at Laredo Air Force Base, Texas, previously held by Rice Cleaning Service and Bartlett Company, respectively.

[56] *Lynchburg Foundry Co.* v *N L R.B* , 80 LRRM 2415

[57] *U S Pipe & Foundry Co* v *N L R B* , 298 F 2d 873 (C A 5, 1962)

[58] 406 U.S. 272, 80 LRRM 2225, 2227–29, discussed *supra*, p. 146

[59] The Supreme Court pointed out, however, that in some instances where "it is perfectly clear that the new employer plans to retain all of the employees in the unit" the new employer may be required to "initially consult with the employees' bargaining representative before he fixes terms " (80 LRRM at 2233–34.)

[60] *Emerald Maintenance* v. *N.L.R.B.*, 464 F.2d 698 (C.A. 5).

At the time Emerald took over the work, Rice and Bartlett Company had unexpired contracts with the union which contained, among other things, a union recognition clause, a checkoff provision, and a "successor and assigns" clause. Prior to Emerald's successful bid, "the Union notified all interested bidders that it was the certified bargaining agent for the employees involved, that the collective bargaining agreements [with Rice and Bartlett] 'contain[ed] a successor clause which shall make them binding upon any successor of the present contractors', and that it expected the successful bidder 'to honor the terms of the Union agreement.' " Emerald, however, refused to recognize the union when it took over the work. Union members were required to apply for employment as new applicants. However, when hiring was completed, 76 of Emerald's 100 employees were former employees of either Rice or Bartlett, and later, after Emerald took over the work, it notified its employees that it would not provide terms of employment as favorable as those specified in the Bartlett and Rice contracts. Furthermore, Emerald adhered to wage rates prevailing at the times bids were advertised, not those higher rates which, under the contracts with Rice and Bartlett, became effective on the day Emerald took over their work.

The court agreed with the Board that Emerald's refusal to recognize the union violated section 8(a)(5) and (1). The court noted the *Burns* holding that when a bargaining unit remains unchanged and a majority of the employees hired by the new employer are represented by a recently certified bargaining agent, it is proper for the Board to require the new employer to bargain with the incumbent union.

The court did not, however, enforce the Board's order requiring Emerald to make restitution of economic benefits withheld or denied because of "unilateral" changes in the terms and conditions of employment previously agreed to by Rice and Bartlett. On this issue, the court added "It is difficult to understand how [Emerald] could be said to have *changed* unilaterally any pre-existing term or condition of employment without bargaining when it had no previous relationship whatsoever to the bargaining unit and, prior to [April] 1, [1970] no outstanding terms and conditions of employment from which a change could be inferred." The court also noted that it was not clear in the instant case until after the work force had been assembled that a majority of Emerald employees were union members, consequently there was no occasion to treat Emerald's behavior as one of these "instances in which it is perfectly clear that the new employer plans to retain all of the employees in the unit and in which it will be appropriate to have him initially consult with the employees' bargaining representative before he fixes terms. [*Ibid.*]"

In another case,[61] shortly after the union demanded recognition and offered to meet with the company its owner transferred all his stock to another company which proceeded to hire only 6 of the 10 employees Miller discharged shortly after deciding to transfer the stock. The court agreed with the Board that the stock transfer did not change the corporate entity, which at all times was Miller Trucking Service. The court also agreed with the Board that although the corporate veil will "sometimes be pierced" when its protection is used to "erode legal responsibility," it will not be pierced to protect a corporation against its own unfair labor practices. Thus, the court agreed, Miller Trucking Service, regardless of ownership, would be responsible for any unfair labor practices committed.

c. Contract Waiver of Bargaining Rights

In two cases, the courts dealt with the issue of whether parties had by contract waived their rights to bargain over mandatory subjects of bargaining during the contract term.

In one case,[62] the Fourth Circuit held that a union had contractually waived its right to bargain respecting a Christmas bonus that employees had regularly been given prior to union representation. The contract negotiated by the union and the employer contained a maintenance of standards clause which in pertinent part declared: "no employee shall suffer a reduction in his hourly rate of pay by the execution of this agreement." It also contained a waiver or so-called zipper clause which stated that during the life of the agreement, both parties unqualifiedly waived the right "to bargain collectively with respect to any subject matter referred to or covered in this Agreement, or with respect to any subject matter not specifically referred to or covered in this Agreement." The court disagreed with the Board's view that the company had a duty to bargain collectively with respect to the bonus during the life of the contract. In the court's view, "whether the maintenance of standards clause is construed to include or exclude Christmas bonuses is immaterial with respect to the company's obligation and the union's right to bargain, [for] the waiver of the duty to bargain expressly included that which was excluded from the contract as well as that which was included." The court cautioned, however, that this is not to say that if the maintenance of standards clause included Christmas bonuses that the company would have any right to discontinue them unilaterally. It would only have the right to decline the union's request to reconsider them during the life of the contract, and conversely the union could decline a similar request by the company.

[61] *N.L.R.B.* v. *Miller Trucking Service*, 445 F.2d 927 (C A 10).
[62] *N.L.R.B.* v. *Southern Materials Co.*, 447 F.2d 15,

However, as the Board had not decided whether the maintenance of standards clause included the bonus, or whether, in the circumstances of the case, the union had been fraudulently induced to agree to the waiver clause, the court remanded the case to the Board, noting that in either event the company may have committed an unfair labor practice.

d. Other Issues

In one case this year,[63] the Ninth Circuit disagreed with the Board's holding that an employer refused to bargain in good faith by refusing to furnish a union, which was the representative of its employees, with a list of names and addresses of bargaining unit members, both union and nonunion. The union advised the employer that the list was needed because the employees were scattered throughout the state and there was no alternative method for direct contact on an individual basis to properly discharge the union's responsibilities. Even though it did not allege that union officials or representatives were connected with the violence during a recent strike at the plant, the company asserted that it was hesitant to supply the names of employees in the unit because it was concerned about the past and possible future harassment of employees if the union had the list. The company stated these concerns to the union in meetings and correspondence.

The union then filed charges alleging the company unlawfully refused to supply the list. Thereafter, the company proposed alternative methods of meeting the union's need. The company proposed to supply the names and addresses to an independent mailing service which, without disclosing the names and addresses to the union, would do all the union's mailing to those addresses.

The union did not offer alternative proposals, and stated that obtaining the employee list was "a matter of principle." The union asserted that such mailings were unsatisfactory since it needed the list so its leadership could make personal visits to employees' homes in order to organize them, "close the ranks," canvass their views and opinions on collective bargaining, etc. The union at no time gave assurances to the company concerning the confidential usage and safeguarding of the names and addresses. The court stated that each case must turn on its peculiar facts, and that the inquiry must always be whether or not under the circumstances of the particular case the statutory obligation to bargain in good faith has been met. The court noted that where the refusal to supply the names and addresses is in fear of harassment of employees, a determination as to whether or not the company has fulfilled its bargaining order will depend in large part on whether or not there is a likelihood of a clear and present danger to the employee

[63] *Shell Oil Co.* v. *N.L.R.B.*, 457 F.2d 615.

involved. Finding in the instant case that such danger was clear, and that it was the union rather than the company which demonstrated intransigence here, the court held that the company expressed proper concerns as to the safety of its employees coupled with reasonable proposals designed to satisfy the needs of the union.

In another case,[64] the Court of Appeals for the District of Columbia agreed with the Board's application of the principles of *N.L.R.B.* v. *American National Ins. Co.*[65] in finding that an employer did not refuse to bargain in violation of section 8(a)(5) of the Act by pressing for inclusion of a "management rights" clause in a new contract with the petitioning union. In this case, the employer proposed for the first time in its 30-year bargaining history, during negotiations for a new contract, to insert a clause reserving to the employer "solely and exclusively, all of its Common Law rights to manage the business" and enumerating at length the areas over which it proposed to exercise exclusive control. Although the employer stated that it was willing to negotiate with respect to elimination of any one or more of the enumerated "management rights," the union flatly rejected the inclusion of any management clause. After further contract negotiations, the union struck the company and during the strike proposed a limited management rights clause conditional, *inter alia*, on the immediate reinstatement of the strikers and a $20 payment to each of them. The employer rejected the conditions, noting that the proposed management clause was "fine as far as it went," but unacceptable because it failed to specify the rights to be reserved by the employer. The employer rejected a second similar union offer on a management clause and the union withdrew all its prior offers. Thereafter, the employer requested that the union "spell out in the contract all of the rights it wanted to protect or in which it had an interest," leaving unspecified matters within the employer's province. Before an agreement could be reached, however, the union permanently broke off negotiations. The court agreed with the Board that the instant case fell within the Supreme Court's *American National Insurance* formulation requiring that the employer's "bargaining standards of Section 8(d) *to the facts of each case* rather than by prohibiting all employers in every industry from bargaining for management clauses altogether." Although observing that the company's initial proposals as to management rights were "undeniably broad," the court rejected the union's assertion that the proposal was conclusive evidence that the employer was "motivated by a bad faith purpose to reach no agreement at all." In approving the Board's application of *American National Insurance Co.* to the facts of this case the

[64] *Intl. Woodworkers of America, AFL–CIO, Loc. 3–10* [*Long Lake Lumber Co.*] v *N.L.R.B.*, 458 F 2d 852

[65] 343 U.S. 395 (1952).

court noted that the parties had had a 30-year history of harmonious bargaining and that the management proposals were offered in a context of substantial progress on other bargaining subjects. In addition, the court stressed the company's repeated invitation that the union "designate those items in its management proposals to which it excepted, and emphasized that it was prepared to consider the elimination of any of the enumerated rights, as well as the inclusion of any express reservations of union rights deemed important by the union." The court thus deferred to the Board's "expert experience" in "evaluation of bargaining processes" [66] and refused to reject its inference based on the record that, contrary to the union's contention, in pressing hard for inclusion of its management rights clause, the employer's aim was not "to avoid reaching agreement with the Union" in violation of section 8(a)(5).

In another case [67] the Eighth Circuit refused to enforce a portion of the Board's bargaining order requiring *Century Electric Motor Co.*, a successor employer, to pay a Christmas bonus to employees of the acquired enterprise, where the predecessor, Tait Mfg. Co., regularly had granted such a bonus during the 10 years preceding the acquisition, and where Century had granted a similar bonus the first year after the acquisition. Century had assumed Tait's 2-year collective-bargaining agreement with the certified union which contained no Christmas bonus provision. In late November of its second year as successor, before negotiations for a new contract were completed, Century, without first consulting the union, announced at an employees' meeting that it had decided to discontinue the Christmas bonus, at least for that year. Although the employees thereafter told the union of Century's action, the union, when it next met with the company in early December to execute the new collective-bargaining agreement, did not raise the matter. The new agreement, like the prior one, had no Christmas bonus provision, but had a broad "wrap-up" or "zipper" provision. However, some 8 days later, the union wrote Century a letter protesting its unilateral discontinuance of the bonus and recognition negotiations. When the parties met 2 weeks later, Century refused to bargain about its decision.

The court upheld the Board's conclusion that Century's actions were violative of section 8(a)(5) of the Act, and it enforced the cease-and-desist portions of the Board's order and the affirmative direction that Century bargain about future changes in the bonus. However, the court declined to enforce the part of the Board's order requiring reimbursement of the withheld Christmas bonus. In the court's view, the union's failure, prior to executing the contract, to raise the issue of Century's

[66] *Dallas General Drivers Loc. 745* v. *N.L.R.B.*, 355 F.2d 842, 844–845 (1966).
[67] *Century Electric Motor Co.* v. *N.L.R.B.*, 447 F.2d 10.

discontinuance of the bonus was "not conduct which is entitled to administrative or judicial approbation."

5. Union Fines

In *Boeing*,[68] the court sustained the Board's holding that the union had violated section 8(b)(1)(A) of the Act by fining members who had crossed the picket line after resigning from the union. The court accepted the Board's reasoning that the union's power to discipline ended on the members' effective resignation from membership and that the subsequent imposition of fines for working during the strike tended to interfere with the free exercise of employee rights within the Act's interdictions. The court rejected, however, the Board's conclusion that the reasonableness of a fine does not affect its legality under the Act. The court noted that the Supreme Court in *N.L.R.B.* v. *Allis-Chalmers Mfg. Co.*[69] and *Scofield* v. *N.L.R.B.*[70] made constant reference to the legality of "reasonable" fines and concluded that in view of this emphasis—and the fact that unreasonably excessive fines may be even more coercive than expulsion—the Board should reconsider the reasonableness of fines levied against employees who had not resigned before returning to work.

In *Silas Mason*,[71] the Fifth Circuit refused to enforce a Board decision that the union violated section 8(b)(1)(A) of the Act by fining an employee after his effective resignation from membership. The court reasoned that the fine imposed by its terms was enforceable only by expulsion from the union, not through the courts—since the fine merely conditioned readmission to membership on payment of the fine. The court concluded that since the proviso to section 8(b)(1)(A) protects a union's right to expel strikebreakers from the union unconditionally, it also protects the union's right to conditionally bar him subject to the payment of a fine.

6. Union Causation of Discrimination

Several decisions by the courts of appeals during the year involved contentions that unions had violated section 8(b)(2) of the Act, which makes it unlawful for a union "to cause or attempt to cause an employer to discriminate against an employee in violation of subsection 8(a)(3) or to discriminate against an employee with respect to whom membership in such organization has been denied or terminated on some

[68] *N.L.R.B.* v. *Booster Lodge 405, IAM* [*Boeing Co.*], 459 F.2d 1143 (C.A.D.C), pet. for cert. filed No. 71-1417.

[69] 388 U.S. 175 (1967)

[70] 394 U.S. 423 (1969)

[71] *Loc. 1255, IAM* [*Mason & Hanger-Silas Mason Co.*] v. *N.L.R.B.*, 456 F.2d 1214

ground other than his failure to tender the periodic dues and the initiation fees uniformly required as a condition of acquiring or retaining membership."

In one case,[72] the union and the employer had established under their collective-bargaining agreement a jointly operated hiring hall designated as the exclusive labor referral source for longshoremen in the Stockton, California, area. The program of dispatch under the agreement—which was not itself alleged as an unfair labor practice—designated class A union members to be dispatched first, class B union members second, and a group of 580 "casuals" last to fill whatever jobs remained. The discrimination complained of occurred when the hall dispatcher initiated a practice of calling the hiring hall of the union's sister local and requesting that members of that local be sent to the hall for dispatch before the casuals were assigned work. Preference to the sister local's members was based, not on any special skills they possessed, but on the principle that "union men . . . will go ahead of any casual people." At no time did nonunion "permit" men benefit from this practice. In these circumstances, the Ninth Circuit affirmed the Board's finding that by such procedure—and its modification under which the sister local's members were dispatched directly from that local's hiring hall—the employer and union violated section 8(a)(3) and 8(b)(2), respectively. The court rejected the contention that there should be no liability because the unionists were given only "temporal" priority, noting that however the procedure was described, the record showed that on several occasions the sister local's members worked when the union's casuals did not.

In another case,[73] the Ninth Circuit held that a union improperly caused the discharge of an employee for failing to pay a "reinstatement" fee. The employee had joined an independent union in 1962 because he was working for an employer which had a collective-bargaining agreement with that union. The employee made his initial payments to the independent and was marked delinquent when he left the job in November 1962. In June 1962, the membership of the independent voted to affiliate with the union involved in the instant case and thereafter merged with it. In November 1968, a month after the employee had begun working for the instant employer, the union advised him that he was delinquent and needed to pay a $135 "reinstatement" fee. The employee declined to pay this amount, and the union demanded and secured his discharge. While refusing to apply a *per se* rule that a reinstatement fee higher than the union's initiation fee would be unlawful, the court noted that the fee was almost seven

[72] *Pacific Maritime Assn.* v. *N L.R.B.*, 452 F 2d 8 (C A. 9)

[73] *N L R B.* v *Fishermen & Allied Workers Union Loc. 33, Int Longshoremen's Union S. G. Giuseppe Fishing)*, 448 F.2d 255.

times as large as the initiation fee and constituted either an unlawful demand for back dues accruing while the employee was not obligated to join the union as a condition of employment or an improper penalty.

In another case,[74] the rules governing the accrual of benefits in a pension fund established under a collective-bargaining agreement allowed employees to obtain credit toward their pensions for service with any contributing employer. In addition, the rules provided a "rebuttable presumption" that persons who were union members in past years were employed by contributing employers, while persons who were not union members were required to make an affirmative showing. An employee who had begun working for a contributing employer in 1952 and had not previously been a union member contended that denying him a pension while granting such retirement credit to seven other employees whose employment histories subsequent to 1952 were similar to his own and who were entitled to the presumption as union members prior to 1952 constituted illegal discrimination. In agreeing with the Board that there was no discrimination, the Third Circuit noted that there was no requirement in the rules of the fund that to receive credit an employee had to be a union member, and that, accordingly, union and nonunion workers could participate in the fund on an equal basis. Furthermore, the court noted that although, as the Board found, it was unlawful to presumptively credit union members with covered employment, in all seven cited instances the employees in fact qualified for benefits by virtue of having worked in covered employment. Accordingly, the court agreed with the Board that no discrimination was shown.

7. Union Bargaining Obligation

A number of cases decided by the courts of appeals during fiscal 1972 considered the nature and the extent of a union's bargaining obligation. In one case [75] the Second Circuit sustained the Board's finding that the union violated section 8(b)(3) and (1) of the Act by unilaterally imposing on its journeymen members, who heretofore had painted an average of 11.5 rooms per week, a rule that henceforth they could only paint 10 rooms per week. In the court's view, the 10-room rule was an illegal modification of the collective-bargaining agreement, which provided that the standard workweek shall consist of five 7-hour days, since under the 10-room rule journeymen painters would no longer work a 5-day, 7 hours per day, week, but only so long as it took them to paint 10 rooms. The Second Circuit also felt

[74] *Richard W. Rosen* v. *N.L.R.B.*, 455 F.2d 615 (C.A. 3)

[75] *New York Dist. Council 9, Intl Brotherhood of Painters & Allied Trades, AFL–CIO [Assn. of Master Painters & Decorators of N.Y.]* v. *N.L.R.B.*, 453 F.2d 783, 786–788.

that the union's reliance on *Scofield*[76] was misplaced, since in *Scofield* the Supreme Court found that the contract was not violated by a production quota which was at a level above the production level of the average efficient worker, whereas in the case at bar it was below. In another case,[77] the Second Circuit enforced the Board's decision that the union violated section 8(b)(3) and (1) of the Act by insisting as a condition of agreement that the employers' association abandon its litigation charging mismanagement of the trust fund and by insisting that only employers of carpenters act as employer trustees of the trust fund. It found that the Board's classification of these terms as nonmandatory subjects of bargaining was within the Board's discretion.

In another case,[78] the Fifth Circuit upheld the Board's finding that a union's good-faith disclaimer of representative status constituted a defense to a complaint alleging that the union violated section 8(b)(3) and 8(b)(4)(D) of the Act. The union had refused to sign a collective-bargaining agreement with the employer and disclaimed its status as bargaining representative on the ground that representing the employer's few employees was not worth the trouble of becoming embroiled in jurisdictional disputes, one of which had already resulted in a Board 10(k) award that was adverse to its sister local.

8. Secondary Boycotts and Strikes

Three circuits considered whether employers were "neutral" to labor disputes not their own and thus protected from union picketing of their premises.

In *Hearst*[79] the District of Columbia Circuit enforced a Board order which held that a union's picketing of an unincorporated division of a large corporation in furtherance of a dispute with another such division of the same corporation, violated section 8(b)(4) of the Act. In *Sid Harvey*,[80] the Second Circuit denied enforcement of a similar order, holding that the union's picketing of one corporation in furtherance of a dispute with another commonly owned corporation did not violate that section. In the courts' view, whether the union may permissibly extend its dispute to the interrelated corporation or division of the same corporation depended on their relative autonomy and economic interdependence.

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[76] *Scofield* v *N L R B.*, 394 U S. 423, 433.

[77] *N.L R.B.* v. *Loc. 964, United Brotherhood of Carpenters & Joiners of America, AFL–CIO* [*Contractors & Suppliers Assn.*], 447 F 2d 643, 645–646.

[78] *Corrugated Asbestos Contractors* v *N L.R B* , 458 F 2d 683, 687

[79] *American Federation of TV & Radio Artists* v *N.L.R.B.*, 462 F 2d 887.

[80] *Loc 810, Steel, Metals, Alloys & Hardware Fabricators & Warehousemen, Teamsters* v *N.L R.B.*, 460 F 2d 1.

Thus, in *Hearst*, the parent company had some 20 divisions, all of which were autonomously run as virtually separate entities, with Hearst's basic interest in each division confined to its profit at the end of the year. The union picketed a newspaper division in Baltimore in furtherance of its dispute with a television broadcasting division in the same city. The court noted that each division was relatively autonomous and that the newspaper and television divisions were actually competitors. Accordingly, the court found the newspaper division not concerned with the union's dispute with the television division and thus was protected from picketing. But in *Sid Harvey*, the court found that each of the subsidiary corporations of the parent company were subject to centralized management, were economically interdependent on the others, and had extensive intercorporate contact in the performance of their respective manufacturing, supply, and distribution functions. In the court's view the various corporations made up an "integrated complex" and none of them could be characterized as "neutral" with respect to the labor disputes of another.

In the third case [81] the Ninth Circuit, reversing the Board, held that the union violated section 8(b)(4) by threatening a general contractor with picketing unless he ceased directing subcontractors to install prefabricated fireplaces in houses under construction. The subcontractors were signatories to an agreement with the union which contained a work-preservation clause requiring hand-built fireplaces. The general contractor was not a signatory to this agreement and had no employees performing fireplace installations. Rejecting the Board's theory that the threat was permissible because the general contractor had the "right to control" the type of fireplace the subcontractors installed, the court found that the union's real dispute was with the subcontractors who, unlike the general contractor, were signatories to the work preservation agreement, that the general contractor was neutral to this dispute, and that the union's picketing threat therefore amounted to unprotected secondary activity.

9. Hot Cargo Clauses

In a case involving a hot cargo issue, the Ninth Circuit remanded the case to the Board for a finding on the merits after the Board dismissed the complaint.[82] The case concerned 37 newspaper dealers who deliver the San Francisco Chronicle and the Examiner in the Bay area by auto. Nine of them charged that certain clauses of their employer's contract with Teamsters Local 921 providing for cancellation of their individual dealership contracts with the employer according

[81] *Western Monolithics Concrete Products* v *N L R B*, 446 F 2d 522
[82] *Douglas Brown* v. *N.L R B*, 462 F.2d 699

to a preset schedule, with the option of joining the union violated section 8(e) of the Act. The Board had concluded that the dealers were employees rather than independent contractors or "persons" within the meaning of section 8(e) and that therefore the section was inapplicable. The court disagreed. Concurring with the Board that the "right of control" test governed, the court based its reversal chiefly on (1) the entrepreneurial aspects of the dealers' status together with a lack of control by the company over the manner and means of distribution, and (2) the dealers' risk of loss and opportunity for gain. In respect to entrepreneurial status the court stressed: (1) employer representations in the individual contracts that the dealers are independent contractors, (2) employer insulation from tort liability in the contracts, (3) dealer freedom of choice in the manner of delivery, (4) the employer's perfunctory supervision of the dealers, (5) dealer responsibility for complaints, (6) their power to refuse delivery, and (7) their freedom to hold outside jobs and sell competing papers. In respect to risk of loss and chance for gain the court emphasized: (1) dealer absorption of losses from damaged or loss papers and customer defaults, (2) limitation on returns of papers for credit, (3) financial assistance to dealers solely to protect circulation, (4) option to refuse promotional aids, (5) freedom to expand street sales at discretion, (6) freedom to determine retail prices, and (7) initial $1,000 outlays for equipment. The court distinguished three important cases in which similar distributors were found to be employees. Of 17 factors of control in *Lindsay Newspapers* [83] the court found 13 missing in the instant case; that in *Herald Co.*[84] the employer exerted heavy control over dealers' immediate income as well as the ultimate value of the dealerships, policed delivery closely, and required promotional activity; and that in *Brush-Moore Newspapers* [84a] dealers could not hold outside jobs or sell competing papers. The Board accepted the remand for a determination of the merits of the 8(e) charges.

10. Remedial Order Provisions

1. Jackson Farmers

In *Jackson Farmers*,[85] the Tenth Circuit upheld a Board order requiring the employer to resume a trucking operation where the Board, affirmed by the court, found that the employer had violated section 8(a)(5) of the Act by contracting out this operation without negotiat-

[83] *N L R B* v. *Lindsay Newspapers*, 315 F 2d 709 (C A 5, 1963).
[84] *Herald Co* v *N L R B*, 444 F 2d 430 (C A 2).
[84a] *N.L R B* v *Brush-Moore Newspapers*, 413 F.2d 809 (C.A. 6, 1969).
[85] *N.L R B* v. *Jackson Farmers*, 457 F.2d 516.

ing with the union. The court noted that although the remedy was severe, it was not economically prohibitive or unduly harsh and, accordingly, was not prohibited by the Act.

2. Local 485

In *Local 485*,[86] the court affirmed the Board's finding that the Union had breached its duty of fair representation by individiously refusing to process to arbitration a member's wrongful discharge grievance. However, it declined to enforce that part of the Board's order which required the union to make the discriminatee whole for any loss of earnings he may have suffered from the date he requested the union to challenge the propriety of his discharge until such time as the union fulfilled its duty of fair representation or the discriminatee obtained substantially equivalent employment, whichever occurred first. The court reasoned that the Supreme Court's decision in *Vaca* v. *Sipes*, 386 U.S. 171 (1967), which required Federal courts to apportion between the union and employer the damages arising from breach of fair representation was equally applicable to Board proceedings under section 8(b)(1)(A). Since the Board's order held the union liable for all backpay, the court found it improper under the principles established in *Vaca*.

3. Golay

In *Golay*,[87] the Seventh Circuit upheld the Board's refusal to toll backpay between the time of the trial examiner's finding that employees were not discriminatorily discharged or entitled to reinstatement and the Board's reversal of that decision, even though the court ultimately found that the discharges were lawful and the discriminatees entitled to reinstatement only under the "balancing" rule espoused in *Thayer*.[88] The court accepted the Board's established rule that backpay will not be tolled unless, unlike the situation therein, special circumstances are shown.

4. IUOE Local 925

In Local 925,[89] the Fifth Circuit approved a Board backpay award even though the award was based, in part, upon evidence of discrimination adduced for the first time at the backpay proceeding, pursuant to an underlying order requiring respondents to make the discrim-

[86] *N.L.R.B.* v. *Local 485, IUE* [*Automative Plating Corp.*], 454 F.2d 17 (C.A. 2).
[87] *Golay & Co* v *N L R.B*, 447 F 2d 290
[88] *N L R B* v. *Thayer Co.*, 213 F 2d 748 (C.A 1, 1954), cert denied 348 U.S. 883
[89] *N.L.R.B* v. *Intl. Union of Operating Engineers Loc 925* [*J L Manta*], 460 F 2d 589.

inatee whole for any "continuing discrimination." [90] The court rejected respondents' contention that the additional acts of discrimination were not based on charges filed within the limitations period prescribed in section 10(b) and further concluded that the procedure utilized, although unusual, did not deprive respondents of a full and fair hearing.

[90] The Board initially found, *inter alia*, that respondents violated sec 8(b)(2) in several respects Subsequent to the Board decision new charges were filed against respondents based on conduct substantially similar to that previously found violative of the Act Thereupon the Board amended its order to require respondents to make the discriminatee whole for any continuing discrimination, and evidence was admitted at the backpay proceeding to prove such discrimination

IX

Injunction Litigation

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

A. Injunctive Litigation Under Section 10(j)

Section 10(j) empowers the Board, in its discretion, after issuance of an unfair labor practice complaint against an employer or a labor organization, to petition a U.S. district court for appropriate temporary relief or restraining order in aid of the unfair labor practice proceeding pending before the Board. In fiscal 1972, the Board filed 19 petitions for temporary relief under the discretionary provisions of section 10(j): 10 against employers and 9 against unions.[1] Injunctions were granted by the courts in 11 cases and denied in 2. Of the remaining cases, three were settled prior to court action, one[2] was dismissed, and three were pending at the close of the report period, and one petition was withdrawn.

Injunctions were obtained against employers in four cases and against unions in seven cases. The cases against the employers variously involved alleged unlawful assistance to unions, refusal to bargain with labor organizations representing their employees, surveillance, interrogation, threats of discharge, and discriminatory discharges. The cases against the unions involved allegations of operating a discriminatory hiring hall, refusing to bargain with employers, threatening reprisals and harassment, engaging in strikes and picketing, threats and acts of physical violence, and blocking entrances to premises of the employers.

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[1] In addition, two petitions filed during fiscal 1971 were pending at the beginning of fiscal 1972.

[2] See table 20 of appendix.

1. Alleged Refusal To Bargain

In the case involving an alleged refusal to bargain [3] the court held that the action of the employer in refusing to sign its written wage raise and pension plan proposal—an appendix to the then existing contract—after acceptance by the certified union, and the employer's subsequent unilateral action in effectuating an across-the-board wage increase provided reasonable cause to believe that the employer was refusing to bargain in good faith in violation of the Act warranting injunctive relief. Accordingly, the court ordered the employer to sign and execute the contract and to make the employees whole for loss of earnings they would have received under the contract.

2. Other 10(j) Litigation

In the *Lawrence Rigging* case,[4] the court issued a temporary injunction after finding that the regional director had reasonable cause to believe that the employer unlawfully interfered with employee rights through interrogation and layoff of union sympathizers and by giving aid and support to another union. However, the court refused to enjoin the employer's alleged refusal to bargain with one of the unions claiming majority status, on the ground that the relief was not timely sought, that it did not have the intrinsic quality of preserving the status quo in the employer's plant, and that such relief would be an invasion of the Board's exclusive jurisdiction over essentially legislative-administrative matters. In addition, the court denied injunctive relief relative to the recall of employees alleged to have been discriminatorily discharged. In another case,[5] the court granted a temporary injunction requiring the employer to reinstate certain discharged employees, and restraining the employer from engaging in unlawful surveillance of employees' union activities, interrogation, threats of discharge, ordering employees not to sign union authorization cards, and discharging employees for union activities. The court concluded that its action was warranted because disposition of a case by the Board is a relatively slow procedure, followed many months later by enforcement in the courts of appeals. In the meantime, it is often possible, noted the court, for employers, unless put under legal restraint, to dissipate union strength and support by unfair labor practices and thereby render meaningful relief unfeasible at the conclusion of the Board proceeding.

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[3] *Davis* v. *Servis Equipment Co.*, 341 F Supp. 1298 (D C.Tex).
[4] *Kaynard* v. *Lawrence Rigging*, 80 LRRM 2600, 68 LC ¶ 12,735 (D.C.N.Y.).
[5] *Davis* v *R. G. LeTourneau*, 340 F Supp 882 (D.C Tex).

In another case [6] involving two employers the court found that the regional director had reasonable cause to believe that two related employers had violated section 8(a) (1), (2), and (3) of the Act by unlawfully rendering assistance and support to one union by recognizing and executing a union-security contract with that union at a time when it was not certified as the bargaining representative of the employees, and the employers had been duly notified of a substantial claim by another union to represent the employees. In addition, the employers threatened to close the plant if the employees chose other than the employer's favored union as their bargaining representative. Accordingly, the court enjoined the unlawful conduct and ordered the employers, *inter alia*, to cease giving effect to the contract until the union was certified by the Board.

Applications for temporary injunctions were denied in two cases. In the *Art Steel* case,[7] the court held that even though the regional director had reasonable cause to believe that the employer had violated section 8(a) (1) of the Act by distributing antiunion leaflets to the employees, injunctive relief was not warranted, since the alleged statutory violations were old and there was no showing that they were about to reoccur, the unfair labor practice charge had been tried before a trial examiner, and petitioner had not made a sufficient showing of irreparable harm to justify a court in interfering at this stage and, in effect, doing the Board's work for it. The court held in denying injunctive relief in the second case [8] that while the regional director had shown reasonable cause to believe that the employer had committed unfair labor practices, he had not shown that the purposes of the Act would have been nullified or the public interest defeated unless an injunction issued. For these reasons the court concluded that the issuance of an injunction would destroy rather than preserve the status quo.

Enforcement of a union's bargaining obligation was secured through 10(j) proceedings in *Communications Workers of America*,[9] where the court enjoined the unions from striking the employer based upon reasonable cause to believe that the object of the action was to compel the employer to modify the bargaining agreement then existing between the employer and the unions in violation of section 8(b) (3) and 8(d). The court also found cause to believe the unions violated the Act by threatening to discipline union members unless they engaged in strike action in violation of the no-strike clause of the contract and by providing financial aid to union members in order

[6] *Cuneo* v. *T.F H. Publications,* Civil No 1721–71 (D.C N J.), decided Dec. 16, 1971 (unreported).

[7] *McLeod* v. *Art Steel Co.*, 78 LRRM 2122 (D.C.N.Y).

[8] *Youngblood* v. *Scottex Corp.*, 80 LRRM 2619 (D.C.Tex.).

[9] *McLeod* v *Communication Workers of America and New York Local No. 1190* [*Western Electric Co.*], 79 LRRM 2532 (D.C.N.Y.).

to encourage them to strike the employer. In the *Bricklayers* case,[10] the court held that there was reasonable cause to believe that the unions had violated the Act by striking certain employers of a multiemployer association after the expiration of their contract with the unions without first complying with the notice requirements of section 8(d)(3), and by failing to bargain in good faith in violation of section 8(b)(3). Accordingly, a temporary injunction was issued by the court. Similarly, in *Hotel Employees*,[11] the court held that there was reasonable cause to believe that the unions violated section 8(d)(3) and 8(b)(3) of the Act by striking the employer's premises without first complying with the notice requirements of the Act after the parties had failed to reach agreement relative to certain modifications of the old contract which had expired. Whereupon, the unions' conduct was enjoined by consent.

In three cases strike violence by unions was enjoined by the courts in 10(j) proceedings. In the first case,[12] the court found reasonable cause to believe that the union violated section 8(b)(1)(A) by engaging in mass picketing or other blocking tactics at the employer's premises, threatening to inflict, or inflicting, bodily injury or to cause other harm to employees and other persons, by intimidation, by acts of violence and property destruction, and by preventing employees and other persons from entering or leaving the employer's premises. A temporary injunction was granted. In the *Boilermakers* case,[13] the court issued a temporary injunction enjoining similar 8(b)(1)(A) violations, and in the *Iron Workers* case,[14] the court found reasonable cause to believe that the union's actions in operating a discriminatory hiring hall and resorting to violence and threats of violence or other reprisals against employees who sought to remedy the discriminatory arrangement were in violation of section 8(b)(1)(A) and (2) of the Act and warranted the issuance of a temporary injunction.

The picketing and inducements engaged in by two unions in the remaining case[15] decided during the fiscal year was enjoined by the court where the evidence supported reasonable cause to believe that an object of the unions' actions was to force and require a ship opera-

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[10] *Cuneo* v *Bergen County Conference of Bricklayers, Masons & Plasterers Intl Union,* Civil No 1062–72 (D.C N.J.), decided June 27, 1972 (unreported)

[11] *Letter* v *Hotel, Restaurant & Hotel Service Employees, Local 180,* Civil No C–71–1474 SC (D C Calif.), decided Aug 20, 1971 (unreported).

[12] *Compton* v *Puerto Rico Newspaper Guild, Loc 225* [*El Mondo, Inc*], 343 F. Supp. 884 (D C P R)

[13] *Squillacote* v *Intl. Brotherhood of Boilermakers, Iron Ship Builders, Loc. 696,* Civil No 71–C–369 (D C Wis), decided July 29, 1971 (unreported).

[14] *Hoffman* v. *Intl. Assn. of Bridge, Structural & Ornamental Iron Workers, Loc 118,* Civil No R–2679 (D C.Nev.), decided June 16, 1972 (unreported).

[15] *Compton* v *Intl. Organization of Masters, Mates & Pilots, Intl. Marine Div. & Union de Trabajadores de Muelles y Ramas Anexas, Loc 1740,* Civil No. 712–71, 66 LC ¶ 12,221 (D C P.R.).

tor to hire deck officers who were members of one of the respondent unions instead of the present officers who were members of another union. Since the unions' actions restrained and coerced the ship operator in the selection of its bargaining representative in violation of section 8(b)(1)(B), a temporary injunction was issued by the court.

B. Injunctive Litigation Under Section 10(l)

Section 10(l) imposes a mandatory duty on the Board to petition for "appropriate injunctive relief" against a labor organization or its agent charged with a violation of section 8(b)(4) (A), (B), and (C),[16] or section 8(b)(7),[17] and against an employer or union charged with a violation of section 8(e),[18] whenever the General Counsel's investigation reveals "reasonable cause to believe that such charge is true and a complaint should issue." In cases arising under section 8(b)(7), however, a district court injunction may not be sought if a charge under section 8(a)(2) of the Act has been filed alleging that the employer 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 and that a complaint should issue." Section 10(l) also provides that its provision shall be applicable, "where such relief is appropriate," to violations of section 8(b)(4)(D) of the Act, which prohibits strikes and other coercive conduct in support of jurisdictional disputes. In addition, under section 10(l) a temporary restraining order pending the hearing on the petition for an injunction may be obtained, without notice to the respondent, upon a showing that "substantial and irreparable injury to the charging party will be unavoidable" unless immediate injunctive relief is granted. Such *ex parte* relief, however, may not extend beyond 5 days.

In fiscal 1972, the Board filed 257 petitions for injunctions under section 10(l). Of the total caseload, comprised of this number plus the 4 cases pending at the beginning of the period, 93 cases were settled, 29 were dismissed, 9 continued in an inactive status, 10 were with-

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

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

[18] Sec 8(e), also incorporated in the Act by the 1959 amendments, makes hot cargo agreements unlawful, with certain exceptions for the construction and garment industries.

drawn, and 11 were pending at the close of the report period. During this period 109 petitions went to final order, the courts granting injunctions in 99 cases and denying them in 10 cases. Injunctions were issued in 52 cases involving secondary boycott action proscribed by section 8(b)(4)(B) as well as violations of section 8(b)(4)(A), which proscribes certain conduct to obtain hot cargo agreements barred by section 8(e) or to force or require any employer or self-employed person to join any labor or employer organization. Injunctions were granted in 24 cases involving jurisdictional disputes in violation of section 8(b)(4)(D) of which 1 also involved proscribed activities under section 8(b)(4)(B). Injunctions were issued in 20 cases to proscribe alleged recognitional or organizational picketing in violation of section 8(b)(7) of which 3 also involved proscribed activities under section 8(b)(4)(B) and 8(b)(4)(D). The remaining three cases in which injunctions were granted arose out of charges involving alleged violations of section 8(e).

Of the 10 injunctions denied under section 10(l), 6 involved alleged secondary boycott situations under section 8(b)(4)(B), one of which also involved alleged violations of section 8(e), 3 involved alleged jurisdictional disputes under section 8(b)(4)(D), and 1 case arose out of a charge involving alleged violations of section 8(b)(7).

Almost without exception the cases going to final order were disposed of by the courts upon findings that the established facts under applicable legal principles either did or did not suffice to support a "reasonable cause to believe" that the statute had been violated. Such being the basis for their disposition, the precedence value of the case is limited primarily to a factual rather than a legal nature. The decisions are not *res judicata* and do not foreclose the subsequent proceeding on the merits before the Board.

Eight of the cases decided during the year, however, are noteworthy. Five of these cases involved charged secondary boycotts, hot cargo agreements, or conduct in furtherance of a jurisdictional dispute, wherein the union invoked a work-preservation defense, i.e., contended that its agreement or conduct was lawful because it was ostensibly for the purpose of protecting the traditional job tasks or working conditions of employees represented by the union. One such case, *George Koch Sons, Inc.*[19] involved an application of the Board's right-to-control test, i.e., that a union engages in a secondary boycott by striking an employer who is powerless to meet the union's demands except by a cessation of business with another employer. In *Koch*, the court of appeals reversed the judgment of the district court which denied a

[19] *Sachs* v *Local Union 48, Plumbers,* 78 LRRM 2490 (DMd.), reversed 454 F.2d 879 (C.A. 4).

temporary injunction on the ground that the regional director did not have reasonable cause to believe that the unions engaged in a secondary boycott by inducing employees of a plumbing contractor (Phillips) not to install certain prefabricated pipe which Phillips was required to install under its subcontract with Koch. The district court, citing the decisions of several other courts of appeals, concluded that the right-to-control test, upon which the regional director relied, was an "erroneous view of the law"; that the unions' work stoppage was solely for the purpose of enforcing work-preservation clauses in their contracts with Phillips, which clauses required that such pipe be fabricated by Phillips' own employees; and therefore that "it would not be just and proper to issue an injunction." On appeal by the regional director, the court of appeals, without passing on the validity of the right-to-control test, concluded that in light of evidence not fully developed in the injunction proceeding—e.g., that Phillips stood to gain financially if the unions were successful in their demands—the regional director had "reasonable cause to believe that no [bona fide] labor dispute exists between Phillips and the unions and that the unions are engaged in a product boycott forbidden by the Act." Accordingly, the proceeding was remanded to the district court for the entry of an appropriate injunction.

In the *Kimstock* case,[20] another district court, relying on decisions of courts of appeals including a decision of its own circuit, rejected the regional director's reliance upon the right-to-control test. In *Kimstock*, the unions and an association of plumbing, heating, and piping contractors were parties to a collective-bargaining agreement which provided in substance that (1) whenever a contractor member of the association was engaged on a job where work within the jurisdictional claims of the unions was being performed by a nonsignatory contractor, the unions and signatory contractor would jointly "take the matter up with the awarding authorities," and that pending such meeting the unions could engage in a work stoppage for a period of up to 7 days; and (2) in such event the unions could require the signatory employer, through contractual arbitration, to pay the equivalent of wages and fringe benefits lost by the unions' members because of his failure to obtain the claimed work. When signatory employers accepted subcontracts on jobs where synthetic bathtubs and shower stalls fabricated by Kimstock were being installed by carpenter employees of Kimstock, contrary to the prevailing area practice whereby such items were installed by a composite crew of plumbers and carpenters, the unions filed a grievance and obtained an award for dam-

[20] *Johansen* v. *Southern Calif Pipe Trades Dist. Council 16* [*Kimstock Div., Tridair Industries*], 80 LRRM 2546 (D.C.Calif.)

ages against one employer, threatened another with work stoppages unless he complied with the aforementioned provisions of the agreement, and threatened employees of Kimstock with fines if they continued to perform certain of the installation work. The regional director contended that the clauses in question constituted a hot cargo agreement, that the unions, in furtherance of a dispute with Kimstock, engaged in a secondary boycott by threatening and fining the signatory employers, and that the unions' conduct, including the threats to Kimstock employees, constituted conduct in furtherance of a jurisdictional dispute with the Carpenters Union, which represented Kimstock's employees. However the district court rejected the regional director's contention that the signatory employers were neutrals to the dispute because they had no power to control the assignment of the disputed work and concluded that the contract clauses and their implementation were primary in nature because they were intended solely to preserve the work of the employees in the bargaining unit. The court relied on its finding that prior to the advent of the synthetic products plumbers performed most if not all of the work of installing bathtubs and shower stalls. The district court also concluded that no jurisdictional dispute was involved because the unions' actions were directed solely at compelling the signatory employers to fulfill their contractual obligations.

In the *U.S. Naval Supply Center* case,[21] the court of appeals affirmed an order of a district court granting a 10(l) injunction, based upon its finding that there was reasonable cause to believe that the unions engaged in a secondary boycott by threatening to and engaging in work stoppages against commercial steamship, stevedoring, and terminal company members of a multiemployer bargaining association, in furtherance of the unions' demands that their members be assigned certain work of loading and unloading cargo and stuffing and stripping containers then being performed at the Center, a facility operated by the United States Department of Defense. The district court rejected the unions' argument that they had a primary dispute with the association because its shipowner members had allegedly contracted to the Center work which the employees of the stevedoring companies were entitled to perform pursuant to the collective-bargaining agreement between the association and the unions. The district court found, upon consideration of all the circumstances, including the fact that the work in dispute had for many years beeen performed by employees of the Center who were represented by another union, that the striking unions' dispute was with the Center. The court enjoined the threats

[21] *Penello* v. *Intl. Longshoremen's Assn., Loc 1248*, 78 LRRM 2009, 65 LC ¶ 12,017 (D C.Va), aff'd. as modified 455 F 2d 912 (C A. 4)

and work stoppages, but refused to enjoin the unions from threatening or imposing fines against the shipowners in furtherance of their demands on the ground that the court would thereby improperly inject itself into the question of whether the unions had a claim for damages against the shipping lines and into an interpretation of the terms of the contract between the association and the unions. The court of appeals held that the finding of reasonable cause was warranted, but that the district court erred in refusing to enjoin the threats and imposition of fines because such conduct "was part and parcel of the same cause of secondary conduct which there was reasonable cause to believe constituted an unfair labor practice." The injunction was affirmed as so expanded. The court of appeals also rejected the unions' argument that the injunction should be dissolved because, subsequent to the issuance of the injunction, a Board trial examiner found that unions did not commit all of the charged unfair labor practices. The court concluded that there was "no final agency action to warrant dissolution of the injunction" because the parties had filed exceptions to the trial examiner's decision and the matter was still pending before the Board.

In *Prudential-Grace Lines*,[22] the court of appeals affirmed a decision and order of the district court enjoining the union from refusing to man two ships owned by the company, in furtherance of that union's jurisdictional dispute with another maritime union over the work of operating the company's ships which were based on the west coast of the United States. The court of appeals, in agreement with the district court, rejected the striking union's argument that its conduct was not in furtherance of a jurisdictional dispute but was intended solely to prevent displacement of crewmembers as a result of the company's transfer of the two struck ships. The court of appeals affirmed the district court's finding, based on the record evidence, that the striking union's action was not confined to protecting the jobs of dislocated crewmembers, but was intended to protect the job opportunities of its entire hiring hall, and held that under applicable Board law such conduct does not constitute a defense to a jurisdictional dispute charge. The court of appeals rejected the union's alternative argument that the applicable Board law, at least in the maritime industry, should be construed so as to legitimatize such conduct as work preservation rather than conduct in furtherance of a jurisdictional dispute. The court, without ruling on the merits of this contention, held that "any expansion of the perimeters governing the statute's application is, first, the province of the Board and is not in the first instance a proper

[22] *McLeod* v. *Natl Maritime Union of America*, 334 F.Supp. 34 (D.C N Y.), affd., 457 F.2d 490 (C.A. 2).

matter for the district court to resolve." The court of appeals also rejected the union's argument that for the purpose of maintaining the *status quo* any injunction order should be conditioned on continued employment of its members aboard the two struck vessels. The court observed that this condition would be contrary to the company's past practice whereby ships based on the west coast were manned by the rival union, and that in any event (citing *Henderson* v. *Intl. Union of Operating Engineers*, 420 F.2d 802, 809 (C.A. 9, 1969) "if *status quo* is a consideration at all in section 10(l) cases, the *status quo* to be preserved is the employer's right to make work assignments without being subjected to continuing strike pressure, pending a Board decision in the unfair labor practice proceedings." Finally, the court of appeals noted that subsequent to the entry of the injunction order the Board had issued its determination on the merits of the dispute pursuant to section 10(k) of the Act, but that the striking union had refused to comply with the determination, thereby necessitating an unfair labor practice proceeding. Therefore the court concluded, as did the Fourth Circuit in the *U.S. Naval Supply Center* case, that the injunction should be continued pending the final disposition of the case by the Board.

In the *Vantage Steamship Corp.* case,[23] the court of appeals reversed the judgment of the district court in denying the regional director's petition to enjoin the union (NMU) from maintaining and giving effect to charged hot cargo clauses in its collective-bargaining agreement with Commerce which provided, in substance, that if Commerce should sell or transfer any of its vessels to another business entity not covered by an NMU contract, for operation under the United States flag, the crew would continue to consist of employees referred through the NMU hiring hall, and that Commerce would obtain from the purchaser or transferee a written commitment for the benefit of NMU, that the collective-bargaining agreement between Commerce and NMU would apply to the vessel. Commerce, a tanker operator in the process of liquidating its operations, sold its last tanker to Vantage, whose employees were represented by a rival union, without complying with the contract clauses; whereupon NMU, in a private suit, sought and obtained an order of the district court enjoining Commerce from transferring the ship. Vantage filed a charge with the Board alleging that the clauses constituted an unlawful hot cargo agreement. The regional director, having concluded that there was reasonable cause to believe that the charges were true, petitioned the district court for a 10(l) injunction.

[23] *McLeod* v. *Natl Maritime Union of America & Commerce Tankers Corp*, 329 F Supp. 151 (D C N Y.), reversed 457 F 2d 1127 (C A. 2)

In the 10(l) proceeding, the district court found that the sole motivation of NMU in negotiating the collective-bargaining agreement with Commerce, and with other tanker operators as well, was to preserve as many of the declining number of jobs as possible for NMU seamen, and that NMU did not have an object of supplanting the rival union as the bargaining agent with Vantage, or any other dispute with Vantage "upon which motivation for secondary activities could be predicated." Although conceding that the clauses would nevertheless be unlawful if they were designed to protect union members generally, rather than those in the "particular bargaining unit," the court found that the unit in question consisted not only of the Commerce fleet, but of "that segment of the tanker industry which recognizes NMU." The court made this finding, notwithstanding the fact that Commerce did not participate in multiemployer bargaining, because of the "nature of the industry," *viz*, that all hiring was done through a central hiring hall, pension and seniority systems were industrywide in scope, and Commerce and other employers customarily executed the same collective-bargaining agreement which NMU negotiated with on association which represented about half of the tanker operators signatory to NMU contracts. Therefore, the court concluded that a 10(l) injunction was not warranted.

The regional director's appeal from the denial of the 10(l) injunction was consolidated with an appeal by Vantage and Commerce from the injunction obtained by NMU. The court of appeals reversed the denial of 10(l) injunctive relief, holding that in light of applicable Board and court precedents the bargaining unit which NMU's contract could lawfully protect consisted solely of Commerce's employees, and, therefore, the regional director had reasonable cause to believe that the clauses were unlawful because they admittedly were designed not only to preserve work for the members within the bargaining unit, but also to acquire work for members of the union as a whole. The court held that although appellate review of an order granting a 10(l) injunction is limited to determining whether the district court was "clearly erroneous" in finding reasonable cause to believe that the Act had been violated and whether the district court abused its discretion in granting the requested relief, the scope of review is not so limited when an injunction is denied because of the congressional policy favoring the granting of 10(l) injunctions. Accordingly, the court remanded the case to the district court for the issuance of an injunction. Applying its rationale to the private suit, the court vacated the order obtained by NMU enjoining the sale of the ship.

Two other cases involved the question of whether the regional director had reasonable cause to believe that picketing or strike conduct at the premises of, or ostensibly directed against, an employer with whom

the union had a dispute constituted a secondary boycott in the particular circumstances of the case. In *Steamship Trade Assn. of Baltimore* (STA),[24] the unions engaged in a strike against STA, an association of shipping and stevedoring companies in the port of Baltimore. Although the unions had been parties to a collective-bargaining contract with STA, and struck upon the expiration of that contract, the regional director contended, on the basis of statements made by union officials, that the strike was actually in furtherance of the unions' contract demands for the port of New York, where employers negotiated through a different association, and therefore constituted a secondary boycott. However the district court concluded, in light of its findings that the STA contract had expired, STA had made no substantial contract proposals, STA had in some negotiations been represented by the same individual who was president of the New York association, and STA traditionally struck upon the expiration of its contract; that "[t]o say that the Baltimore locals do not have a primary dispute with the STA is to ignore the substance and history of the dispute." The court further concluded that insofar as the strike may have had a partial object of applying pressure on the New York association, that object played only a minor part in the Baltimore strike, and in any event could not be used as a basis for enjoining the unions from striking STA after its contract had expired. Therefore, the court held that the regional director did not have reasonable cause to believe that the strike was unlawful. The court also held that it would not be just and proper in the circumstances to enjoin the unions from striking for the unlawful object, because such an order would impair their right to strike in furtherance of their demands for a Baltimore contract by placing them in jeopardy of being in contempt of court if their actions were deemed to be in support of the New York demands.

In the *Danens* case,[25] the union, which was engaged in strike against Cemstone, a firm engaged in the ready-mix concrete business and in the mining and sale of sand, gravel, and road building material known as "aggregate," extended its picket lines at the Cemstone premises to the entrance of a roadway which had been built and set aside solely for the use of Danens, a firm engaged in excavating and hauling dirt and earth. Pursuant to a contract with Cemstone, Danens was engaged in excavating earth known as borrow from a pit on Cemstone's premises, Cemstone having contracted to sell the borrow to the State of Minnesota. The regional director contended that Danen's work was unrelated to the normal operations of Cemstone and therefore, under the *General Electric* "reserved gate" rule,[26] the union engaged in a secondary boy-

[24] *Penello* v *Local 829, Intl. Longshoremen's Assn*, 334 F.Supp 690 (D C Md.).

[25] *Meter* v. *General Drivers Loc. 120, a/w Intl. Brotherhood of Teamsters* [*J A. Danens & Sons*], 329 F Supp 1348 (D C Minn).

[26] See *Loc 761, Electrical Workers* v *N.L R.B.*, 366 U S 667, 681 (1961).

cott by picketing the roadway utilized by Danens' employees. The district court rejected this contention on the basis of its findings that Cemstone sold the borrow to Danens as a normal byproduct of its mining operations and in the usual course of its business, that Cemstone was required by local law to eventually remove the borrow in order to meet sloping requirements, and that removal of such overburden was a normal part of Danens' operations. Therefore the court concluded that the regional director did not have reasonable cause to believe that the picketing was unlawful and refused to issue an injunction.

The eighth case, *Sardec*,[27] involved a question of the applicability of the Federal rules concerning pretrial discovery to 10(l) injunction proceedings. After the regional director petitioned the district court to enjoin charged secondary boycott conduct, the unions sought to take his deposition upon oral examination prior to trial. The regional director appeared for the deposition but refused to answer certain questions contending, in sum, that they were improper because they requested privileged information concerning the investigation by the Board's regional office, internal communications of Board personnel, and the mental processes of the director. The unions requested the district court to compel the director to answer the questions, contending that the purpose of the questions was to discover the facts on which the Director intended to rely at the injunction hearing, in order to aid the unions in presenting their defense. On the scheduled date of hearing the district court heard argument on the request, but then reserved decision pending the director's presentation of his witnesses in support of the injunction petition. After their testimony, which included extensive cross-examination, the court adjourned the hearing for 3 days to enable the unions to prepare their defense in light of the testimony presented by the director. After the unions presented their testimony, the district court denied the request to compel answers in the oral deposition and, finding reasonable cause to believe that the unions had engaged in a secondary boycott, entered a temporary injunction.

On appeal by the unions, the court of appeals affirmed the injunction, holding that the district court acted within the scope of its permissible discretion in refusing to compel the regional director to answer questions in the deposition. In agreement with the district court, the court of appeals held that the use of pretrial discovery to obtain factual information was not entirely precluded in 10(l) proceedings, but was discretionary with the district court, which had to balance the need for such information against the necessity for an expeditious injunction proceeding. The court of appeals held that the procedure followed by the district court was a proper exercise of that discretion.

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[27] *Samoff* v *Williamsport Building & Construction Trades Council*, 313 F.Supp. 1105 (D.C.Pa., 1970), affd 451 F.2d 272 (C.A. 3).

X

Contempt Litigation

During fiscal 1972, petitions for adjudication in contempt for noncompliance with decrees enforcing Board orders were filed in 19 cases: 18 for civil contempt and 1 for criminal contempt. In one of the these petition was granted and civil contempt adjudicated.[1] Five were discontinued upon full compliance.[2] In four cases the courts referred the issues to special masters for trials and recommendations, two to U.S. district judges,[3] and two to law professors.[4] Two cases await referral to a special master.[5] Of the remaining seven cases, six remain before the courts in various stages of litigation,[6] and the seventh was dismissed on the merits.[7] In addition, in two cases writs of body at-

[1] *N L R B* v *Whitehall Kitchens, Inc.*, order of Jan 17, 1972, No 71–1657 (C A 5), in civil contempt of judgment of May 4, 1971

[2] Upon proper posting and full compliance otherwise in *N L R B* v *GMW Corp , d/b/a Howard Johnson Motel* in civil contempt of judgment of Mar 10, 1971, No. 71–1188 (C.A 2) ; upon posting and mailing of notices to employees as required by decree in *N L.R B.* v *Daniel Contracting Co* , in civil contempt of judgment of Dec. 31, 1970, No 71–1334 (C A 5) ; upon proper reposting and payment of backpay in *N L R.B* v. *Herb A. Cook & Joan D Cook, d/b/a Golden Hours Convalescent Hospitals*, in civil contempt of judgment of June 9, 1971, No 71–1090 (C A 9) , upon bona fide reinstatement of discriminatee in *N L R B* v *Inland Motors*, in civil contempt of 439 F 2d 82 (C A. 9) ; upon bona fide reinstatement of discriminatee in *N L.R B* v *Otlans Roofing Co* , in civil contempt of 445 F 2d 299 (C A 9)

[3] *N L R B* v *Decaturville Sportswear Co* , in civil contempt of 8(a) (1) and (3) decree in 406 F 2d 886 (C A. 6), referred to U S District Judge Harry W Wellford (D C Tenn) , *N.L.R B.* v. *Loc. 25, Ironworkers*, in civil contempt of bargaining hall decree of Apr 9, 1970, No. 20,189 (C.A 6), referred to Senior U S District Judge Thomas P Thornton (D C Mich)

[4] *N L R B* v. *Flambeau Plastics Corp* , in civil contempt of 401 F 2d 128 (C A 7), cert denied, 393 U S 1019 , *N L R B* v *Dallas General Drivers, Local 745* [*Farmers Co-Op Gin Assn*], in civil contempt of 389 F 2d 553 (C A D C)

[5] *N.L R.B* v *Loc 15, Bricklayers*, in civil contempt of hiring hall decree of Oct. 1, 1971, in No 72–1158 (C A. 3) , *N L R B* v *Professional Tape Co* , in civil contempt of 422 F 2d 989 (C A 7)

[6] *N L R B* v *Amalgamated Loc 355 & Russell Motors*, in criminal contempt of judgments of Jan 6, 1964, Jan 11, 1966, and Mar 28, 1966, in Nos 28,451, 30,236, and 30,405 (C A. 2), against *Loc 355* and judgment of Mar 22, 1968, in No. 32,200 against *Russell Motors, N.L R.B.* v. *Hickman Garment Co* , in civil contempt of 437 F 2d 956 (C A 6) ; *N L R B* v. *Triar, Inc* , in civil contempt of judgment of Apr 6, 1972, in No 71–1069 (C A 9) , *N L R B* v *Laurence Gillespie*, in civil contempt of judgment of Nov. 2, 1971, in No. 25,560 (C A 9) ; *N L R B.* v. *Wayne R Sherwood, d/b/a Grounds Service,* re . the judgment of Feb 17, 1972, 450 F 2d 1119 (C A 9), discovery proceeding.

[7] *N L R B* v *Byrne Dairy*, order of May 1, 1972, denying Board's motion for contempt of 431 F 2d 1363 (C A. 2).

tachment were authorized by the courts because of the failure of the respondents to purge themselves as directed, one writ resulting in the resumption of good-faith bargaining [8] and the other in the payment of backpay.[9] In another case, compliance with a backpay order was achieved by garnishment of the respondent's assets.[10]

Turning to cases which commenced prior to fiscal 1971 but were disposed of during this period, contempt was adjudicated in five civil proceedings.[11] Five proceedings were abated: one upon the signing of a collective-bargining agreement,[12] two upon entry of and compliance with orders for the bona fide reinstatement of discriminatees with full backpay;[13] the fourth upon settlement of backpay liability;[14] and the fifth by the entry of an order requiring fixed nondiscriminatory hiring hall procedures.[15] In one case a writ of attachment was granted, resulting in full compliance with the backpay decree.[16] In another, the Board's petition was dismissed on the merits, the court approving a special master's report finding the original multiemployer unit no longer existent.[17]

A number of opinions which were rendered during this fiscal period warrant comment. In *Johnson Mfg. Co.*,[18] the court overruled its special master who had absolved the company of the charge of bad-faith bargaining in reliance on the rule of the Fifth Circuit that bad faith cannot be inferred from the content of company proposals alone, so long as they are not *per se* illegal.[19] Here, however, the proposals, which amounted to the retention of unilateral control over all significant terms and conditions of employment, were the same ones for which the company was faulted by the Board in the underlying case.

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[8] *N.L.R.B.* v. *Stafford Trucking*, order of Apr 7, 1972, 79 LRRM 3083 (C.A. 7).

[9] *N.L.R.B.* v. *Ambrose Distributing Co*, order of Dec. 7, 1971, in No 20,200 (C.A. 9), for failure to purge as directed by the contempt adjudication of July 26, 1967

[10] *N.L.R.B.* v. *K & H Specialties Co.*, No 37,068 (C.A. 6), garnishment issued out of U.S. District Court for Eastern District of Michigan, Nov. 15, 1971.

[11] *N.L.R.B.* v. *Amalgamated Loc 355*, 77 LRRM 3082 (C.A. 2); *N.L.R.B.* v. *Truck Drivers & Helpers, Loc. 676, Intl. Brotherhood of Teamsters*, 450 F.2d 413 (C.A. 3); *N.L.R.B.* v. *Johnson Mfg. Co. of Lubbock*, 458 F.2d 453 (C.A. 5), *N.L.R.B.* v. *Construction & General Laborers Union, No 1140*, adjudication of Feb 9, 1972, in No 19,297 (C.A. S); *N.L.R.B.* v. *Intl. Assn. of Bridge, Structural & Ornamental Ironworkers*, adjudication of Feb. 23, 1972, in No. 24,510, 79 LRRM 2723 (C.A. 9)

[12] *N.L.R.B.* v. *Arland Printing Co.*, in civil contempt of judgment of Oct. 8, 1970 No. 34,319 (C.A. 2).

[13] *N.L.R.B.* v. *J. P. Stevens & Co*, in civil contempt of 417 F 2d 533 (C.A. 5); *N.L.R.B.* v *Lipsey, Inc*, in civil contempt of judgment of Nov 14, 1969, No. 28,149 (C.A 5)

[14] *N.L.R.B* v. *Reynolds Box Co.*, approving settlement order of U.S. District Judge Rubin, as special master, No. 15,192 (C.A. 6)

[15] *N.L.R.B.* v. *Loc. 138, IUOE*, approving settlement recommendation of U.S. District Judge Bruchhausen, as special master, setting forth fixed hiring hall procedures, No. 26,562 (C.A. 2).

[16] *N.L.R.B.* v. *Wayne Lee*, upon issuance of writ of body attachment in No 18,438 (C.A. 6).

[17] *N.L.R.B.* v. *Southwestern Colorado Contractors Assn.*, 447 F 2d 968 (C.A. 10).

[18] See fn 11, above.

[19] See, for example, *Chevron Oil Co.* v. *N.L.R.B.*, 442 F.2d 1067 (C.A. 5, 1971)

For this reason, the court rejected the special master's recommendation and adjudged the company in contempt. Although the court found the company not to be in contempt for failing to provide the union with an evaluation for each employee for the purpose of merit wage increases, since it formally evaluated only "above normal" or "below normal" employees, the court noted that evaluations for all employees were necessary if the union was to meaningfully represent its members. The court therefore ordered the company to commence the special evaluation of each and every employee and to enter into good-faith negotiations for the restructuring of standards to be utilized in awarding merit wage increases.

In *Truck Drivers and Helpers Local Union 676*,[20] upon adjudicating the union in civil contempt for a second time for engaging in unlawful secondary boycott activity, in violation of the court's 1965 decree, the court not only assessed the $5,500 fine it had prospectively imposed in the first contempt case, but simultaneously increased the compliance fine to $20,000 per future violation plus $2,000 for each day it continues.

In *Ironworkers Local 86*,[21] the Ninth Circuit, in summarily adjudicating the union in civil contempt for continuing to give unlawful preference to union members in the operation of its hiring hall, not only ordered the traditional cease-and-desist remedies, but also substantially regulated the union's hiring hall procedures. The court's action in this respect is in notable contrast to the refusal of the Second Circuit to regulate a union's administration of its referral system. See *Loc. 138, Intl. Union of Operating Engineers* [*J. J. Hagerty*] v. *N.L.R.B.*, 321 F.2d 130, 137–138 (C.A. 2, 1963). Among other things, the court's hiring hall plan, which Local 86 was directed to implement for a 3-year period, establishes criteria for granting preferences in referrals and requires the union to maintain permanent records of all referrals. In order to quickly resolve any disputes arising over the interpretation and application of the hiring hall procedures, the court further directed that an independent investigating referee be appointed by the president of the local bar association to investigate complaints, issue remedial orders, and recommend changes in the hiring hall procedures. The order provides that costs and expenses of the referee be borne by the union, and for fixed fines for future noncompliance.

In *Southwestern Colorado Contractors Assn.*,[22] the Tenth Circuit dismissed the Board's civil contempt petition alleging violations of an order directing former members of a multiemployer association to

[20] See fn 11, above.

[21] *N L.R.B.* v. *Intl. Assn. of Structural & Ornamental Ironworkers, Loc. 86*, contempt adjudication of Feb 23, 1972, in No. 24,510, 443 F.2d 544. See fn. 11, above.

[22] See fn. 17, above.

engage in joint bargaining with the certified representative of their employees. The court found that all but five of the former members of the dissolved association had been eliminated from negotiations by consent of the parties, and that the union had entered into separate contracts with two employers and taken unilateral handbilling action against one. On these facts, the court concluded that the original unit had become fragmented without fault of the remaining employer respondents and was no longer viable. Accordingly, it absolved the employers from the contempt charges as it deemed that negotiations had become futile and unrequired under its order. However, it rejected the employers' further claim that the court lacked jurisdiction to entertain the proceedings by virtue of the diminution in the composition of the bargaining unit, noting that once jurisdiction attached in the original action enforcing the Board's order, that jurisdiction extended to ancillary contempt proceedings.

XI

Special and Miscellaneous Litigation

A. Judicial Intervention in Board Proceedings

1. Representation Proceedings

In *Algie V. Surratt* v. *N.L.R.B.*,[1] the Board, under its policy of generally not conducting an election pending resolution of unfair labor practice charges against the union or employer, had dismissed an employee petition for a decertification election on the ground that the General Counsel had found merit in unfair labor practice charges alleging that the employer had violated Section 8(a) (5) and (1) of the Act by refusing to bargain in good faith during the first year of the union's certification, and had determined to issue a complaint. The employees sought an injunction, in an Alabama Federal district court, requiring the Board to process the election petition. Finding that under the authority of the Fifth Circuit's decision in *Templeton* v. *Dixie olor Printing Co.*,[2] it had jurisdiction over the action, the district court ordered the Board to reinstate the election petition. On appeal, the Fifth Circuit affirmed the district court. The court held that while the Board had discretion to refuse to conduct the election pending resolution of the unfair labor practice case, it could not dismiss the election petition by "mechanical application of a blocking charge," for this is "what *Templeton* proscribed." Accordingly, the Board was directed to "exercise its discretion by looking to the circumstances of the case itself" and determining whether the election should be conducted.

In Dufresne v. *McCann Steel Co.*,[3] the Board had dismissed an employee petition for a decertification election in view of the pendency

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[1] —— F 2d —— (C A. 5), 80 LRRM 2804.

[2] 444 F.2d 1064 (1971), pet. for rehearing denied 444 F. 2d 1070. See thirty-sixth Annual Report at p. 129

[3] —— F.Supp —— (D C.Tenn), 78 LRRM 2331.

before the Board of a trial examiner's decision finding that the employer had violated section 8(a)(5) of the Act by refusing to bargain in good faith with the union. The employee brought suit in the Federal district court, asserting that under the reasoning in *Templeton* the Board was required to process the election petition. However, the court dismissed the action. The court stated that under the doctrine of *Leedom* v. *Kyne*,[4] "Federal district courts are without jurisdiction over representation matters unless the Board has acted in excess of its delegated powers or in contravention of a specific prohibition of the National Labor Relations Act." The court held that the blocking charge policy was within the Board's discretionary authority and not subject to review in the Federal district courts.[5] In *Commorato* v. *McLeod*,[6] the Board determined to conduct an election sought by a rival union which had asked that the election proceed even though the General Counsel had issued a complaint alleging that the employer engaged in unfair labor practices to coerce the employees from supporting either the rival or the incumbent union. The incumbent union brought suit in the Federal district court to enjoin the election on the ground that it was prohibited under the Board's blocking charge policy. The court dismissed the action for lack of jurisdiction, concluding that under *Leedom* v. *Kyne*, the Board's determination "that the 'blocking charge rule' should cease to apply and that in the circumstances any further delay in the election would not effectuate the policies of the act . . . was discretionary, not in violation of any clear mandatory provision of the Act, and, therefore, not within the exception permitting Federal district court review."

In *Catalytic Industrial Maintenance Co.* v. *Compton*,[7] the Federal district court dismissed the employer's suit to set aside the Board's certification of the union's election victory. The employer asserted that the Board had improperly overruled his objections to union election conduct by refusing to conduct a hearing on the objections. The court held that the Board's policy of conducting such hearings only where the objecting party has raised a substantial and material issue of fact was not in "direct contravention of a clear and specific mandatory statutory mandate," and hence, under *Leedom* v. *Kyne*, was not reviewable in a Federal district court.

2. Unfair Labor Practice Proceedings

In *Saez* v. *Goslee*,[8] the First Circuit affirmed the Federal district court's dismissal of Saez' suit for mandamus to compel the General

[4] 358 U S 184 (1958) See also *Boire* v. *Greyhound*, 376 U.S 473 (1964).

[5] The court distinguished *Templeton* in the Fifth Circuit as resting on the particular and unique facts presented.

[6] — F.Supp — (D.C N.Y.), 78 CRRM 2741.

[7] —— F Supp. —— (D C.P R), 78 LRRM 2431.

[8] —— F.2d ——, 80 LRRM 2808.

Counsel to issue a complaint alleging that the employer had discharged Saez for engaging in activity protected by the Act. The General Counsel had administratively dismissed Saez' charges on the ground that the investigation showed that Saez was a supervisor. In affirming the district court, the First Circuit stated, "Section 3(d) of the Act gives the General Counsel final authority over the investigation and issuance of unfair labor practice complaints. For a quarter of a century this section has been uniformly interpreted to mean that Federal courts have no jurisdiction to review the General Counsel's refusal.[9] Regarding Saez' claim that dismissal of charges without a hearing violated due process, the court stated that "to require some form of hearing for every unfair labor practice charge, [would place] a significant burden on the resources of the General Counsel's office. Perhaps more important, the informality of pre-Board procedures serves the public interest by promoting the amiable and peaceful settlement of disputes. . . . In any event, this determination does not reach constitutional levels.[10]

In *Henderson* v. *Intl. Longshoremen's Union, Loc. 50* [*Pacific Maritime Assn.*] [11] after the Board issued its order and determination under section 10(k) of the Act resolving a work assignment dispute between two unions, both the union which had not been awarded the work and the employer filed a petition to review in the Ninth Circuit. The court dismissed the petitions to review for lack of jurisdiction, noting that a 10(k) award and order are only reviewable in the event that a refusal by the losing union to comply with the Board's determination results in a further Board determination that the economic pressure it brought to obtain the work violated section 8(b)(4)(D) of the Act. The employers had, in addition, filed a court petition to review the General Counsel's dismissal of 8(b)(4)(D) charges which also had been pending against the union to which the Board awarded the work. The General Counsel had dismissed the charges since section 8(b)(4)(D) by its terms did not prohibit economic pressure by a union where the employer's refusal to assign the work is a "failing to conform to an order" of the Board. The court dismissed the petition to review on the ground that " '[b]y virtue of § 3(d) . . . the General Counsel['s] . . . decision on whether to issue a complaint charging an unfair labor practice is final and not reviewable by either the Board or the courts.' " [12]

In *Sears, Roebuck & Co.* v. *Solien*,[13] after issuing a complaint against the union based on charges filed by Sears, the General Counsel executed

[9] —— F 2d at ——, 80 LRRM at 2809.
[10] —— F.2d at ——, 80 LRRM at 2809.
[11] 457 F.2d 572 (C.A. 9).
[12] 457 F 2d at 578.
[13] 450 F.2d 353 (C.A. 8), cert. denied 405 U.S. 996.

a formal settlement agreement which provided for entry of a Board order and a court of appeals enforcement decree. Sears had objected to the settlement agreement, and had filed in a Federal district court to enjoin the regional director from engaging in settlement negotiations without Sears' full participation and access to evidence on which the regional director was relying. The Federal district court dismissed the suit for lack of jurisdiction, and on appeal the Eighth Circuit affirmed.[14] The court held that under the doctrine of *Myers* v. *Bethlehem Shipbuilding Corp.*,[15] requiring exhaustion of administrative remedies and statutory review procedures, the assertions of error made by Sears were reviewable exclusively before the Board prior to entry of its order and on review of that order, if any, in the court of appeals asked to enter an enforcement decree. In *Terminal Freight Cooperative Assn.* v. *N.L.R.B.*,[16] the General Counsel, over the objections of Terminal, the charging party, entered into a precomplaint informal settlement agreement with the respondent union requiring remedial action. Terminal filed a petition to review in the Third Circuit, asserting that under that court's holding in *Leeds & Northrup Co.* v. *N.L.R.B.*,[17] the Board had erred by refusing to grant an evidentiary hearing on the objections to the informal settlement. The court denied the petition to review. It noted that *Leeds & Northrup* "held that a charging party is entitled to an evidentiary hearing upon its objections to a proposed settlement agreement . . . once a complain has been issued." [18] The court held, however, that a precomplaint settlement is an exercise of the General Counsel's authority under section 3(d) of the Act to investigate charges and issue complaints. Since the General Counsel has "unreviewable discretion" under section 3(d), the court found that it could not review the refusal to grant a hearing on the objections to the precomplaint settlement.

B. Intervention in Court Proceedings

In *Intl. Brothd. of Boilermakers, Iron Shipbuilders* v. *Combustion Engineering*,[19] the union represented the employees under a contract covering one plant, and obtained an arbitration decision that the contract also applied to employees hired at a new plant the employer had

[14] Two related Eighth Circuit cases arising out of the same Board proceeding and referred to in the court's decision are discussed in the thirty-sixth Annual Report, pp 132–133

[15] 303 U.S 41(1938)

[16] 447 F.2d 1009 (C A. 3)

[17] 357 F.2d 527 (1966)

[18] 447 F 2d at 1101

[19] —— F.Supp. —— (D C Conn., 1971), 78 LRRM 2512.

opened. The union brought suit in a Federal district court to enforce the arbitrator's award. On charges filed by the employees at the new plant, however, the General Counsel issued a complaint alleging that the new plant was not an accretion to the existing single-plant bargaining unit; therefore, the application of the contract to the new plant violated the employee's protected right to elect their own bargaining representative. The Board moved to intervene in the court suit and moved to have the proceeding stayed pending the Board's decision. The court granted both motions, noting that "if this court confirms the [arbitrator's] award and the Board rejects it by finding that the application of the contract to the East Windsor employees is an unfair labor practice as charged, the decision of the Board would conflict with and take precedence over the decision of this Court. . . . This potential conflict is good reason for staying this proceeding until the Board makes its determination." [20]

C. Freedom of Information Act Issues

In *Julius G. Getman* v. *N.L.R.B.*,[21] the plaintiffs brought suit under the Freedom of Information Act (5 U.S.C. 552) to compell the Board to furnish them with copies of the *Excelsior* lists of employee names and home addresses which employers had submitted in about 35 election cases.[22] The plaintiffs sought the lists to enable them to make a study of Board elections through postelection and preelection interviews of employees. The plaintiffs asserted that they were entitled to the lists under the Freedom of Information Act's requirement that "each agency, on request for identifiable records . . . shall make the records promptly available to any person." (5 U.S.C. 552 (a)(3).) The district court ordered the Board to produce the lists. On appeal, the District of Columbia Circuit affirmed. The court rejected the Board's contention that the *Excelsior* lists were privileged from disclosure under three of the exemptions specified in the Freedom of

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[20] —— F.Supp. at ——, 78 LRRM at 2513.

[21] 450 F 2d 670 (C.A.D C).

[22] In *Excelsior Underwear Inc*, 156 NLRB 1236 (1966), the Board determined that, in order to ensure a fair representation election, henceforth it would require the employer to furnish the Board's regional director, shortly before the election, with a list of the names and home addresses of the employees eligible to vote in the election, which, in turn, would be made available to the unions or other persons who had demonstrated sufficient support among the employees to be placed on the ballot in the election. The validity of the *Excelsior* requirement was approved by the Supreme Court in *N L R B.* v. *Wyman-Gordon Co.*, 394 U.S 759, 767. See thirty-fourth Annual Report, pp 111–112.

Information Act.[23] The court also rejected the Board's contention that the district court had equitable jurisdiction to permit withholding of records which do not fall within one of the specific exemptions and that, since any good served by production of the *Excelsior* lists to the plaintiffs was outweighed by the possible interference with the election process which could flow from the use of the lists as a means of interviewing employees during the election campaign, the district court erred by requiring production. The court held that no such equitable discretion existed, stating, that "a District Court has not equitable jurisdiction to deny disclosure on grounds other than those laid out under one of the Act's enumerated exemptions." [24] The court stated, however, that as regards interference with the Board's elections, "It will be time enough to consider the relief to which the Board is entitled if and when a showing of disruption of Board functions is made." [25]

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[23] That Act exempts from disclosure nine categories of information and provides that records may not be withheld except as specifically exempted. The Board sought to justify withholding the *Excelsior* lists under the following exemptions (5 U.S.C. 552(b)):

* * * * * * *

(4) trade secrets and commercial or financial information obtained from a person and privileged or confidential;

* * * * * * *

(6) personnel and medical files and similar files the disclosure of which would constitute a clearly unwarranted invasion of personal privacy;

* * * * * * *

(7) investigatory files compiled for law enforcement purposes except to the extent available by law to a party other than an agency;

[24] 450 F.2d at 678.

[25] 450 F.2d at 675.

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APPENDIX

Statistical Tables for Fiscal Year 1972

Readers are encouraged to communicate with the Agency as to questions on the tables by writing to the Office of Statistical Reports and Evaluations, National Labor Relations Board, 1717 Pennsylvania Avenue NW., Washington, D.C. 20570.

GLOSSARY OF TERMS USED IN STATISTICAL TABLES

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

Adjusted Cases

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

Advisory Opinion Cases

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

Agreement of Parties

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

Amendment of Certification Cases

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

Backpay

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

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Backpay Hearing

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

Backpay Specification

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

Case

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

Certification

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

Challenges

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

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

Charge

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

Complaint

The document which initiates "formal" proceedings in an unfair labor practice case. It is issued by the regional director when he concludes on the

basis of a completed investigation that any of the allegations contained in the charge have merit and an adjustment or settlement has not been achieved by the parties. The complaint sets forth all allegations and information necessary to bring a case to hearing before a trial examiner pursuant to due process of law. The complaint contains a notice of hearing, specifying the time and place of hearing.

Compliance

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

Dismissed Cases

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

Dues

See "Fees, Dues, and Fines."

Election, Consent

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

Election Directed

Board-Directed

An election conducted by the regional pursuant to a decision and direction of election by the Board. Postelection rulings are made by the regional director or by the Board.

Regional Director-Directed

An election conducted by the regional director pursuant to a decision and direction of election issued by the regional director after a hearing. Postelection rulings are made by the regional director or by the Board.

Election, Expedited

An election conducted by the regional director pursuant to a petition filed within 30 days of the commencement of picketing in a situation in which a meritorious 8(b)(7)(C) charge has been filed. The election is conducted under priority conditions and without a hearing unless the regional director believes the proceeding raises questions which cannot be decided without a hearing.

Postelection rulings on objections and/or challenges are made by the regional director and are final and binding unless the Board grants an appeal on application by one of the parties.

Election, Rerun

An election held after an initial election has been set aside either by the regional director or by the Board.

Election, Runoff

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

Election, Stipulated

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

Eligible Voters

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

Fees, Dues, and Fines

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

Fines

See "Fees, Dues, and Fines."

Formal Action

Formal actions may be documents issued or proceedings conducted when the voluntary agreement of all parties regarding the disposition of all issues in a case cannot be obtained, and where dismissal of the charge or petition is not warranted. Formal actions are, further, those in which the decision-making authority of the Board (the regional director in representation

cases), as provided in sections 9 and 10 of the Act, must be exercised in order to achieve the disposition of a case or the resolution of any issue raised in a case. Thus, formal action takes place when a Board decision and consent order is issued pursuant to a stipulation, even though the stipulation constitutes a voluntary agreement.

Formal Agreement (in unfair labor practice cases)

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

Informal Agreement (in unfair labor practice cases)

A written agreement entered into between the party charged with committing an unfair labor practice, the regional director, and (in most cases) the charging party requiring the charged party to take certain specific remedial action as a basis for the closing of the case. Cases closed in this manner are included in "adjusted" cases.

Injunction Petitions

Petitions filed by the Board with respective U.S. district courts for injunctive relief under section 10(j) or section 10(l) of the Act pending hearing and adjudication of unfair labor practice charges before the Board. Also, petitions filed with the U.S. court of appeals under section 10(e) of the Act.

Jurisdictional Disputes

Controversies between unions or groupings of employees as to which employees will perform specific work. Cases involving jurisdictional disputes are received by the Board through the filing of charges alleging a violation of section 8(b)(4)(D). They are initially processed under section 10(k) of the Act which is concerned with the determination of the jurisdictional dispute itself rather than with a finding as to whether an unfair labor practice has been committed Thereafter, the failure of a party to comply with the Board's determination of dispute is the basis for the issuance of an unfair labor practice complaint and the processing of the case through usual unfair labor practice procedures.

Objections

Any party to an election may file objections alleging that either the conduct of the election or the conduct of a party to the election failed to meet the Board's standards. An election will be set aside if eligible employee-voters have not been given an adequate opportunity to cast their ballots, in secrecy and without hindrance from fear or other interference with the expression of their free choice.

Petition

See "Representation Case." Also see "Other Cases—AC, UC, and UD" under "Type of Cases."

Proceeding

One or more cases included in a single litigated action. A "proceeding" may be a combination of C and R cases consolidated for the purposes of hearing.

Representative Case

This term applies to cases bearing the alphabetical designations RC, RM, or RD. (See "R Cases" under "Types of Cases," this glossary, for specific definitions of these terms.) All three types of cases are included in the term "representation" which deals generally with the problem of which union, if any, shall represent employees in negotiations with their employer. The cases are initiated by the filing of a petition by a union, an employer, or a group of employees.

Representative Election

An election by secret ballot conducted by the Board among the employees in an appropriate collective-bargaining unit to determine whether the employees wish to be represented by a particular labor organization for purposes of collective bargaining. The tables herein reflect only final elections which result in the issuance of a certification of representatives if a union is chosen, or a certification of results if the majority has voted for "no union."

Situation

One or more unfair labor practice cases involving the same factual situation. These cases are processed as a single unit of work. A situation may include one or more CA cases, a combination of CA and CB cases, or a combination of other types of C cases. It does not include representation cases.

Types of Cases

General: Letter designations are given to all cases depending upon the subsection of the Act allegedly violated or otherwise describing the general nature of each case. Each of the letter designations appearing below is descriptive of the case it is associated with.

C Cases (unfair labor practice cases)

A case number which contains the first letter designation C, in combination with another letter, i.e., CA, CB, etc., indicates that it involves a charge that an unfair labor practice has been committed in violation of one or more subsections of section 8.

CA: A charge that an employer has committed unfair labor practices in violation of section 8(a) (1), (2), (3), (4), or (5), or any combination thereof.

CB: A charge that a labor organization has committed unfair labor practices in violation of section 8(b) (1), (2), (3), (5), or (6), or any combination thereof.

CC: A charge that a labor organization has committed unfair labor practices under section 8(b)(4) (i) and/or (ii), (A), (B), or (C), or any combination thereof.

CD: A charge that a labor organization has committed an unfair labor practice in violation of section 8(b)(4) (i) or (ii)(D). Preliminary actions under section 10(k) for the determination of jurisdictional disputes are processed as CD cases. (See "Jurisdictional Disputes" in this glossary.)

CE: A charge that either a labor organization or an employer, or both jointly, have committed an unfair labor practice in violation of section 8(e).

CP: A charge that a labor organization has committed unfair labor practices in violation of section 8(b)(7) (A), (B), or (C), or any combination thereof.

R Cases (representation cases)

A case number which contains the first letter designation R, in combination with another letter, i.e, RC, RD, RM, indicates that it is a petition for investigation and determination of a question concerning representation of employees, filed under section 9(c) and the Act.

RC: A petition filed by a labor organization or an employee alleging that a question concerning representation has arisen and seeking an election for the determination of a collective-bargaining representative.

RM: A petition filed by an employer alleging that a question concerning representation has arisen and seeking an election for the determination of a collective-bargaining representative.

RD: A petition filed by employees alleging that the union previously certified or currently recognized by the employer as their collective-bargaining representative no longer represents a majority of the employees in the appropriate unit and seeking an election to determine this.

Other Cases

AC: (Amendment of Certification cases): A petition filed by a labor organization or an employer for amendment of an existing certification to reflect changed circumstances, such as changes in the name or affiliation of the labor organization involved or in the name or location of the employer involved

AO: (Advisory Opinion cases): As distinguished from the other types of cases described above, which are filed in and processed by regional offices of the Board, AO or "advisory opinion" cases are filed directly with the Board in Washington and seek a determination as to whether the Board would or would not assert jurisdiction in any given situation on the basis of its current standards, over the party or parties to a proceeding pending before a State or territorial agency or a court. (See subpart H of the Board's Rules and Regulations, Series 8, as amended.)

UC: (Unit Clarification cases): A petition filed by a labor organization or an employer seeking a determination as to whether certain classifications of employees should or should not be included within a presently existing bargaining unit.

UD: (Union Deauthorization cases): A petition filed by employees pursuant to section 9(e)(1) requesting that the Board conduct a referendum to determine whether a union's authority to enter into a union-shop contract should be rescinded.

UD Cases

See "Other Cases—UD" under "Types of Cases."

Unfair Labor Practice Cases

See "C Cases" under "Types of Cases."

Union Deauthorizing Cases

See "Other cases—UD" under "Types of Cases."

Union-Shop Agreement

An agreement between an employer and a labor organization which requires membership in the union as a condition of employment on or after the 30th day following (1) the beginning of such employment or (2) the effective date of the agreement, whichever is the later.

Unit, Appropriate Bargaining

A grouping of employees in a plant, firm, or industry recognized by the employer, agreed upon by the parties to a case, or designated by the Board or its regional director, as appropriate for the purposes of collective bargaining.

Valid Vote

A secret ballot on which the choice of the voter is clearly shown.

Withdrawn Cases

Cases are closed as "withdrawn" when the charging party or petitioner, for whatever reasons, requests withdrawal of the charge or the petition and such request is approved.

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Table 1.—Total Cases Received, Closed, and Pending, Fiscal Year 1972 [1]

	Total	Identification of filing party					
		AFL–CIO unions	Teamsters	Other national unions	Other local unions	Individuals	Employers
All cases							
Pending July 1, 1971	11,232	4,673	1,347	527	429	2,840	1,416
Received fiscal 1972	41,039	14,395	5,840	1,514	1,327	12,943	5,020
On docket fiscal 1972	52,271	19,068	7,187	2,041	1,756	15,783	6,436
Closed fiscal 1972	39,474	13,644	5,679	1,522	1,255	12,348	5,026
Pending June 30, 1972	12,797	5,424	1,508	519	501	3,435	1,410
Unfair labor practice cases [2]							
Pending July 1, 1971	8,206	3,124	696	333	270	2,616	1,167
Received fiscal 1972	26,852	7,724	2,065	739	669	11,665	3,990
On docket fiscal 1972	35,058	10,848	2,761	1,072	939	14,281	5,157
Closed fiscal 1972	25,555	7,142	2,031	741	629	11,079	3,933
Pending June 30, 1972	9,503	3,706	730	331	310	3,202	1,224
Representation cases [3]							
Pending July 1, 1971	2,927	1,518	649	190	156	184	230
Received fiscal 1972	13,711	6,514	3,754	759	632	1,087	965
On docket fiscal 1972	16,638	8,032	4,403	949	788	1,271	1,195
Closed fiscal 1972	13,438	6,348	3,631	765	600	1,070	1,024
Pending June 30, 1972	3,200	1,684	772	184	188	201	17
Union-shop deauthorization cases							
Pending July 1, 1971	38					38	
Received fiscal 1972	172					172	
On docket fiscal 1972	210					210	
Closed fiscal 1972	180					180	
Pending June 30, 1972	30					30	
Amendment of certification cases							
Pending July 1, 1971	11	8	1	1	0	1	0
Received fiscal 1972	83	46	5	8	11	9	4
On docket fiscal 1972	94	54	6	9	11	10	4
Closed fiscal 1972	80	47	4	6	10	9	4
Pending June 30, 1972	14	7	2	3	1	1	0
Unit clarification cases							
Pending July 1, 1971	50	23	1	3	3	1	19
Received fiscal 1972	221	111	16	8	15	10	61
On docket fiscal 1972	271	134	17	11	18	11	80
Closed fiscal 1972	221	107	13	10	16	10	65
Pending June 30, 1972	50	27	4	1	2	1	15

[1] See "Glossary" for definitions of terms. Advisory opinion (AO) cases not included. See table 22.
[2] See table 1A for totals by types of cases.
[3] See table 1B for totals by types of cases.

Table 1A.—Unfair Labor Practice Cases Received, Closed, and Pending, Fiscal Year 1972 [1]

	Total	Identification of filing party					
		AFL-CIO unions	Teamsters	Other national unions	Other local unions	Individuals	Employers
	CA cases						
Pending July 1, 1971	5,894	3,074	683	318	220	1,595	4
Received fiscal 1972	17,736	7,612	2,045	665	547	6,856	11
On docket fiscal 1972	23,630	10,686	2,728	983	767	8,451	15
Closed fiscal 1972	16,725	7,027	2,011	665	506	6,505	11
Pending June 30, 1972	6,905	3,659	717	318	261	1,946	4
	CB cases						
Pending July 1, 1971	1,465	34	9	6	23	1,001	392
Received fiscal 1972	5,985	71	15	22	41	4,731	1,105
On docket fiscal 1972	7,450	105	24	28	64	5,732	1,497
Closed fiscal 1972	5,747	71	13	24	41	4,493	1,105
Pending June 30, 1972	1,073	34	11	4	23	1,239	392
	CC cases						
Pending July 1, 1971	485	3	1	5	14	10	452
Received fiscal 1972	1,947	12	1	45	41	50	1,798
On docket fiscal 1972	2,432	15	2	50	55	60	2,250
Closed fiscal 1972	1,928	13	1	41	48	51	1,774
Pending June 30, 1972	504	20	1	9	7	9	476
	CD cases						
Pending July 1, 1971	208	11	0	1	3	2	191
Received fiscal 1972	649	25	3	5	20	8	588
On docket fiscal 1972	857	36	3	6	23	10	779
Closed fiscal 1972	630	27	2	6	17	7	571
Pending June 30, 1972	227	9	1	0	6	3	208
	CE cases						
Pending July 1, 1971	58	0	1	1	5	2	49
Received fiscal 1972	86	0	0	1	11	3	71
On docket fiscal 1972	144	0	1	2	16	5	120
Closed fiscal 1972	79	0	1	2	9	5	62
Pending June 30, 1972	65	0	0	0	7	0	58
	CP cases						
Pending July 1, 1971	96	2	2	2	5	6	79
Received fiscal 1972	449	4	1	1	9	17	417
On docket fiscal 1972	545	6	3	3	14	23	496
Closed fiscal 1972	446	4	3	3	8	18	410
Pending June 30, 1972	99	2	0	0	6	5	86

[1] See "Glossary" for definitions of terms.

Table 1B.—Representation Cases Received, Closed, and Pending, Fiscal Year 1972 [1]

	Totals	Identification of filing party					
		AFL-CIO unions	Teamsters	Other national unions	Other local unions	Individuals	Employers
	RC cases						
Pending July 1, 1971	2,522	1,518	649	190	156	9	
Received fiscal 1972	11,666	6,509	3,750	750	630	18	
On docket fiscal 1972	14,188	8,027	4,399	949	786	27	
Closed fiscal 1972	11,359	6,344	3,629	765	598	23	
Pending June 30, 1972	2,829	1,683	770	184	188	4	
	RM cases						
Pending July 1, 1971	230						230
Received fiscal 1972	965						965
On docket fiscal 1972	1,195						1,195
Closed fiscal 1972	1,024						1,024
Pending June 30, 1972	171						171
	RD cases						
Pending July 1, 1971	175	0	0	0	0	175	
Received fiscal 1972	1,080	5	4	0	2	1,069	
On docket fiscal 1972	1,255	5	4	0	2	1,244	
Closed fiscal 1972	1,055	4	2	0	2	1,047	
Pending June 30, 1972	200	1	2	0	0	197	

[1] See "Glossary" for definitions of terms.

Table 2.—Types of Unfair Labor Practices Alleged, Fiscal Year 1972

	Number of cases showing specific allegations	Percent of total cases
A. Charges filed against employers under Sec. 8(a)		
Subsections of Sec. 8(a): Total cases	17,733	100.0
8(a)(1)	1,831	10 3
8(a)(1)(2)	328	1.8
8(a)(1)(3)	8,964	50.5
8(a)(1)(4)	82	0 5
8(a)(1)(5)	4,226	23.8
8(a)(1)(2)(3)	201	1.2
8(a)(1)(2)(4)	3	0.0
8(a)(1)(2)(5)	88	0.5
8(a)(1)(3)(4)	291	1.6
8(a)(1)(3)(5)	1,531	8.6
8(a)(1)(4)(5)	6	0 0
8(a)(1)(2)(3)(4)	10	0 1
8(a)(1)(2)(3)(5)	112	0.6
8(a)(1)(2)(4)(5)	5	0 0
8(a)(1)(3)(4)(5)	36	0 3
8(a)(1)(2)(3)(4)(5)	19	0.2
Recapitulation [1]		
8(a)(1) [2]	17,733	100 0
8(a)(2)	766	4.3
8(a)(3)	11,164	63.0
8(a)(4)	452	2.5
8(a)(5)	6,023	34.0
B. Charges filed against unions under Sec. 8(b)		
Subsections of Sec. 8(b). Total cases	9,030	100.0
8(b)(1)	3,522	39.0
8(b)(2)	226	2 5
8(b)(3)	383	4.3
8(b)(4)	2,596	28.7
8(b)(5)	7	0.1
8(b)(6)	14	0.2
8(b)(7)	449	5.0
8(b)(1)(2)	1,572	17.4
8(b)(1)(3)	165	1.8
8(b)(1)(5)	6	0 1
8(b)(1)(6)	3	0 0
8(b)(2)(3)	7	0.1
8(b)(2)(5)	2	0 0
8(b)(2)(6)	2	0 0
8(b)(3)(5)	1	0 0
8(b)(3)(6)	2	0.0
8(b)(1)(2)(3)	62	0.7
8(b)(1)(2)(5)	8	0.1
8(b)(1)(2)(6)	1	0.0
8(b)(2)(3)(5)	1	0 0
8(b)(1)(2)(3)(5)	1	0 0
Recapitulation [1]		
8(b)(1)	5,340	59.1
8(b)(2)	1,882	20.8
8(b)(3)	622	6.9
8(b)(4)	2,596	28.7
8(b)(5)	26	0.3
8(b)(6)	22	0.2
8(b)(7)	449	5 0
B1. Analysis of 8(b)(4)		
Total cases 8(b)(4)	2,596	100.0
8(b)(4)(A)	64	2 5
8(b)(4)(B)	1,806	69.5
8(b)(4)(C)	8	0.3
8(b)(4)(D)	649	25.0
8(b)(4)(A)(B)	59	2.3
8(b)(4)(A)(C)	2	0.1
8(b)(4)(B)(C)	6	0 2
8(b)(4)(A)(B)(C)	2	0.1
Recapitulation [1]		
8(b)(4)(A)	127	4.9
8(b)(4)(B)	1,873	72 1
8(b)(4)(C)	18	0.7
8(b)(4)(D)	649	25.0
B2. Analysis of 8(b)(7)		
Total cases 8(b)(7)	449	100.0
8(b)(7)(A)	137	30 5
8(b)(7)(B)	16	3.6
8(b)(7)(C)	291	64.9
8(b)(7)(A)(B)	1	0.2
8(b)(7)(A)(C)	2	0 4
8(b)(7)(B)(C)	1	0.2
8(b)(7)(A)(B)(C)	1	0.2
Recapitulation [1]		
8(b)(7)(A)	141	31.4
8(b)(7)(B)	19	4.2
8(b)(7)(C)	295	65.7
C. Charges filed under Sec. 8(e)		
Total cases 8(e)	86	100.0
Against unions alone	65	75.6
Against employers alone	3	3.5
Against unions and employers	18	20.9

[1] A single case may include allegations of violation of more than 1 subsection of the act. Therefore, the total of the various allegations is greater than the total number of cases

[2] Sec. 8(a)(1) is a general provision forbidding any type of employer interference with the rights of the employees guaranteed by the Act, and therefore is included in all charges of employer unfair labor practices

Table 3A.—Formal Actions Taken in Unfair Labor Practice Cases, Fiscal Year 1972 [1]

Types of formal actions taken	Cases in which formal actions taken	Formal actions taken by type of case										
		Total formal actions taken	CA	CB	CC	CD		CE	CP	CA combined with CB	C combined with representation cases	Other C combinations
						Jurisdictional dispute	Unfair labor practices					
10(k) notices of hearings issued	249	207				207						
Complaints issued	3,740	2,709	2,007	295	163		14	6	39	90	54	41
Backpay specifications issued	81	59	50	5	0		0	0	0	1	3	0
Hearings completed, total	1,881	1,342	912	130	37	108	3	6	14	53	60	19
Initial ULP hearings	1,809	1,286	868	124	37	108	3	6	14	52	58	16
Backpay hearings	56	43	32	5	0		0	0	0	1	2	3
Other hearings	16	13	12	1	0		0	0	0	0	0	0
Decisions by trial examiners, total	1,533	1,079	797	120	28		2	5	12	47	55	13
Initial ULP decisions	1,458	1,023	749	117	28		2	5	12	47	51	12
Backpay decisions	44	32	30	1	0		0	0	0	0	0	1
Supplemental decisions	31	24	18	2	0		0	0	0	0	4	0
Decisions and orders by the Board, total	1,885	1,376	855	163	76	78	5	13	25	75	46	40
Upon consent of parties.												
Initial decisions	245	158	69	24	39		1	0	7	9	1	8
Supplemental decisions	9	6	5	1	0		0	0	0	0	0	0
Adopting trial examiners' decisions (no exceptions filed):												
Initial ULP decisions	350	284	218	32	10		0	0	4	10	9	1
Backpay decisions	9	7	7	0	0		0	0	0	0	0	0
Contested												
Initial ULP decisions	1,168	866	518	99	22	78	3	13	13	56	35	29
Decisions based on stipulated record	22	12	8	2	1		1	0	0	0	0	0
Supplemental ULP decisions	20	11	8	2	1		0	0	0	0	0	0
Backpay decisions	62	32	22	3	3		0	0	1	0	1	2

[1] See "Glossary" for definitions of terms.

Table 3B.—Formal Actions Taken in Representation and Union Deauthorization Cases, Fiscal Year 1972 [1]

Types of formal actions taken	Cases in which formal actions taken	Formal actions taken by type of case				
		Total formal actions taken	RC	RM	RD	UD
Hearings completed, total	2,722	2,526	2,269	104	153	4
Initial hearings	2,472	2,287	2,054	91	142	3
Hearings on objections and/or challenges	250	239	215	13	11	1
Decisions issued, total	2,404	2,220	1,998	96	126	3
By regional directors	2,169	2,054	1,850	90	114	3
Elections directed	1,959	1,854	1,672	80	102	2
Dismissals on record	210	200	178	10	12	1
By Board	235	166	148	6	12	0
After transfer by regional directors for initial decision	190	126	112	4	10	0
Elections directed	143	84	76	1	7	0
Dismissals on record	47	42	36	3	3	0
After review of regional directors' decision	45	40	36	2	2	0
Elections directed	38	35	32	1	2	0
Dismissals on record	7	5	4	1	0	0
Decisions on objections and/or challenges, total	1,170	1,141	1,048	56	37	6
By regional directors	355	349	313	21	15	5
By Board	815	792	735	35	22	1
In stipulated elections	762	740	687	32	21	1
No exceptions to regional directors' reports	549	528	484	25	19	0
Exceptions to regional directors' reports	213	212	203	7	2	1
In directed elections (after transfer by regional directors)	36	36	33	2	1	0
In directed elections after review of regional directors' supplemental decisions	17	17	16	1	0	0

[1] See "Glossary" for definitions of terms

Table 3C.—Formal Actions Taken in Amendment of Certification and Unit Clarification Cases, Fiscal Year 1972 [1]

Types of formal actions taken	Cases in which formal actions taken	Formal actions taken by type of case	
		AC	UC
Hearings completed	100	9	90
Decisions issued after hearing	104	12	81
By regional directors	89	8	71
By Board	15	4	10
After transfer by regional directors for initial decision	10	3	6
After review of regional directors' decisions	5	1	4

[1] See "Glossary" for definitions of terms.

Table 4.—Remedial Actions Taken in Unfair Labor Practice Cases Closed, Fiscal Year 1972 [1]

Action taken	Total all	Remedial action taken by—											
		Employer						Union					
		Total	Pursuant to—					Total	Pursuant to—				
			Agreement of parties		Recommendation of trial examiner	Order of—			Agreement of parties		Recommendation of trial examiner	Order of—	
			Informal settlement	Formal settlement		Board	Court		Informal settlement	Formal settlement		Board	Court
A. By number of cases involved	[2] 7,466												
Notice posted	3,488	2,361	1,528	93	6	427	307	1,179	743	125	2	153	156
Recognition or other assistance withdrawn	119	119	59	5	0	17	38						
Employer-dominated union disestablished	37	37	22	0	0	9	6						
Employees offered reinstatement	1,029	1,029	681	35	0	189	124						
Employees placed on preferential hiring list	143	143	116	3	0	17	7						
Hiring hall rights restored	23							23	14	1	0	5	3
Objections to employment withdrawn	60							60	34	5	0	10	11
Picketing ended	746							746	686	23	0	16	21
Work stoppage ended	323							323	299	10	0	12	2
Collective bargaining begun	1,673	1,510	1,196	42	2	108	162	193	156	0	0	4	3
Backpay distributed	1,679	1,523	1,177	41	4	184	121	156	101	10	0	26	36
Reimbursement of fees, dues, and fines	417	314	234	5	0	42	33	103	68	9	1	12	13
Other conditions of employment improved	1,248	659	657	0	0	2	0	589	576	1	0	11	1
Other remedies	6	5	1	0	0	1	3	1	1	0	0	0	0

B. By number of employees affected Employees offered reinstatement, total	3,555	3,555	2,437	96	0	338	684						
Accepted	2,544	2,544	1,958	53	0	188	345						
Declined	1,011	1,011	479	43	0	151	338						
Employees placed on preferential hiring list	547	547	487	8	0	34	18						
Hiring hall rights restored	39							39	25	4	0	5	5
Objections to employment withdrawn	111							111	72	9	0	10	20
Employees receiving backpay:													
From either employer or union	6,093	5,822	4,236	144	4	519	919	271	146	15	0	31	100
From both employer and union	132	51	31	2	0	3	26	81	65	4	0	0	15
Employees reimbursed for fees, dues, and fines:													
From either employer or union	3,478	1,671	516	16	0	610	529	1,807	179	973	20	161	474
From both employer and union	194	0	0	0	0	0	0	194	136	0	0	0	58
C. By amounts of monetary recovery, total	$6,570,960	$6,208,150	$2,475,400	$118,620	$1,540	$1,542,200	$2,071,390	$362,540	$115,550	$47,770	$810	$48,660	$149,750
Backpay (includes all monetary payments except fees, dues, and fines)	6,448,640	6,141,790	2,434,220	117,650	1,540	1,522,590	2,066,790	306,850	93,830	38,210	0	38,650	136,160
Reimbursement of fees, dues, and fines	122,050	66,360	41,180	970	0	19,610	4,600	55,690	21,720	9,560	810	10,010	13,590

[1] See "Glossary" for definitions of terms. Data in this table are based on unfair labor practice cases that were closed during fiscal year 1972 after the company and/or union had satisfied all remedial action requirements.

[2] A single case usually results in more than one remedial action; therefore, the total number of actions exceeds the number of cases involved.

Table 5.—Industrial Distribution of Cases Received, Fiscal Year 1972 [1]

Industrial group [2]	All cases	Unfair labor practice cases							Representation cases				Union deauthorization cases	Amendment of certification cases	Unit clarification cases
		All C	CA	CB	CC	CD	CE	CP	All R	RC	RM	RD	UD	AC	UC
Ordnance and accessories	76	53	43	10	0	0	0	0	22	20	0	2	0	0	1
Food and kindred products	2,063	1,290	907	311	47	6	8	11	743	658	40	45	7	0	23
Tobacco manufacturers	20	17	10	6	1	0	0	0	2	2	0	0	0	0	1
Textile mill products	448	286	231	41	5	0	2	7	159	133	15	11	3	0	0
Apparel and other finished products made from fabric and similar materials	569	423	333	78	5	0	0	7	145	125	13	7	0	0	1
Lumber and wood products (except furniture)	511	266	217	34	10	2	0	3	237	212	12	13	4	1	3
Furniture and fixtures	481	297	240	39	12	2	0	4	178	149	12	17	2	2	2
Paper and allied products	719	470	345	106	16	2	0	1	238	205	13	20	5	2	4
Printing, publishing, and allied industries	1,202	747	526	178	20	20	0	3	425	350	24	51	6	4	20
Chemicals and allied products	1,008	548	295	99	44	6	0	4	433	381	21	31	3	4	20
Products of petroleum and coal	248	139	99	28	7	0	0	5	101	90	3	8	1	6	1
Rubber and plastic products	761	465	373	80	7	2	0	3	279	243	14	22	5	4	8
Leather and leather products	165	99	75	22	2	0	0	0	57	54	1	2	1	7	1
Stone, clay, and glass products	945	600	409	137	33	14	0	7	337	290	19	28	4	1	3
Primary metal industries	1,504	1,076	714	322	31	4	0	5	414	364	17	33	8	2	
Fabricated metal products (except machinery and transportation equipment)	1,524	975	715	221	22	10	0	7	534	449	27	58	5	1	9
Machinery (except electrical)	1,708	1,012	761	223	19	6	0	3	671	545	52	74	7	7	11
Electrical machinery, equipment, and supplies	1,311	870	611	233	11	11	1	3	423	371	24	28	10	1	7
Aircraft and parts	311	235	151	83	1	0	0	0	66	55	6	5	1	5	4
Ship and boat building and repairing	151	106	72	28	3	3	0	0	42	31	1	10	1	0	2
Automotive and other transportation equipment	1,264	882	615	250	13	1	2	1	369	324	15	30	5	4	4
Professional, scientific, and controlling instruments	213	140	114	23	2	1	0	0	70	58	8	4	1	0	2
Miscellaneous Manufacturing	927	593	367	198	19	5	0	4	322	285	17	20	7	2	3
Manufacturing	18,129	11,589	8,323	2,750	330	95	13	78	6,267	5,394	354	519	86	53	134
Metal mining	73	63	37	23	2	1	0	0	10	9	0	1	0	0	0
Coal mining	326	272	124	75	59	0	4	10	52	45	1	6	0	1	1
Crude petroleum and natural gas production	36	15	13	1	0	1	0	0	20	14	4	2	0	0	1

Nonmetallic mining and quarrying	100	57	41	11	2	1	1	1	42	34	2	6	1	0	0
Mining	535	407	215	110	63	3	5	11	124	102	7	15	1	1	2
Construction	4,374	3,892	1,214	972	1,039	439	39	189	462	368	74	20	4	9	7
Wholesale trade	2,319	1,166	858	211	66	6	1	24	1,134	951	88	95	11	3	5
Retail trade	4,711	2,546	1,962	387	104	15	4	74	2,115	1,705	221	189	35	5	10
Finance, insurance, and real estate	401	201	152	25	17	4	0	3	193	171	4	18	1	0	6
U.S. Postal Service	1,298	1,259	1,232	27	0	0	0	0	39	38	0	1	0	0	0
Local passenger transportation	417	303	215	81	5	2	0	0	108	92	9	7	2	2	2
Motor freight, warehousing, and transportation services	2,746	1,823	1,183	489	105	16	10	20	909	802	61	46	5	1	8
Water transportation	299	267	89	118	49	8	1	2	32	30	0	2	0	0	0
Other transportation	115	50	36	10	1	0	0	3	64	55	7	2	1	0	0
Communications	1,006	706	347	321	28	7	2	1	279	236	13	30	5	2	14
Heat, light, power, water, and sanitary services	543	317	200	72	27	17	0	1	218	183	10	25	0	1	7
Transportation, communication, and other utilities	5,126	3,466	2,070	1,091	215	50	13	27	1,610	1,398	100	112	13	6	31
Hotels and other lodging places	483	330	238	58	17	2	7	8	147	115	21	11	3	1	2
Personal services	283	170	118	37	7	3	0	5	109	93	5	11	1	2	1
Automobile repairs, garages, and other miscellaneous repair services	372	154	120	22	7	1	0	4	216	191	9	16	2	0	0
Motion pictures and other amusement and recreation services	370	272	148	78	24	9	3	10	97	79	12	6	1	0	0
Medical and other health services	850	433	366	54	6	3	0	4	404	360	20	24	9	0	4
Educational services	262	106	82	18	4	2	0	0	150	138	9	3	2	0	4
Nonprofit membership organizations	182	142	105	33	1	0	1	2	33	25	4	4	0	0	7
Miscellaneous business services	1,116	605	454	91	36	15	0	9	500	444	28	28	3	2	6
Miscellaneous repair services	60	23	18	5	0	0	0	0	36	31	2	3	0	1	0
Legal services	4	2	2	0	0	0	0	0	2	2	0	0	0	0	0
Museum, art galleries, and botanical and zoological gardens	12	7	7	0	0	0	0	0	4	2	1	1	0	0	1
Miscellaneous services	152	82	52	16	11	2	0	1	69	59	6	4	0	0	1
Services	4,146	2,326	1,710	412	113	37	11	43	1,767	1,539	117	111	21	6	26
Total, all industrial groups	41,039	26,852	17,736	5,985	1,947	649	86	449	13,711	11,666	965	1,080	172	83	221

[1] See "Glossary" for definitions of terms.
[2] Source: Standard Industrial Classification, Division of Statistical Standards, U.S. Bureau of the Budget, Washington, 1957.

Table 6A.—Geographic Distribution of Cases Received, Fiscal Year 1972 [1]

Division and State [2]	All cases	Unfair labor practice cases							Representation cases				Union deauthorization cases	Amendment of certification	Unit clarification cases
		All C	CA	CB	CC	CD	CE	CP	All R	RC	RM	RD	UD	AC	UC
Maine	90	42	30	8	3	1	0	0	47	43	1	3	1	0	0
New Hampshire	112	61	42	3	11	2	0	3	50	45	3	2	1	0	0
Vermont	40	27	16	5	3	3	0	0	13	13	0	0	0	0	0
Massachusetts	1,070	665	419	136	69	31	0	10	395	351	21	23	4	1	5
Rhode Island	171	107	70	22	9	5	0	1	57	47	2	8	3	2	2
Connecticut	413	267	165	72	20	8	0	2	140	129	4	7	0	0	6
New England	1,896	1,169	742	246	115	50	0	16	702	628	31	43	9	3	13
New York	3,335	2,403	1,289	836	141	64	8	65	889	765	69	55	24	1	18
New Jersey	1,554	992	599	272	65	26	1	29	544	471	42	31	12	3	3
Pennsylvania	2,436	1,527	930	346	135	78	3	35	875	786	41	48	10	11	13
Middle Atlantic	7,325	4,922	2,818	1,454	341	168	12	129	2,308	2,022	152	134	46	15	34
Ohio	2,574	1,722	1,171	360	123	35	5	28	811	683	54	74	9	3	29
Indiana	1,682	1,221	766	383	46	15	0	11	448	400	15	33	5	2	6
Illinois	2,703	2,065	1,302	611	86	40	3	23	609	489	51	69	16	5	8
Michigan	2,059	1,280	942	221	83	19	3	12	760	629	45	86	7	4	8
Wisconsin	897	550	394	109	32	13	0	2	333	274	31	28	2	4	8
East North Central	9,915	6,838	4,575	1,684	370	122	11	76	2,961	2,475	196	290	39	18	59
Iowa	386	219	158	21	24	11	1	4	162	144	6	12	1	1	3
Minnesota	489	189	122	24	31	6	1	5	284	241	22	21	8	3	5
Missouri	1,741	1,266	804	288	99	46	9	20	452	390	21	41	14	1	8
North Dakota	70	42	26	7	5	3	0	1	26	21	2	3	0	2	0
South Dakota	87	42	30	6	4	0	0	2	44	30	10	4	0	0	1
Nebraska	176	112	81	22	3	4	0	2	64	55	4	5	0	0	0
Kansas	277	160	121	21	10	4	1	3	115	92	12	11	0	0	2
West North Central	3,226	2,030	1,342	389	176	74	12	37	1,147	973	77	97	23	7	19
Delaware	83	35	17	8	6	3	0	1	45	43	1	1	0	3	0
Maryland	602	318	196	69	35	10	2	6	280	253	12	15	3	0	1
District of Columbia	199	115	77	23	7	4	1	3	82	73	6	3	0	0	2
Virginia	377	245	192	33	18	1	0	1	130	108	16	6	0	1	1

West Virginia	493	351	184	93	53	14	3	4	137	113	11	13	1	0	4
North Carolina	491	315	270	37	7	1	0	0	173	160	3	10	0	1	2
South Carolina	189	132	115	15	2	0	0	0	56	49	4	3	0	1	0
Georgia	664	413	333	56	19	1	0	4	248	235	2	11	0	1	2
Florida	1,040	733	543	91	65	18	8	8	301	265	15	21	0	1	5
South Atlantic	4,138	2,657	1,927	425	212	52	14	27	1,452	1,299	70	83	4	8	17
Kentucky	640	447	315	75	38	6	0	13	185	163	13	9	0	4	4
Tennessee	748	485	336	101	33	10	0	5	260	231	12	17	1	1	1
Alabama	543	326	259	48	14	2	1	2	208	196	3	9	0	2	7
Mississippi	268	190	152	13	20	3	0	2	74	64	2	8	0	0	4
East South Central	2,199	1,448	1,062	237	105	21	1	22	727	654	30	43	1	7	16
Arkansas	257	162	125	25	7	4	0	1	95	83	3	9	0	0	0
Louisiana	532	341	209	92	25	13	0	2	188	171	3	14	2	0	1
Oklahoma	300	174	130	24	17	2	0	1	122	105	7	10	0	1	3
Texas	1,646	1,172	847	225	74	17	2	7	460	369	34	57	0	3	11
West South Central	2,735	1,849	1,311	366	123	36	2	11	865	728	47	90	2	4	15
Montana	194	106	76	15	6	5	1	3	87	61	16	10	1	0	0
Idaho	116	75	62	10	3	0	0	0	40	33	5	2	0	0	1
Wyoming	48	24	16	3	4	0	0	1	23	20	1	2	0	1	0
Colorado	564	370	273	53	30	6	0	8	189	159	16	14	3	2	0
New Mexico	198	128	89	22	12	0	0	5	67	51	8	8	0	2	1
Arizona	357	249	155	50	28	10	0	6	108	101	2	5	0	0	0
Utah	168	86	53	9	18	4	0	2	78	69	1	8	0	0	4
Nevada	240	182	116	43	9	7	4	3	58	46	11	1	0	0	0
Mountain	1,885	1,220	840	205	110	32	5	28	650	540	70	40	4	5	6
Washington	889	602	389	136	52	10	0	15	272	188	48	36	4	1	10
Oregon	426	197	112	27	43	13	0	2	217	150	38	29	7	1	4
California	5,462	3,519	2,327	738	282	66	29	77	1,894	1,530	197	167	26	8	15
Alaska	110	63	42	16	4	1	0	0	46	39	1	6	0	0	1
Hawaii	196	108	73	19	8	4	0	4	88	76	4	8	0	0	0
Guam	2	1	1	0	0	0	0	0	1	1	0	0	0	0	0
Pacific	7,085	4,490	2,944	936	389	94	29	98	2,518	1,984	288	246	37	10	30
Puerto Rico	611	221	167	43	6	0	0	5	365	348	3	14	7	6	12
Virgin Islands	24	8	8	0	0	0	0	0	16	15	1	0	0	0	0
Outlying Areas	635	229	175	43	6	0	0	5	381	363	4	14	7	6	12
Total, all States and areas	41,039	26,852	17,736	5,985	1,947	649	86	449	13,711	11,666	965	1,080	172	83	221

[1]See "Glossary" for definitions of terms.
[2]The States are grouped according to the method used by the Bureau of the Census, U S. Department of Commerce

Table 6B.—Standard Federal Administrative Regional Distribution of Cases Received, Fiscal Year 1972 [1]

Standard Federal regions [2]	All cases	Unfair labor practice cases							Representation cases				Union deauthorization cases	Amendment of certification cases	Unit clarification cases
		All C	CA	CB	CC	CD	CE	CP	All R	RC	RM	RD	UD	AC	UC
Connecticut	413	267	165	72	20	8	0	2	140	129	4	7	0	0	6
Maine	90	42	30	8	3	1	0	0	47	43	1	3	1	0	0
Massachusetts	1,070	665	419	136	69	31	0	10	395	351	21	23	4	1	5
New Hampshire	112	61	42	3	11	2	0	3	50	45	3	2	1	0	0
Rhode Island	171	107	70	22	9	5	0	1	57	47	2	8	3	2	2
Vermont	40	27	16	5	3	3	0	0	13	13	0	0	0	0	0
Region I	1,896	1,169	742	246	115	50	0	16	702	628	31	43	9	3	13
Delaware	83	35	17	8	6	3	0	1	45	43	1	1	0	3	0
New Jersey	1,554	992	599	272	65	26	1	29	544	471	42	31	12	3	3
New York	3,335	2,403	1,289	836	141	64	8	65	889	765	69	55	24	1	18
Puerto Rico	611	221	167	43	6	0	0	5	365	348	3	14	7	6	12
Virgin Islands	24	8	8	0	0	0	0	0	16	15	1	0	0	0	0
Region II	5,607	3,659	2,080	1,159	218	93	9	100	1,859	1,642	116	101	43	13	33
District of Columbia	199	115	77	23	7	4	1	3	82	73	6	3	0	0	2
Maryland	602	318	196	69	35	10	2	6	280	253	12	15	3	0	1
Pennsylvania	2,436	1,527	930	346	135	78	3	35	875	786	41	48	10	11	13
Virginia	377	245	192	33	18	1	0	1	130	108	16	6	0	1	1
West Virginia	493	351	184	93	53	14	3	4	137	113	11	13	1	0	4
Region III	4,107	2,556	1,579	564	248	107	9	49	1,504	1,333	86	85	14	12	21
Alabama	543	326	259	48	14	2	1	2	208	196	3	9	0	2	7
Florida	1,040	733	543	91	65	18	8	8	301	265	15	21	0	1	5
Georgia	664	413	333	56	19	1	0	4	248	235	2	11	0	1	2
Kentucky	640	447	315	75	38	6	0	13	185	163	13	9	0	4	4
Mississippi	268	190	152	13	20	3	0	2	74	64	2	8	0	0	4
North Carolina	491	315	270	37	7	1	0	0	173	160	3	10	0	1	2
South Carolina	189	132	115	15	2	0	0	0	56	49	4	3	0	1	0
Tennessee	748	485	336	101	33	10	0	5	260	231	12	17	1	1	1
Region IV	4,583	3,041	2,323	436	198	41	9	34	1,505	1,363	54	88	1	11	25
Illinois	2,703	2,065	1,302	611	86	40	3	23	609	489	51	69	16	5	8
Indiana	1,682	1,221	766	383	46	15	0	11	448	400	15	33	5	2	6
Michigan	2,059	1,280	942	221	83	19	3	12	760	629	45	86	7	4	8

Minnesota	489	189	122	24	31	6	1	5	284	241	22	21	8	3	5
Ohio	2,574	1,722	1,171	360	123	35	5	28	811	683	54	74	9	3	29
Wisconsin	897	550	394	109	32	13	0	2	333	274	31	28	2	4	8
Region V	10,404	7,027	4,697	1,708	401	128	12	81	3,245	2,716	218	311	47	21	64
Arkansas	257	162	125	25	7	4	0	1	95	83	3	9	0	0	0
Louisiana	532	341	209	92	25	13	0	2	188	171	3	14	2	0	1
New Mexico	198	128	89	22	12	0	0	5	67	51	8	8	0	2	1
Oklahoma	300	174	130	24	17	2	0	1	122	105	7	10	0	1	3
Texas	1,646	1,172	847	225	74	17	2	7	460	369	34	57	0	3	11
Region VI	2,933	1,977	1,400	388	135	35	2	16	932	779	55	98	2	6	16
Iowa	386	219	158	21	24	11	1	4	162	144	6	12	1	1	3
Kansas	277	160	121	21	10	4	1	3	115	92	12	11	0	0	2
Missouri	1,741	1,266	804	288	99	46	9	20	452	390	21	41	14	1	8
Nebraska	176	112	81	22	3	4	0	2	64	55	4	5	0	0	0
Region VII	2,580	1,757	1,164	352	136	65	11	29	793	681	43	69	15	2	13
Colorado	564	370	273	53	30	6	0	8	189	159	16	14	3	2	0
Montana	194	106	76	15	6	5	1	3	87	61	16	10	1	0	0
North Dakota	70	42	26	7	5	3	0	1	26	21	2	3	0	2	0
South Dakota	87	42	30	6	4	0	0	2	44	30	10	4	0	0	1
Utah	168	86	53	9	18	4	0	2	78	69	8	1	0	0	4
Wyoming	48	24	16	3	4	0	0	1	23	20	1	2	0	1	0
Region VIII	1,131	670	474	93	67	18	1	17	447	360	53	34	4	5	5
Arizona	357	249	155	50	28	10	0	6	108	101	5	2	0	0	0
California	5,462	3,519	2,327	738	282	66	29	77	1,894	1,530	197	167	26	8	15
Hawaii	196	108	73	19	8	4	0	4	88	76	4	8	0	0	0
Guam	2	1	1	0	0	0	0	0	1	1	0	0	0	0	0
Nevada	240	182	116	43	9	7	4	3	58	46	11	1	0	0	0
Region IX	6,257	4,059	2,672	850	327	87	33	90	2,149	1,754	217	178	26	8	15
Alaska	110	63	42	16	4	1	0	0	46	39	1	6	0	0	1
Idaho	116	75	62	10	3	0	0	0	40	33	5	2	0	0	1
Oregon	426	197	112	27	43	13	0	2	217	150	38	29	7	1	4
Washington	889	602	389	136	52	10	0	15	272	188	48	36	4	1	10
Region X	1,541	937	605	189	102	24	0	17	575	410	92	73	11	2	16
Total, all Federal regions	41,039	26,852	17,736	5,985	1,947	649	86	449	13,711	11,666	965	1,080	172	83	221

[1] See "Glossary" for definitions of terms.
[2] The States are grouped according to the 10 Standard Federal Administrative regions.

Table 7.—Analysis of Methods of Disposition of Unfair Labor Practice Cases Closed, Fiscal Year 1972[1]

Method and stage of disposition	All C cases			CA cases		CB cases		CC cases		CD cases		CE cases		CP cases	
	Number	Percent of total closed	Percent of total method	Number	Percent of total closed	Number	Percent of total closed	Number	Percent of total closed	Number	Percent of total closed	Number	Percent of total closed	Number	Percent of total closed
Total number of cases closed	25,555	100.0	.....	16,725	100 0	5,747	100 0	1,928	100.0	630	100.0	79	100 0	446	100.0
Agreement of the parties	6,071	23.8	100.0	4,021	24.0	989	17.2	887	46.0	9	1.4	16	20.3	149	33.4
Informal settlement	5,847	22 8	96.3	3,926	23.5	937	16 3	828	42.9	5	0.8	14	17.8	137	30.7
Before issuance of complaint	4,445	17.4	73.2	2,835	17.0	757	13.2	724	37.5	(2)	.....	10	12 7	119	26.7
After issuance of complaint, before opening of hearing	1,327	5.2	21.9	1,033	6 1	168	2.9	100	5.2	5	0.8	4	5.1	17	3.8
After hearing opened before issuance of trial examiner's decision	75	0.3	1.2	58	0 3	12	0.2	4	0.2	0	.....	0	.....	1	0.2
Formal settlement	224	0.9	3.7	95	0.6	52	0.9	59	3.1	4	0.6	2	2.5	12	2.7
After issuance of complaint, before opening of hearing	184	0 7	3.0	69	0.4	42	0.7	56	2 9	3	0 5	2	2.5	12	2.7
Stipulated decision	16	0.1	0 3	10	0.1	2	0 0	4	0.2	0	.....	0	.....	0	.....
Consent decree	168	0 7	2.8	59	0.3	40	0.7	52	2.7	3	0.5	2	2.5	12	2.7
After hearing opened	40	0.2	0.7	26	0.1	10	0 2	3	0.1	1	0.1	0	.....	0	.....
Stipulated decision	1	0 0	0 0	1	0 0	0	.....	0	.....	0	.....	0	.....	0	.....
Consent decree	39	0 2	0.6	25	0.1	10	0.2	3	0.1	1	0.1	0	.....	0	.....
Compliance with	1,085	4.2	100 0	810	4.8	160	2 8	76	3 9	16	2.5	6	7.6	17	3.8
Trial examiner's decision	9	0 0	0.8	7	0 0	1	0 0	1	0	0	.....	0	.....	0	.....
Board decision	616	2.4	56 8	450	2.7	95	1 6	42	2.1	13	2.1	4	5.1	12	2.7
Adopting trial examiner's decision (no exceptions filed)	132	0.5	12.2	105	0.6	18	0 3	5	0.2	1	0.2	1	1 3	2	0.4
Contested	484	1.9	44.6	345	2.1	77	1.3	37	1.9	12	1 9	3	3.8	10	2.2

Circuit court of appeals decree	420	1.6	38.7	316	1.8	62	1.0	32	1.6	3	0 4	2	2 5	5	1.1
Supreme Court action	40	0 2	3.7	37	0.2	2	0 0	1	0.0	0	-------	0	-------	0	-------
Withdrawal	9,028	35.3	100 0	5,983	35.8	2,170	37.8	679	35.2	4	0.6	27	34.2	165	37.0
Before issuance of complaint	8,799	34.4	97.5	5,845	34.9	2,130	37.1	636	32.9	(2)	-------	27	34.2	161	36.1
After issuance of complaint, before opening of hearing	195	0.8	2 2	114	0.7	34	0.5	43	2.2	2	0.3	0	-------	2	0.4
After hearing opened, before trial examiner's decision	26	0.1	0.3	19	0.1	5	0.0	0	-------	0	-------	0	-------	2	0.4
After trial examiner's decision, before Board decision	2	0 0	0 0	1	0.0	1	0.0	0	-------	0	-------	0	-------	0	-------
After Board or court decision	6	0 0	0 1	4	0 0	0	-------	0	-------	2	0.3	0	-------	0	-------
Dismissal	8,755	34.3	100.0	5,894	35.2	2,427	42.2	286	14.8	3	0.5	30	37.9	115	25.8
Before issuance of complaint	8,375	32.8	95.7	5,590	33.4	2,375	41 3	280	14.5	(2)	-------	20	25.3	110	24.7
After issuance of complaint, before opening of hearing	31	0.1	0.4	26	0.1	4	0.0	0	-------	1	0.2	0	-------	0	-------
After hearing opened, before trial examiner's decision	5	0 0	0.1	4	0 0	0	-------	0	-------	0	-------	1	1.2	0	-------
By trial examiner's decision	2	0.0	0.0	2	0.0	0	-------	0	-------	0	-------	0	-------	0	-------
By Board decision	296	1.2	3.4	229	1.3	45	0 7	6	0.3	2	0.3	9	11.3	5	1.1
Adopting trial examiner's decision (no exceptions filed)	93	0 4	1.1	74	0.4	16	0.2	3	0.1	0	-------	0	-------	0	-------
Contested	203	0 8	2.3	155	0.9	29	0.5	3	0.1	2	0.3	9	11.3	5	1.1
By circuit court of appeals decree	41	0.2	0.5	38	0.2	3	0.0	0	-------	0	-------	0	-------	0	-------
By Supreme Court action	5	0 0	0.1	5	0 0	0	-------	0	-------	0	-------	0	-------	0	-------
10(k) actions (see table 7A for details of dispositions)	598	2.3	-------	-------	-------	-------	-------	-------	-------	598	94.9	-------	-------	-------	-------
Otherwise (compliance with order of trial examiner or Board not achieved—firms went out of business)	18	0 1	-------	17	0.1	1	-------	0	-------	0	-------	0	-------	0	-------

[1] See table 8 for summary of disposition by stage. See "Glossary" for definitions of terms.
[2] CD cases closed in this stage are processed as jurisdictional dispute under sec. 10(k) of the Act. See table 7A.

Table 7A.—Analysis of Methods of Disposition of Jurisdictional Dispute Cases Closed Prior to Unfair Labor Practice Proceedings, Fiscal Year 1972 [1]

Method and stage of disposition	Number of cases	Percent of total closed
Total number of cases closed before issuance of complaint	598	100.0
Agreement of the parties—informal settlement	266	44.5
Before 10(k) notice	235	39.3
After 10(k) notice, before opening of 10(k) hearing	31	5.2
After opening of 10(k) hearing, before issuance of Board decision and determination of dispute	0	----
Compliance with Board decision and determination of dispute	44	7.4
Withdrawal	211	35.2
Before 10(k) notice	192	32.1
After 10(k) notice, before opening of 10(k) hearing	11	1.8
After opening of 10(k) hearing, before issuance of Board decision and determination of dispute	0	----
After Board decision and determination of dispute	8	1.3
Dismissal	77	12.9
Before 10(k) notice	66	11.0
After 10(k) notice, before opening of 10(k) hearing	1	0.2
After opening of 10(k) hearing, before issuance of Board decision and determination of dispute	0	----
By Board decision and determination of dispute	10	1.7

[1] See "Glossary" for definitions of terms.

Table 8.—Disposition by Stage of Unfair Labor Practice Cases Closed, Fiscal Year 1972 [1]

Stage of disposition	All C cases		CA cases		CB cases		CC cases		CD cases		CE cases		CP cases	
	Number of cases	Percent of cases closed	Number of cases	Percent of cases closed	Number of cases	Percent of cases closed	Number of cases	Percent of cases closed	Number of cases	Percent of cases closed	Number of cases	Percent of cases closed	Number of cases	Percent of cases closed
Total number of cases closed	25,555	100.0	16,725	100.0	5,747	100.0	1,928	100.0	630	100 0	79	100.0	446	100.0
Before issuance of complaint	22,217	86.9	14,270	85.3	5,262	91.6	1,640	85.0	598	94.9	57	72.2	390	87 4
After issuance of complaint, before opening of hearing	1,737	6.8	1,242	7.4	248	4.3	199	10.3	11	1.7	6	7.6	31	7.0
After hearing opened, before issuance of trial examiner's decision	146	0.6	107	0.6	27	0 5	7	0.4	1	0.2	1	1.2	3	0.7
After Trial Examiner's Decision, before issuance of Board decision	13	0.0	10	0.0	2	0.0	1	0 0	0	-------	0	-------	0	-------
After Board order adopting Trial Examiner's Decision in absence of exceptions	225	0.9	179	1 1	34	0.6	8	0.4	1	0.2	1	1.2	2	0.4
After Board decision, before circuit court decree	711	2.8	521	3.1	107	1.8	40	2.1	16	2.5	12	15.2	15	3 4
After circuit court decree, before Supreme Court action	461	1.8	354	2.1	65	1.2	32	1.7	3	0.5	2	2.6	5	1.1
After Supreme Court action	45	0.2	42	0.3	2	0 0	1	0 0	0	-------	0	-------	0	-------

[1] See "Glossary" for definitions of terms.

Table 9.—Disposition by Stage of Representation and Union Deauthorization Cases Closed, Fiscal Year 1972 [1]

Stage of disposition	All R cases		RC cases		RM cases		RD cases		UD cases	
	Number of cases	Percent of cases closed	Number of cases	Percent of cases closed	Number of cases	Percent of cases closed	Number of cases	Percent of cases closed	Number of cases	Percent of cases closed
Total number of cases closed	13,438	100 0	11,359	100 0	1,024	100 0	1,055	100 0	180	100 0
Before issuance of notice of hearing	5,814	43.3	4,529	39 8	660	64 5	625	59.2	121	67 2
After issuance of notice before close of hearing	5,237	38 9	4,713	41 5	233	22.7	291	27 6	3	1 7
After hearing closed before issuance of decision	159	1 2	135	1.2	12	1 2	12	1 1	2	1.1
After issuance of regional director's decision	2,052	15 3	1,827	16.1	112	10 9	113	10.7	54	30.0
After issuance of Board decision	176	1.3	155	1 4	7	0.7	14	1 3	0	

[1] See "Glossary" for definitions of terms.

Table 10.—Analysis of Methods of Disposition of Representation and Union Deauthorization Cases Closed, Fiscal Year 1972 [1]

Method and stage of disposition	All R cases		RC cases		RM cases		RD cases		UD cases	
	Number	Percent	Number	Percent	Number	Percent	Number	Percent	Number	Percent
Total, all	13,438	100.0	11,359	100.0	1,024	100.0	1,055	100.0	180	100.0
Certification issued, total	9,081	67.6	8,116	71.4	506	49.4	459	43.5	95	52.8
After:										
Consent election	1,892	14.1	1,664	14.6	119	11.6	109	10.3	25	13.9
Before notice of hearing	1,160	8.6	1,016	8.9	87	8.5	57	5.4	22	12.2
After notice of hearing, before hearing closed	731	5.4	647	5.7	32	3 1	52	4.9	3	1.7
After hearing closed, before decision	1	0.0	1	0 0	0		0		0	
Stipulated election	5,386	40.1	4,852	42 7	280	27.3	254	24.1	16	8.9
Before notice of hearing	2,189	16.3	1,892	16.7	175	17.0	122	11.6	16	8.9
After notice of hearing, before hearing closed	3,166	23.5	2,934	25.8	103	10.1	129	12.2	0	
After hearing closed, before decision	31	0.2	26	0.2	2	0.2	3	0.3	0	
Expedited election	30	0 2	9	0 1	21	2.1	0		0	
Regional director-directed election	1,643	12.2	1,476	13 0	82	8 0	85	8.1	54	30.0
Board-directed election	130	1.0	115	1.0	4	0.4	11	1.0	0	
By withdrawal, total	3,358	25 0	2,630	23.2	359	35.1	369	35.0	65	36.1
Before notice of hearing	1,870	13.9	1,335	11 7	262	25 6	273	25.9	63	35.0
After notice of hearing, before hearings closed	1,227	9.1	1,077	9.5	73	7.1	77	7.3	0	
After hearing closed, before decision	59	0 4	45	0.4	8	0.8	6	0.6	2	1.1
After regional director's decision and direction of election	191	1 4	163	1.4	15	1.5	13	1.2	0	
After Board decision and direction of election	11	0.1	10	0.1	1	0 1	0		0	
By dismissal, total	999	7 4	613	5.4	159	15.5	227	21.5	20	11.1
Before notice of hearing	565	4.2	277	2.4	115	11.2	173	16.4	20	11.1
After notice of hearing, before hearing closed	113	0.8	55	0.5	25	2.4	33	3.1	0	
After hearing closed, before decision	68	0.5	63	0.6	2	0.2	3	0.3	0	
By regional director's decision	218	1.6	188	1.6	15	1.5	15	1.4	0	
By Board decision	35	0 3	30	0.3	2	0.2	3	0.3	0	

[1] See "Glossary" for definitions of terms.

Table 10A.—Analysis of Methods of Disposition of Amendment of Certification and Unit Clarification Cases Closed, Fiscal Year 1972

	AC	UC
Total, all	80	221
Certification amended or unit clarified	46	35
Before hearing	41	9
By regional director's decision	41	9
By Board decision	0	0
After hearing	5	26
By regional director's decision	4	25
By Board decision	1	1
Dismissed	14	85
Before hearing	8	23
By regional director's decision	8	23
By Board decision	0	0
After hearing	6	62
By regional director's decision	3	53
By Board decision	3	9
Withdrawn	20	101
Before hearing	20	98
After hearing	0	3

Table 11.—Types of Elections Resulting in Certification in Cases Closed, Fiscal Year 1972 [1]

Type of case	Total	Type of election				
		Consent	Stipulated	Board-directed	Regional director-directed	Expedited elections under 8(b)(7)(C)
All types, total.						
Elections	9,020	1,818	5,378	94	1,702	28
Eligible voters	597,794	93,478	370,990	14,066	118,474	786
Valid votes	524,013	77,007	333,037	11,947	101,426	596
RC cases						
Elections	8,066	1,591	4,882	84	1,503	6
Eligible voters	556,100	86,873	346,171	13,686	109,166	204
Valid votes	489,332	71,283	311,936	11,594	94,363	156
RM cases						
Elections	406	93	231	2	58	22
Eligible voters	14,746	1,957	10,300	87	1,820	582
Valid votes	12,105	1,708	8,580	74	1,303	440
RD cases						
Elections	451	108	249	8	86	0
Eligible voters	20,790	2,867	13,503	293	4,127	0
Valid votes	18,040	2,573	11,715	279	3,473	0
UD cases.						
Elections	97	26	16	0	55	----
Eligible voters	6,158	1,781	1,016	0	3,361	----
Valid votes	4,536	1,443	806	0	2,287	----

[1] See "Glossary" for definitions of terms.

Table 11A.—Analysis of Elections Conducted in Representation Cases Closed, Fiscal Year 1972

Type of election	All R elections				RC elections				RM elections				RD elections			
	Elections conducted				Elections conducted				Elections conducted				Elections conducted			
	Total elections	Withdrawn or dismissed before certification	Resulting in a rerun or runoff	Resulting in certification [1]	Total elections	Withdrawn or dismissed before certification	Resulting in a rerun or runoff	Resulting in certification	Total elections	Withdrawn or dismissed before certification	Resulting in a rerun or runoff	Resulting in certification	Total elections	Withdrawn or dismissed before certification	Resulting in a rerun or runoff	Resulting in certification
All types	9,226	83	220	8,923	8,354	79	209	8,066	415	2	7	406	457	2	4	451
Rerun required			162				152				7				3	
Runoff required			58				57				0				1	
Consent elections	1,829	7	30	1,792	1,623	5	27	1,591	97	1	3	93	109	1	0	108
Rerun required			21				18				3				0	
Runoff required			9				9				0				0	
Stipulated elections	5,538	45	131	5,362	5,053	45	126	4,882	234	0	3	231	251	0	2	249
Rerun required			97				92				3				2	
Runoff required			34				34				0				0	
Regional director-directed	1,731	30	54	1,647	1,583	28	52	1,503	59	1	0	58	89	1	2	86
Rerun required			42				41				0				1	
Runoff required			12				11				0				1	
Board-directed	99	1	4	94	89	1	4	84	2	0	0	2	8	0	0	8
Rerun required			1				1				0				0	
Runoff required			3				3				0				0	
Expedited—sec. 8(b)(7)(C)	29	0	1	28	6	0	0	6	23	0	1	22	0	0	0	0
Rerun required			1				0				1				0	
Runoff required			0				0				0				0	

[1] The total of representation elections resulting in certification excludes elections held in UD cases, which are included in the totals in table 11.

Table 11B.—Representation Elections in Which Objections and/or Determinative Challenges Were Ruled On in Cases Closed, Fiscal Year 1972

	Total elections	Objections only		Challenges only		Objections and challenges		Total objections [1]		Total challenges [2]	
		Number	Percent	Number	Percent	Number	Percent	Number	Percent	Number	Percent
All representation elections	9,226	713	7.7	339	3.7	164	1.8	877	9.5	503	5.5
By type of case											
In RC cases	8,354	651	7.8	311	3.7	151	1.8	802	9.6	462	5.5
In RM cases	415	42	10.1	17	4.1	8	1.9	50	12.0	25	6.0
In RD cases	457	20	4.4	11	2.4	5	1.1	25	5.5	16	3.5
By type of election											
Consent elections	1,829	76	4.2	40	2.2	12	7	88	4.8	52	2.8
Stipulated elections	5,538	433	7.8	184	3.3	103	1.9	536	9.7	287	5.2
Expedited elections	29	5	17.2	0	------	0	------	5	17.2	0	------
Regional director-directed elections	1,731	185	10.7	109	6.3	47	2.7	232	13.4	156	9.0
Board-directed elections	99	14	14.1	6	6.1	2	2.0	16	16.2	8	8.1

[1] Number of *elections* in which objections were ruled on, regardless of number of allegations in each election.
[2] Number of *elections* in which challenges were ruled on, regardless of number of individual ballots challenged in each election.

Table 11C.—Objections Filed in Representation Cases Closed, by Party Filing, Fiscal Year 1972[6]

	Total		By employer		By union		By both parties [1]	
	Number	Percent by type	Number	Percent by type	Number	Percent by type	Number	Percent by type
All representation elections	1,095	100.0	391	35.7	682	62.3	22	2.0
By type of case								
RC cases	1,007	100.0	373	37.0	619	61.5	15	1.5
RM cases	58	100.0	12	20.7	43	74.1	3	5.2
RD cases	30	100.0	6	20.0	20	66.7	4	13.3
By type of election								
Consent elections	118	100.0	41	34.7	74	62.7	3	2.6
Stipulated elections	668	100.0	232	34.7	425	63.6	11	1.7
Expedited elections	6	100.0	1	16.7	5	83.3	0	--------
Regional director-directed elections	287	100.0	112	39.0	168	58.5	7	2.5
Board-directed elections	16	100.0	5	31.3	10	62.5	1	6.2

[1] See "Glossary" for definitions of terms.
[2] Objections filed by more than one party in the same case are counted as 1

Table 11D.—Disposition of Objections in Representation Cases Closed, Fiscal Year 1972 [1]

	Objections filed	Objections withdrawn	Objections ruled upon	Overruled		Sustained [2]	
				Number	Percent of total ruled upon	Number	Percent of total ruled upon
All representation elections	1,095	218	877	683	77.9	194	22.1
By type of case.							
RC cases	1,007	205	802	618	77.1	184	22.9
RM cases	58	8	50	43	86.0	7	14.0
RD cases	30	5	25	22	88.0	3	12.0
By type of election							
Consent elections	118	31	87	63	72.4	24	27.6
Stipulated elections	668	131	537	424	79.0	113	21.0
Expedited elections	6	1	5	4	80 0	1	20.0
Regional director-directed elections	287	55	232	178	76.7	54	23.3
Board-directed elections	16	0	16	14	87.5	2	12.5

[1] See "Glossary" for definitions of terms
[2] See table 11E for rerun elections held after objections were sustained In 32 elections in which objections were sustained, the cases were subsequently withdrawn. Therefore, in these cases no rerun elections were conducted.

Table 11E.—Results of Rerun Elections Held in Representation Cases Closed, Fiscal Year 1972 [1]

	Total reruns elections [2]		Union certified		No union chosen		Outcome of original election reversed	
	Number	Percent by type	Number	Percent by type	Number	Percent by type	Number	Percent by type
All representation elections	151	100.0	51	33 8	100	66.2	45	29.8
By type of case								
RC cases	141	100 0	45	31.9	96	68.1	43	30.5
RM cases	7	100 0	5	71.4	2	28.6	2	28.6
RD cases	3	100 0	1	33 3	2	66.7	0	----
By type of election								
Consent elections	21	100.0	3	14.3	18	85.7	6	28.6
Stipulated elections	87	100 0	30	34.5	57	65.5	25	28.7
Expedited elections	1	100.0	0	----	1	100.0	0	----
Regional director-directed elections	41	100 0	18	43.9	23	56.1	14	34.1
Board-directed elections	1	100.0	0	----	1	100.0	0	----

[1] See "Glossary" for definitions of terms
[2] Includes only final rerun elections, i.e., those resulting in certification. Excluded from the table are 11 rerun elections which were conducted and subsequently set aside pursuant to sustained objections. The 11 invalid rerun elections were followed by valid rerun elections which are included in the table.

Table 12.—Results of Union-Shop Deauthorization Polls in Cases Closed, Fiscal Year 1972

Affiliation of union holding union-shop contract	Number of polls					Employees involved (number eligible to vote) [1]					Valid votes cast			
	Total	Resulting in deauthorization		Resulting in continued authorization		Total eligible	In polls				Total	Percent of total eligible	Cast for deauthorization	
							Resulting in deauthorization		Resulting in continued authorization					
		Number	Percent of total	Number	Percent of total		Number	Percent of total	Number	Percent of total			Number	Percent of total eligible
Total	97	56	57.7	41	42.3	6,158	2,799	45.5	3,359	54.5	4,536	73.7	1,602	35.3
AFL–CIO unions	70	38	54.3	32	45.7	4,571	1,945	42.6	2,626	57.4	3,423	74.9	1,091	31.9
Teamsters	21	12	57.1	9	42.9	1,113	380	34.1	733	65.9	774	68.5	223	28.8
Other local unions	6	6	100.0	0	----------	474	474	100.0	0	----------	339	71.5	288	85.0

[1] Sec. 8(a)(3) of the Act requires that to revoke a union-shop agreement, a majority of the employees eligible to vote must vote in favor of deauthorization.

Table 13.—Final Outcome of Representation Elections in Cases Closed, Fiscal Year 1972 [1]

Participating unions	Total elections [2]	Elections won by unions						Election in which no representative chosen	Employees eligible to vote						In elections where no representative chosen
		Percent won	Total won	AFL–CIO unions	Teamsters	Other national unions	Other local unions		Total	In elections won	In units won by				
											AFL–CIO unions	Teamsters	Other national unions	Other local unions	
A. All representation elections															
AFL–CIO	4,753	50.4	2,397	2,397				2,356	299,375	112,936	112,936				186,439
Teamsters	2,629	51.3	1,349		1,349			1,280	76,330	26,537		26,537			49,793
Other national unions	576	52.4	302			302		274	42,342	13,885			13,885		28,457
Other local unions	256	55.5	142				142	114	13,974	4,998				4,998	8,976
1-union elections	8,214	51.0	4,190	2,397	1,349	302	142	4,024	432,021	158,356	112,936	26,537	13,885	4,998	273,665
AFL–CIO v. AFL–CIO	152	70.4	107	107				45	12,339	6,393	6,393				5,946
AFL–CIO v. Teamsters	178	83.7	149	56	93			29	18,394	12,485	4,877	7,608			5,909
AFL–CIO v. National	96	88.5	85	46		39		11	18,894	17,704	10,389		7,315		1,190
AFL–CIO v. Local	99	87.9	87	43			44	12	57,002	52,085	20,224			31,861	4,917
Teamsters v. Teamsters	3	66.7	2		2			1	203	154		154			49
Teamsters v. National	32	96.9	31		20	11		1	1,792	1,789		1,308	481		3
Teamsters v. Local	48	89.6	43		19		24	5	5,067	4,793		1,516		3,277	274
National v. Local	34	91.2	31			17	14	3	8,564	8,274			3,019	5,255	290
National v. National	10	100.0	10			10		0	694	694			694		0
Local v. Local	14	92.9	13				13	1	1,306	1,296				1,296	10
2-union elections	666	83.8	558	252	134	77	95	108	124,255	105,667	41,883	10,586	11,509	41,689	18,588
AFL–CIO v. AFL–CIO v. AFL–CIO	3	33.3	1	1				2	1,825	222	222				1,603
AFL–CIO v. AFL–CIO v. Teamsters	4	75.0	3	1	2			1	793	281	157	124			512
AFL–CIO v. AFL–CIO v. National	2	100.0	2	1		1		0	1,069	1,069	521		548		0
AFL–CIO v. AFL–CIO v. Local	9	100.0	9	7			2	0	5,923	5,923	1,698			4,225	0
AFL–CIO v. Teamsters v. Teamsters	3	100.0	3	0	3			0	105	105	0	105			0
AFL–CIO v. Teamsters v. National	5	100.0	5	2	2	1		0	1,680	1,680	185	405	1,090		0
AFL–CIO v. Teamsters v. Local	9	100.0	9	1	7		1	0	1,269	1,269	341	853		75	0
AFL–CIO v. National v. National	1	100.0	1	0		1		0	1,421	1,421	0		1,421		0
AFL–CIO v. National v. Local	2	100.0	2	0		1	1	0	276	276	0		13	263	0
AFL–CIO v. Local v. Local	3	66.7	2	0			2	1	20,764	20,623	0			20,623	141
Teamsters v. National v. Local	1	100.0	1		0	1	0	0	120	120		0	120	0	0

See footnotes at end of table.

Table 13.—Final Outcome of Representation Elections in Cases Closed, Fiscal Year 1972 [1]—Con.

Participating unions	Total elections [2]	Elections won by unions						Elections in which no representative chosen	Employees eligible to vote							In elections where no representative chosen
		Percent won	Total won	AFL–CIO unions	Teamsters	Other national unions	Other local unions		Total	In elections won	In units won by					
											AFL–CIO unions	Teamsters	Other national unions	Other local unions		
National v. Local v. Local	1	100.0	1			1	0	0	115	115			115	0	0	
3 (or more)-union elections	43	90.7	39	13	14	6	6	4	35,360	33,104	3,124	1,487	3,307	25,186	2,256	
Total representation elections	8,923	53.6	4,787	2,662	1,497	385	243	4,136	591,6.6	297,127	157,943	38,610	28,701	71,873	294,509	
B. Elections in RC Cases																
AFL–CIO	4,266	52.8	2,253	2,253				2,013	278,826	103,892	103,892				174,934	
Teamsters	2,377	52.8	1,255		1,255			1,122	70,638	24,405		24,405			46,233	
Other national unions	527	53.9	284			284		243	39,174	11,632			11,632		27,542	
Other local unions	231	56.7	131				131	100	13,241	4,497				4,497	8,744	
1-union elections	7,401	53.0	3,923	2,253	1,255	284	131	3,478	401,879	144,426	103,892	24,405	11,632	4,497	257,453	
AFL–CIO v. AFL–CIO	149	70 5	105	105				44	12,287	6,346	6,346				5,941	
AFL–CIO v. Teamsters	160	82.5	132	47	85			28	16,603	10,954	3,654	7,300			5,649	
AFL–CIO v. National	93	89.2	83	45		38		10	18,742	17,575	10,364		7,211		1,167	
AFL–CIO v. Local	94	90.4	85	42			43	9	54,684	51,917	20,203			31,714	2,767	
Teamsters v. Teamsters	3	66.7	2		2			1	203	154		154			49	
Teamsters v. National	30	96.7	29		18	11		1	1,610	1,607		1,126	481		3	
Teamsters v. Local	44	88.6	39		18		21	5	4,840	4,566		1,411		3,155	274	
National v. Local	28	92.9	26			16	10	2	8,174	7,945			2,914	5,031	229	
National v. National	10	100.0	10			10		0	694	694			694		0	
Local v. Local	14	92.9	13				13	1	1,306	1,296				1,296	10	
2-union elections	625	83.3	524	239	123	75	87	101	119,143	103,054	40,567	9,991	11,300	41,196	16,089	
AFL–CIO v. AFL–CIO v. AFL–CIO	3	33.3	1	1				2	1,825	222	222				1,603	
AFL–CIO v. AFL–CIO v. Teamsters	8	66.7	2	0	2			1	636	124	0	124			512	

AFL-CIO v AFL-CIO v. National	2	100.0	2	1		1		0	1,069	1,069	521		548		0
AFL-CIO v AFL-CIO v Local	9	100.0	9	7			2	0	5,923	5,923	1,698			4,225	0
AFL-CIO v. Teamsters v. Teamsters	2	100 0	2	0	2			0	100	100	0	100			0
AFL-CIO v. Teamsters v. National	5	100.0	5	2	2	1		0	1,680	1,680	185	405	1,090		0
AFL-CIO v. Teamsters v. Local	9	100 0	9	1	7		1	0	1,269	1,269	341	853		75	0
AFL-CIO v. National v. National	1	100.0	1	0		1		0	1,421	1,421	0		1,421		0
AFL-CIO v. National v Local	2	100.0	2	0		1	1	0	276	276	0		13	263	0
AFL-CIO v. Local v. Local	3	66.7	2	0			2	1	20,764	20,623	0			20,623	141
National v. Local v. Local	1	100.0	1			1	0	0	115	115			115	0	0
3- (or more) union elections	40	90 0	36	12	13	5	6	4	35,078	32,822	2,967	1,482	3,187	25,186	2,256
Total RC elections	8,066	55.6	4,483	2,504	1,391	364	224	3,583	556,100	280,302	147,426	35,878	26,119	70,879	275,798

C. Elections in RM cases

AFL-CIO	207	36 2	75	75				132	7,709	3,245	3,245				4,464
Teamsters	154	42 9	66		66			88	3,048	1,200		1,200			1,848
Other national unions	15	46.7	7			7		8	511	364			364		147
Other local unions	13	69.2	9				9	4	515	449				449	66
1-union elections	389	40.4	157	75	66	7	9	232	11,783	5,258	3,245	1,200	364	449	6,525
AFL-CIO v. AFL-CIO	1	0 0	0	0				1	5	0	0				5
AFL-CIO v. Teamsters	3	100.0	3	2	1			0	133	133	75	58			0
AFL-CIO v. National	1	100 0	1	1		0		0	25	25	25		0		0
AFL-CIO v. Local	4	50 0	2	1			1	2	2,260	168	21			147	2,092
Teamsters v. National	1	100.0	1		1	0		0	126	126		126	0		0
Teamsters v. Local	2	100.0	2		1		1	0	137	137		105		32	0
National v. Local	4	75.0	3			1	2	1	272	211			105	106	61
2-union elections	16	75 0	12	4	3	1	4	4	2,958	800	121	289	105	285	2,158
AFL-CIO v. Teamsters v. Teamsters	1	100 0	1	0	1			0	5	5	0	5			0
3 (or more)-union elections	1	100.0	1	0	1	0	0	0	5	5	0	5	0	0	0
Total RM elections	406	41 9	170	79	70	8	13	236	14,746	6,063	3,366	1,494	469	734	8,683

See footnotes at end of table.

Table 13.—Final Outcome of Representation Elections in Cases Closed, Fiscal Year 1972 [1]—Con.

Participating unions	Total elections [2]	Elections won by unions						Elections in which no representative chosen	Employees eligible to vote						In elections where no representative chosen
		Percent won	Total won	AFL–CIO unions	Teamsters	Other national unions	Other local unions		Total	In elections won	In units won by				
											AFL–CIO unions	Teamsters	Other national unions	Other local unions	
D. Elections in RD cases															
AFL–CIO	280	24.6	69	69				211	12,840	5,799	5,799				7,041
Teamsters	98	28.6	28		28			70	2,644	932		932			1,712
Other national unions	34	32.4	11			11		23	2,657	1,889			1,889		768
Other local unions	12	16.7	2				2	10	218	52				52	166
1-union elections	424	25.9	110	69	28	11	2	314	18,359	8,672	5,799	932	1,889	52	9,687
AFL–CIO v. AFL–CIO	2	100.0	2	2				0	47	47	47				0
AFL–CIO v. Teamsters	15	93.3	14	7	7			1	1,658	1,398	1,148	250			260
AFL–CIO v. National	2	50.0	1	0		1		1	127	104	0		104		23
AFL–CIO v. Local	1	0.0	0	0			0	1	58	0	0			0	58
Teamsters v. National	1	100.0	1		1	0		0	56	56		56	0		0
Teamsters v. Local	2	100.0	2		0		2	0	90	90		0		90	0
National v. Local	2	100.0	2			0	2	0	118	118			0	118	0
2-union elections	25	88.0	22	9	8	1	4	3	2,154	1,813	1,195	306	104	208	341
AFL–CIO v. AFL–CIO v. Teamsters	1	100.0	1	1	0			0	157	157	157	0			0
Teamsters v. National v. Local	1	100.0	1		0	1	0	0	120	120		0	120	0	0
3 (or more)-union elections	2	100.0	2	1	0	1	0	0	277	277	157	0	120	0	0
Total RD elections	451	29.7	134	79	36	13	6	317	20,790	10,762	7,151	1,238	2,113	260	10,028

[1] See "Glossary" for definitions of terms.
[2] Includes each unit in which a choice as to collective-bargaining agent was made; for example, there may have been more than 1 election in a single case, or several cases may have been involved in 1 election unit.

Table 14.—Valid Votes Cast in Representation Elections, by Final Results of Election, in Cases Closed, Fiscal Year 1972 [1]

Participating unions	Total valid votes cast	Valid votes cast in elections won						Valid votes cast in elections lost					
		Votes for unions					Total votes for no union	Votes for unions					Total votes for no union
		Total	AFL-CIO unions	Teamsters	Other national unions	Other local unions		Total	AFL-CIO unions	Teamsters	Other national unions	Other local unions	
A. All representation elections													
AFL-CIO	268,024	66,429	66,429				32,942	59,049	59,049				109,604
Teamsters	68,209	16,738		16,738			7,088	14,887		14,887			29,496
Other national unions	38,020	7,985			7,985		4,268	9,795			9,795		15,972
Other local unions	11,859	3,115				3,115	981	2,465				2,465	5,298
1-union elections	386,112	94,267	66,429	16,738	7,985	3,115	45,279	86,196	59,049	14,887	9,795	2,465	160,370
AFL-CIO v. AFL-CIO	10,853	4,987	4,987				678	1,764	1,764				3,424
AFL-CIO v. Teamsters	16,606	10,297	3,818	6,479			811	2,008	568	1,440			3,490
AFL-CIO v. Natl	16,421	13,807	8,019		5,788		1,536	455	211		244		623
AFL-CIO v. Local	46,617	42,480	19,841			22,639	977	1,233	336			897	1,927
Teamsters v Teamsters	184	108		108			28	22		22			26
Teamsters v. Natl	1,504	1,378		907	471		123	1		0	1		2
Teamsters v. Local	4,328	4,089		1,942		2,147	72	121		67		54	46
Natl. v. Local	7,857	7,418			3,636	3,782	201	82			63	19	156
Natl v. Natl	639	630			630		9	0			0		0
Local v. Local	1,108	1,095				1,095	8	2				2	3
2-union elections	106,117	86,289	36,665	9,436	10,525	29,663	4,443	5,688	2,879	1,529	308	972	9,697
AFL-CIO v. AFL-CIO v. AFL-CIO	1,634	191	191				0	507	507				936
AFL-CIO v. AFL-CIO v. Teamsters	654	232	149	83			12	95	46	49			315
AFL-CIO v. AFL-CIO v. Natl	940	796	451		345		144	0	0		0		0
AFL-CIO v. AFL-CIO v. Local	5,054	4,104	1,617			2,487	950	0	0			0	0
AFL-CIO v. Teamsters v. Teamsters	87	81	5	76			6	0	0	0			0
AFL-CIO v. Teamsters v. Natl	1,503	1,495	310	301	884		8	0	0	0	0		0
AFL-CIO v. Teamsters v. Local	1,120	1,107	356	591		160	13	0	0	0		0	0
AFL-CIO v. Natl. v. Natl	1,259	1,247	534		713		12	0	0		0		0
AFL-CIO v. Natl. v. Local	259	259	47		79	133	0	0	0		0	0	0

See footnote at end of table.

Table 14.—Valid Votes Cash in Representation Elections, by Final Results of Election, in Cases Closed, Fiscal Year 1972 [1]—Continued

Participating unions	Total valid votes cast	Valid votes cast in elections won						Valid votes cast in elections lost					
		Votes for unions					Total votes for no union	Votes for unions					Total votes for no union
		Total	AFL-CIO unions	Teamsters	Other national unions	Other local unions		Total	AFL-CIO unions	Teamsters	Other national unions	Other local unions	
A All representation elections—Continued													
AFL-CIO v. Local v. Local	14,533	14,192	5,245			8,947	207	50	36			14	84
Teamsters v Natl. v. Local	98	97		39	56	2	1	0		0	0	0	0
Natl. v. Local v. Local	107	107			58	49	0	0			0	0	0
3 (or more)-union elections	27,248	23,908	8,905	1,090	2,135	11,778	1,353	652	589	49	0	14	1,335
Total representation elections	519,477	204,464	111,999	27,264	20,645	44,556	51,075	92,536	62,517	16,465	10,103	3,451	171,402
B. Elections in RC cases													
AFL-CIO	250,476	60,817	60,817				30,751	56,175	56,175				102,733
Teamsters	63,141	15,416		15,416			6,491	14,066		14,066			27,168
Other national unions	35,409	6,911			6,911		3,539	9,600			9,600		15,359
Other local unions	11,222	2,783				2,783	881	2,431				2,431	5,127
1-union elections	360,248	85,927	60,817	15,416	6,911	2,783	41,662	82,272	56,175	14,066	9,600	2,431	150,387
AFL-CIO v. AFL-CIO	10,813	4,947	4,947				678	1,764	1,764				3,424
AFL-CIO v. Teamsters	15,104	9,033	3,067	5,966			785	1,914	481	1,433			3,372
AFL-CIO v. Natl	16,285	13,700	7,973		5,727		1,530	449	209		240		606
AFL-CIO v. Local	44,956	42,324	19,765			22,559	977	700	218			482	955
Teamsters v. Teamsters	184	108		108			28	22		22			26
Teamsters v. Natl	1,349	1,223		772	451		123	1		0	1		2
Teamsters v. Local	4,121	3,883		1,862		2,021	71	121		67		54	46
Natl. v. Local	7,516	7,145			3,546	3,599	182	67			50	17	122
Natl. v. Natl	639	630			630		9	0			0		
Local v. Local	1,108	1,095				1,095	8	2				2	0

2-union elections	102,075	84,088	35,752	8,708	10,354	29,274	4,391	5,040	2,672	1,522	291	555	8,556
AFL-CIO v AFL-CIO v. AFL-CIO	1,634	191	191				0	507	507				936
AFL-CIO v. AFL-CIO v. Teamsters	518	96	20	76			12	95	46	49			315
AFL-CIO v. AFL-CIO v. Natl	940	796	451		345		144	0	0		0		0
AFL-CIO v. AFL-CIO v. Local	5,054	4,104	1,617			2,487	950	0	0			0	0
AFL-CIO v. Teamsters v. Teamsters	82	76	5	71			6	0	0	0			0
AFL-CIO v. Teamsters v Natl	1,503	1,495	310	301	884		8	0	0	0	0		0
AFL-CIO v Teamsters v. Local	1,120	1,107	356	591		160	13	0	0	0		0	0
AFL-CIO v. Natl. v. Natl	1,259	1,247	534		713		12	0	0		0		0
AFL-CIO v. Natl. v. Local	259	259	47		79	133	0	0	0		0	0	0
AFL-CIO v. Local v. Local	14,533	14,192	5,245			8,947	207	50	36			14	84
Natl v. Local v. Local	107	107			58	49	0	0			0	0	0
3 (or more)-union elections	27,009	23,670	8,776	1,039	2,079	11,776	1,352	652	589	49	0	14	1,335
Total RC elections	489,332	193,685	105,345	25,163	19,344	43,833	47,405	87,964	59,436	15,637	9,891	3,000	160,278

C. Elections in RM cases

AFL-CIO	6,405	1,908	1,908				824	1,218	1,218				2,455
Teamsters	2,621	732		732			307	417		417			1,165
Other national unions	423	208			208		95	22			22		98
Other local unions	441	296				296	86	14				14	45
1-union elections	9,890	3,144	1,908	732	208	296	1,312	1,671	1,218	417	22	14	3,763
AFL-CIO v. Teamsters	105	96	40	56			9	0	0	0			0
AFL-CIO v. Natl	22	16	15		1		6	0	0		0		0
AFL-CIO v Local	1,615	156	76			80	0	513	118			395	946
Teamsters v Natl	105	105		103	2		0	0		0	0		0
Teamsters v. Local	123	123		66		57	0	0		0		0	0
Natl v. Local	240	191			76	115	0	15			13	2	34
2-union elections	2,210	687	131	225	79	252	15	528	118	0	13	397	980
AFL-CIO v Teamsters v Teamsters	5	5	0	5			0	0	0	0			0
3 (or more)-union elections	5	5	0	5	0	0	0	0	0	0	0	0	0
Total RM elections	12,105	3,836	2,039	962	287	548	1,327	2,199	1,336	417	35	411	4,743

See footnote at end of table.

Table 14.—Valid Votes Cast in Representation Elections, by Final Results of Election, in Cases Closed, Fiscal Year 1972 [1]—Continued

Participating unions	Total valid votes cast	Valid votes cast in elections won						Valid votes cast in elections lost					
		Votes for unions					Total votes for no union	Votes for unions					Total votes for no union
		Total	AFL-CIO unions	Teamsters	Other national unions	Other local unions		Total	AFL-CIO unions	Teamsters	Other national unions	Other local unions	
D. Elections in RD cases													
AFL-CIO	11,143	3,704	3,704				1,367	1,656	1,656				4,416
Teamsters	2,447	590		590			290	404		404			1,163
Other national unions	2,188	866			866		634	173			173		515
Other local unions	196	36				36	14	20				20	126
1-union elections	15,974	5,196	3,704	590	866	36	2,305	2,253	1,656	404	173	20	6,220
AFL-CIO v. AFL-CIO	40	40	40				0	0	0				0
AFL-CIO v. Teamsters	1,397	1,168	711	457			17	94	87	7			118
AFL-CIO v. Natl	114	91	31		60		0	6	2		4		17
AFL-CIO v. Local	46	0	0			0	0	20	0			20	26
Teamsters v. Natl	50	50		32	18		0	0		0	0		0
Teamsters v. Local	84	83		14		69	1	0		0		0	0
Natl. v. Local	101	82			14	68	19	0			0	0	0
2-union elections	1,832	1,514	782	503	92	137	37	120	89	7	4	20	161
AFL-CIO v. AFL-CIO v. Teamsters	136	136	129	7			0	0	0	0			0
Teamsters v. Natl. v. Local	98	97		39	56	2	1	0		0	0	0	0
3 (or more)-union elections	234	233	129	46	56	2	1	0	0	0	0	0	0
Total RD elections	18,040	6,943	4,615	1,139	1,014	175	2,343	2,373	1,745	411	177	40	6,381

[1] See "Glossary" for definitions of terms.

Table 15A.—Geographic Distribution of Representation Elections Held in Cases Closed, Fiscal Year 1972

Division and State [1]	Total elections	Number of elections in which representation rights were won by unions					Number of elections in which no representative was chosen	Number of employees eligible to vote	Total valid votes cast	Valid votes cast for unions					Total votes for no union	Eligible employee in units choosing represen tation
		Total	AFL–CIO unions	Teamsters	Other national unions	Other local unions				Total	AFL–CIO unions	Teamsters	Other national unions	Other local unions		
Maine	42	22	15	6	0	1	20	2,683	2,367	1,120	975	136	0	9	1,247	1,376
New Hampshire	39	21	11	8	2	0	18	1,349	1,238	598	355	155	88	0	640	648
Vermont	13	10	8	1	0	1	3	408	358	294	105	6	74	109	64	336
Massachusetts	239	122	55	55	5	7	117	13,599	12,177	6,225	3,111	1,223	1,369	522	5,952	5,150
Rhode Island	35	14	4	6	2	2	21	1,866	1,737	721	597	81	16	27	1,016	263
Connecticut	95	49	28	16	2	3	46	13,241	11,472	6,777	2,707	514	1,413	2,143	4,695	7,805
New England	463	238	121	92	11	14	225	33,146	29,349	15,735	7,850	2,115	2,960	2,810	13,614	15,578
New York	488	281	156	62	29	34	207	52,522	40,655	31,295	13,795	2,237	1,240	14,023	9,360	39,212
New Jersey	317	184	83	75	12	14	133	15,327	13,903	8,316	4,367	2,006	1,045	898	5,587	8,388
Pennsylvania	580	334	169	110	33	22	246	31,072	28,227	14,908	9,658	2,815	1,357	1,078	13,319	13,383
Middle Atlantic	1,385	799	408	247	74	70	586	98,921	82,785	54,519	27,820	7,058	3,642	15,999	28,266	60,983
Ohio	548	306	180	82	30	14	242	30,260	26,980	15,741	8,414	1,788	3,931	1,608	11,239	15,245
Indiana	295	157	75	55	25	2	138	17,517	15,673	9,444	4,513	1,605	2,147	1,179	6,229	9,720
Illinois	388	174	97	54	17	6	214	26,521	23,363	11,832	7,509	1,356	2,559	408	11,531	10,470
Michigan	552	305	131	100	61	13	247	30,179	26,536	13,811	8,102	2,098	2,955	656	12,725	12,739
Wisconsin	235	131	88	35	5	3	104	9,290	8,304	4,736	3,778	539	244	175	3,568	4,843
East North Central	2,018	1,073	571	326	138	38	945	113,767	100,856	55,564	32,316	7,386	11,836	4,026	45,292	53,017
Iowa	109	68	40	21	5	2	41	5,356	4,899	2,690	1,402	652	563	73	2,209	2,731
Minnesota	180	110	52	46	10	2	70	6,186	5,461	3,296	1,532	992	632	140	2,165	3,996
Missouri	279	140	65	67	4	4	139	29,233	24,853	17,567	10,606	1,816	1,217	3,928	7,286	19,732
North Dakota	20	10	4	6	0	0	10	572	522	229	105	124	0	0	293	196
South Dakota	22	14	13	1	0	0	8	579	525	274	251	23	0	0	251	329
Nebraska	48	29	19	9	0	1	19	1,860	1,632	831	635	180	0	16	801	530
Kansas	74	48	31	14	2	1	26	3,032	2,529	1,366	782	293	137	154	1,163	1,596
West North Central	732	419	224	164	21	10	313	46,818	40,421	26,253	15,313	4,080	2,549	4,311	14,168	29,110
Delaware	31	15	7	2	6	0	16	3,304	3,029	1,211	572	105	513	21	1,818	482
Maryland	170	82	48	27	4	3	88	16,613	15,006	10,040	5,671	1,059	94	3,216	4,966	10,252

See footnote at end of table.

Table 15A.—Geographic Distribution of Representation Elections Held in Cases Closed, Fiscal Year 1972—Continued

Division and State [1]	Total elections	Number of elections in which representation rights were won by unions					Number of elections in which no representative was chosen	Number of employees eligible to vote	Total valid votes cast	Valid votes cast for unions					Total votes for no union	Eligible employee in units choosing representation
		Total	AFL–CIO unions	Teamsters	Other national unions	Other local unions				Total	AFL–CIO unions	Teamsters	Other national unions	Other local unions		
District of Columbia	42	27	20	1	0	6	15	1,467	1,274	661	349	169	0	143	613	673
Virginia	73	39	26	10	2	1	34	24,727	21,730	17,072	7,988	507	115	8,462	4,658	19,001
West Virginia	95	58	31	11	12	4	37	5,119	4,701	2,504	1,820	242	307	135	2,197	1,892
North Carolina	122	55	34	19	2	0	67	15,454	14,080	6,711	5,900	665	146	0	7,369	5,977
South Carolina	59	34	28	6	0	0	25	8,223	7,524	3,438	2,954	128	356	0	4,086	3,473
Georgia	183	89	60	22	5	2	94	15,930	14,479	6,713	5,085	929	570	129	7,766	6,118
Florida	210	98	61	31	2	4	112	12,813	11,447	5,281	3,899	1,011	276	95	6,166	4,035
South Atlantic	985	497	315	129	33	20	488	103,650	93,270	53,631	34,238	4,815	2,377	12,201	39,639	51,903
Kentucky	135	61	28	20	9	4	74	9,076	8,436	4,087	2,270	640	1,078	99	4,349	2,779
Tennessee	182	96	46	41	5	4	86	17,106	15,658	7,973	5,345	2,136	309	183	7,685	6,464
Alabama	155	78	57	12	8	1	77	13,266	11,768	5,734	4,965	298	278	193	6,034	5,273
Mississippi	62	29	20	8	0	1	33	8,260	7,795	4,047	3,237	716	71	23	3,748	3,960
East South Central	534	264	151	81	22	10	270	47,708	43,657	21,841	15,817	3,790	1,736	498	21,816	18,476
Arkansas	65	35	29	5	1	0	30	5,002	4,608	2,292	2,123	120	49	0	2,316	2,551
Louisiana	139	69	44	17	5	3	70	10,455	9,405	5,616	3,632	453	1,293	238	3,789	4,952
Oklahoma	99	53	38	12	3	0	46	5,885	5,473	2,645	1,870	241	534	0	2,828	1,930
Texas	328	180	116	48	10	6	148	22,455	20,030	10,459	7,791	1,524	535	609	9,571	10,528
West South Central	631	337	227	82	19	9	294	43,797	39,516	21,012	15,416	2,338	2,411	847	18,504	19,961
Montana	47	32	19	12	0	1	15	705	644	373	256	109	0	8	271	418
Idaho	21	9	3	6	0	0	12	700	606	305	91	214	0	0	301	219
Wyoming	11	4	3	0	1	0	7	433	399	196	165	6	25	0	203	81
Colorado	133	63	39	19	2	3	70	4,354	3,805	1,766	1,022	513	155	76	2,039	1,526
New Mexico	42	20	14	6	0	0	22	885	757	369	207	157	5	0	388	313
Arizona	77	52	32	20	0	0	25	2,622	2,360	1,262	967	277	12	6	1,098	1,168
Utah	54	28	18	10	0	0	26	2,429	2,233	1,278	880	394	4	0	955	1,155
Nevada	46	18	13	2	2	1	28	1,866	1,710	762	369	65	39	289	948	347

Mountain	431	226	141	75	5	5	205	13,994	12,514	6,311	3,957	1,735	240	379	6,203	5,227
Washington	200	107	62	43	0	2	93	10,213	8,626	5,067	2,280	1,017	64	1,706	3,559	6,377
Oregon	141	78	50	25	3	0	63	4,190	3,721	2,117	1,572	214	138	193	1,604	2,348
California	1,110	582	322	199	43	18	528	54,385	47,420	23,980	13,644	6,913	2,212	1,211	23,440	22,990
Alaska	28	17	8	9	0	0	11	330	294	161	95	66	0	0	133	183
Hawaii	59	33	13	6	13	1	26	2,242	1,859	1,038	463	248	315	12	821	957
Guam	1	0	0	0	0	0	1	37	31	6	6	0	0	0	25	0
Pacific	1,539	817	455	282	59	21	722	71,397	61,951	32,369	18,060	8,458	2,729	3,122	29,582	32,855
Puerto Rico	198	114	46	19	3	46	84	18,141	14,901	9,617	3,581	1,954	268	3,814	5,284	9,891
Virgin Islands	7	3	3	0	0	0	4	297	257	148	148	0	0	0	109	126
Outlying areas	205	117	49	19	3	46	88	18,438	15,158	9,765	3,729	1,954	268	3,814	5,393	10,017
Total, all States and areas	8,923	4,787	2,662	1,497	385	243	4,136	591,636	519,477	297,000	174,516	43,729	30,748	48,007	222,477	297,127

[1] The States are grouped according to the method used by the Bureau of the Census, U.S. Department of Commerce.

Table 15B.—Standard Federal Administrative Regional Distribution of Representation Elections Held in Cases Closed, Fiscal Year 1972

Standard Federal regions [1]	Total elections	Number of elections in which representation rights were won by unions					Number of elections in which no representative was chosen	Number of employees eligible to vote	Total valid votes cast	Valid votes cast for unions					Total votes for no union	Eligible employee in units choosing representation
		Total	AFL–CIO unions	Teamsters	Other national unions	Other local unions				Total	AFL–CIO unions	Teamsters	Other national unions	Other local unions		
Connecticut	95	49	28	16	2	3	46	13,241	11,472	6,777	2,707	514	1,413	2,143	4,695	7,805
Maine	42	22	15	6	0	1	20	2,683	2,367	1,120	975	136	0	9	1,247	1,376
Massachusetts	239	122	55	55	5	7	117	13,599	12,177	6,225	3,111	1,223	1,369	522	5,952	5,150
New Hampshire	39	21	11	8	2	0	18	1,349	1,238	598	355	155	88	0	640	648
Rhode Island	35	14	4	6	2	2	21	1,866	1,737	721	597	81	16	27	1,016	263
Vermont	13	10	8	1	0	1	3	408	358	294	105	6	74	109	64	336
Region I	463	238	121	92	11	14	225	33,146	29,349	15,735	7,850	2,115	2,960	2,810	13,614	15,578
Delaware	31	15	7	2	6	0	16	3,304	3,029	1,211	572	105	513	21	1,818	482
New Jersey	317	184	83	75	12	14	133	15,327	13,903	8,316	4,367	2,006	1,045	898	5,587	8,388
New York	488	281	156	62	29	34	207	52,522	40,655	31,295	13,795	2,237	1,240	14,023	9,360	39,212
Puerto Rico	198	114	46	19	3	46	84	18,141	14,901	9,617	3,581	1,954	268	3,814	5,284	9,891
Virgin Islands	7	3	3	0	0	0	4	297	257	148	148	0	0	0	109	126
Region II	1,041	597	295	158	50	94	444	89,591	72,745	50,587	22,463	6,302	3,066	18,756	22,158	58,099
District of Columbia	42	27	20	1	0	6	15	1,467	1,274	661	349	169	0	143	613	673
Maryland	170	82	48	27	4	3	88	16,613	15,006	10,040	5,671	1,059	94	3,216	4,966	10,252
Pennsylvania	580	334	169	110	33	22	246	31,072	28,227	14,908	9,658	2,815	1,357	1,078	13,319	13,383
Virginia	73	39	26	10	2	1	34	24,727	21,730	17,072	7,988	507	115	8,462	4,658	19,001
West Virginia	95	58	31	11	12	4	37	5,119	4,701	2,504	1,820	242	307	135	2,197	1,892
Region III	960	540	294	159	51	36	420	78,998	70,938	45,185	25,486	4,792	1,873	13,034	25,753	45,201
Alabama	155	78	57	12	8	1	77	13,266	11,768	5,734	4,965	298	278	193	6,034	5,273
Florida	210	98	61	31	2	4	112	12,813	11,447	5,281	3,899	1,011	276	95	6,166	4,035
Georgia	183	89	60	22	5	2	94	15,930	14,479	6,713	5,085	929	570	129	7,766	6,118
Kentucky	135	61	28	20	9	4	74	9,076	8,436	4,087	2,270	640	1,078	99	4,349	2,779
Mississippi	62	29	20	8	0	1	33	8,260	7,795	4,047	3,237	716	71	23	3,748	3,960
North Carolina	122	55	34	19	2	0	67	15,454	14,080	6,711	5,900	665	146	0	7,369	5,977
South Carolina	59	34	28	6	0	0	25	8,223	7,524	3,438	2,954	128	356	0	4,086	3,473
Tennessee	182	96	46	41	5	4	86	17,106	15,658	7,973	5,345	2,136	309	183	7,685	6,464
Region IV	1,108	540	334	159	31	16	568	100,128	91,187	43,984	33,655	6,523	3,084	722	47,203	38,079

Illinois	388	174	97	54	17	6	214	26,521	23,363	11,832	7,509	1,356	2,559	408	11,531	10,470
Indiana	295	157	75	55	25	2	138	17,517	15,673	9,444	4,513	1,605	2,147	1,179	6,229	9,720
Michigan	552	305	131	100	61	13	247	30,179	26,536	13,811	8,102	2,098	2,955	656	12,725	12,739
Minnesota	180	110	52	46	10	2	70	6,186	5,461	3,296	1,532	992	632	140	2,165	3,996
Ohio	548	306	180	82	30	14	242	30,260	26,980	15,741	8,414	1,788	3,931	1,608	11,239	15,245
Wisconsin	235	131	88	35	5	3	104	9,290	8,304	4,736	3,778	539	244	175	3,568	4,843
Region V	2,198	1,183	623	372	148	40	1,015	119,953	106,317	58,860	33,848	8,378	12,468	4,166	47,457	57,013
Arkansas	65	35	29	5	1	0	30	5,002	4,608	2,292	2,123	120	49	0	2,316	2,551
Louisiana	139	69	44	17	5	3	70	10,455	9,405	5,616	3,632	453	1,293	238	3,789	4,952
New Mexico	42	20	14	6	0	0	22	885	757	369	207	157	5	0	388	313
Oklahoma	99	53	38	12	3	0	46	5,885	5,473	2,645	1,870	241	534	0	2,828	1,930
Texas	328	180	116	48	10	6	148	22,455	20,030	10,459	7,791	1,524	535	609	9,571	10,528
Region VI	673	357	241	88	19	9	316	44,682	40,273	21,381	15,623	2,495	2,416	847	18,892	20,274
Iowa	109	68	40	21	5	2	41	5,356	4,899	2,690	1,402	652	563	73	2,209	2,731
Kansas	74	48	31	14	2	1	26	3,032	2,529	1,366	782	293	137	154	1,163	1,596
Missouri	279	140	65	67	4	4	139	29,233	24,853	17,567	10,606	1,816	1,217	3,928	7,286	19,732
Nebraska	48	29	19	9	0	1	19	1,860	1,632	831	635	180	0	16	801	530
Region VII	510	285	155	111	11	8	225	39,481	33,913	22,454	13,425	2,941	1,917	4,171	11,459	24,589
Colorado	133	63	39	19	2	3	70	4,354	3,805	1,766	1,022	513	155	76	2,039	1,526
Montana	47	32	19	12	0	1	15	705	644	373	256	109	0	8	271	418
North Dakota	20	10	4	6	0	0	10	572	522	229	105	124	0	0	293	196
South Dakota	22	14	13	1	0	0	8	579	525	274	251	23	0	0	251	329
Utah	54	28	18	10	0	0	26	2,429	2,233	1,278	880	394	4	0	955	1,155
Wyoming	11	4	3	0	1	0	7	433	399	196	165	6	25	0	203	81
Region VIII	287	151	96	48	3	4	136	9,072	8,128	4,116	2,679	1,169	184	84	4,012	3,705
Arizona	77	52	32	20	0	0	25	2,622	2,360	1,262	967	277	12	6	1,098	1,168
California	1,110	582	322	199	43	18	528	54,385	47,420	23,980	13,644	6,913	2,212	1,211	23,440	22,990
Hawaii	59	33	13	6	13	1	26	2,242	1,859	1,038	463	248	315	12	821	957
Guam	1	0	0	0	0	0	1	37	31	6	6	0	0	0	25	0
Nevada	46	18	13	2	2	1	28	1,866	1,710	762	369	65	39	289	948	347
Region IX	1,293	685	380	227	58	20	608	61,152	53,380	27,048	15,449	7,503	2,578	1,518	26,332	25,462
Alaska	28	17	8	9	0	0	11	330	294	161	95	66	0	0	133	183
Idaho	21	9	3	6	0	0	12	700	606	305	91	214	0	0	301	219
Oregon	141	78	50	25	3	0	63	4,190	3,721	2,117	1,572	214	138	193	1,604	2,348
Washington	200	107	62	43	0	2	93	10,213	8,626	5,067	2,280	1,017	64	1,706	3,559	6,377
Region X	390	211	123	83	3	2	179	15,433	13,247	7,650	4,038	1,511	202	1,899	5,597	9,127
Total, all Federal regions	8,923	4,787	2,662	1,497	385	243	4,136	591,636	519,477	297,000	174,516	43,729	30,748	48,007	222,477	297,127

[1] The States are grouped according to the 10 standard Administrative regions.

Table 16.—Industrial Distribution of Representation Elections Held in Cases Closed, Fiscal Year 1972

Industrial group[1]	Total elections	Number of elections in which representation rights were won by unions					Number of elections in which no representative was chosen	Number of employees eligible to vote	Total valid votes cast	Valid votes cast for unions					Total votes for no union	Eligible employees in units choosing representation
		Total	AFL–CIO unions	Teamsters	Other national unions	Other local unions				Total	AFL–CIO unions	Teamsters	Other national unions	Other local unions		
Ordnance and accessories	14	7	5	0	2	0	7	2,532	2,284	1,182	1,031	7	144	0	1,102	1,492
Food and kindred products	541	292	150	125	11	6	249	33,602	29,437	15,978	10,387	4,089	1,092	430	13,459	16,376
Tobacco manufacturers	3	1	0	1	0	0	2	268	242	84	79	5	0	0	158	6
Textile mill products	88	39	30	7	0	2	49	11,578	10,474	5,545	4,210	590	492	253	4,929	4,732
Apparel and other finished products, made from fabric and similar materials	103	43	33	5	0	5	60	15,607	14,009	5,973	5,416	261	106	190	8,036	5,233
Lumber and wood products (except furniture)	181	101	69	28	2	2	80	10,872	9,649	5,654	4,628	743	157	126	3,995	6,651
Furniture and fixtures	114	60	37	19	2	2	54	8,392	7,611	3,936	2,736	902	238	60	3,675	3,813
Paper and allied products	170	87	53	26	5	3	83	14,648	13,276	6,895	5,708	777	75	335	6,381	6,050
Printing, publishing, and allied industries	292	159	131	13	5	10	133	9,858	8,971	4,805	3,430	515	154	106	4,166	4,257
Chemicals and allied products	319	165	73	71	15	6	154	19,868	17,959	9,736	5,120	2,713	1,507	396	8,223	9,060
Products of petroleum and coal	71	35	21	10	1	3	36	3,051	2,572	1,826	936	228	21	641	746	2,214
Rubber and miscellaneous plastic products	209	99	54	30	12	3	110	19,125	17,232	9,322	6,406	1,237	844	835	7,910	8,481
Leather and leather products	47	15	12	2	1	0	32	6,828	6,342	2,467	2,293	42	64	68	3,875	1,535
Stone, clay, and glass products	233	136	58	58	11	9	97	12,428	11,169	6,554	3,211	2,029	460	854	4,615	7,673
Primary metal industries	292	162	113	21	23	5	130	27,564	24,552	14,159	10,344	1,072	2,159	584	10,393	14,757

Fabricated metal products (except machinery and transportation equipment)	407	219	140	46	27	6	188	27,638	25,372	13,891	7,889	2,407	2,453	1,142	11,481	12,711
Machinery (except electrical)	492	257	144	45	54	14	235	35,616	32,645	16,579	9,212	1,507	5,185	675	16,066	13,256
Electrical machinery, equipment, and supplies	304	146	88	24	21	13	158	47,421	43,006	23,753	14,325	2,157	3,665	3,606	19,253	21,897
Aircraft and parts	36	21	13	3	3	2	15	21,963	18,240	16,118	7,473	194	1,509	6,942	2,122	20,729
Ship and boat building and repairing	36	18	8	3	3	4	18	18,387	15,856	14,422	5,525	168	160	8,569	1,434	16,987
Miscellaneous transportation equipment	251	141	77	29	30	5	110	26,386	24,018	12,713	7,889	1,510	2,602	712	11,305	10,583
Professional, scientific, and controlling instruments	62	29	19	5	5	0	33	10,804	10,018	4,634	2,985	697	914	38	5,384	2,764
Miscellaneous manufacturing	169	90	47	29	10	4	79	12,857	11,682	5,433	3,612	899	864	53	6,249	4,794
Manufacturing	4,434	2,322	1,375	600	243	104	2,112	397,293	356,616	201,659	124,845	24,729	24,865	27,220	154,957	196,051
Metal mining	5	2	2	0	0	0	3	394	374	178	149	29	0	0	196	75
Coal mining	28	16	2	1	9	4	12	1,688	1,528	1,036	167	13	675	181	492	951
Crude petroleum and natural gas production	13	7	5	2	0	0	6	456	345	155	121	34	0	0	190	187
Nonmetallic mining and quarrying	31	15	6	6	1	2	16	1,338	1,256	833	533	187	101	12	423	790
Mining	77	40	15	9	10	6	37	3,876	3,503	2,202	970	263	776	193	1,301	2,003
Construction	235	141	104	16	13	8	94	8,812	6,613	4,149	2,575	432	441	701	2,464	4,859
Wholesale trade	760	422	87	299	26	10	338	16,470	14,993	7,798	2,455	4,407	560	376	7,195	7,215
Retail trade	1,242	640	426	153	30	31	602	40,388	35,035	17,030	11,580	3,316	1,150	984	18,005	16,771
Finance, insurance, and real estate	107	55	40	9	5	1	52	4,918	4,485	1,997	1,539	212	83	163	2,488	1,075
U.S. Postal Service	2	1	0	0	0	1	1	179	140	98	0	6	0	92	42	146

See footnote at end of table.

Table 16.—Industrial Distribution of Representation Elections Held in Cases Closed, Fiscal Year 1972—Continued

Industrial group[1]	Total elections	Number of elections in which representation rights were won by unions					Number of elections in which no representative was chosen	Number of employees eligible to vote	Total valid votes cast	Valid votes cast for unions					Total votes for no union	Eligible employees in units choosing representation
		Total	AFL-CIO unions	Teamsters	Other national unions	Other local unions				Total	AFL-CIO unions	Teamsters	Other national unions	Other local unions		
Local passenger transportation	67	41	21	16	0	4	26	2,848	2,181	1,231	672	456	0	103	950	1,804
Motor freight, warehousing, and transportation services	544	307	39	245	9	14	237	12,604	11,009	6,231	1,265	4,443	218	305	4,778	6,721
Water transportation	22	9	5	3	1	0	13	360	311	138	86	41	11	0	173	107
Other transportation	34	18	9	8	1	0	16	1,469	1,275	978	254	489	3	232	297	1,068
Communications	202	122	110	3	1	8	80	37,380	28,443	24,080	10,140	337	4	13,099	4,363	31,788
Heat, light, power, water, and sanitary services	153	99	68	19	9	3	54	9,623	9,006	5,965	3,570	363	1,043	989	3,041	5,593
Transportation, communication, and other utilities	1,022	596	252	294	21	29	426	64,284	52,225	38,623	15,987	6,629	1,279	14,728	13,602	47,081
Hotels and other lodging places	115	52	37	6	4	5	63	6,770	5,432	2,373	1,663	97	213	400	3,059	1,573
Personal services	79	42	16	24	2	0	37	2,017	1,818	1,011	419	522	67	3	807	966
Automobile repairs, garages, and other miscellaneous repair services	142	74	33	38	3	0	68	3,365	3,028	1,693	507	1,052	134	0	1,335	1,591
Amusement and recreation services, except motion pictures	35	20	15	2	1	2	15	940	812	449	248	49	106	46	363	333
Medical and other health services	250	155	128	9	7	11	95	13,498	10,818	6,244	5,410	306	110	418	4,574	7,639
Educational services	79	35	18	2	4	11	44	13,557	11,187	5,271	2,365	706	35	2,165	5,916	3,317

Nonprofit membership organizations	16	11	4	0	0	7	5	504	426	285	196	0	0	89	141	345
Miscellaneous business services	257	147	95	32	13	7	110	12,682	10,499	5,251	3,204	902	911	234	5,248	5,156
Miscellaneous repair services	30	16	10	2	3	1	14	468	445	227	180	22	18	7	218	210
Museums, art galleries, botanical and zoological gardens	2	2	1	0	0	1	0	72	62	43	2	0	0	41	19	72
Miscellaneous services	39	16	6	2	0	8	23	1,543	1,340	597	371	79	0	147	743	724
Services	1,044	570	363	117	37	53	474	55,416	45,867	23,444	14,565	3,735	1,594	3,550	22,423	21,926
Total, all industrial groups	8,923	4,787	2,662	1,497	385	243	4,136	591,636	519,477	297,000	174,516	43,729	30,748	48,007	222,477	297,127

[1] Source Standard Industrial Classification, Division of Statistical Standards, U.S. Bureau of the Budget, Washington, 1957.

Table 17.—Size of Units in Representation Election Cases Closed, Fiscal Year 1972 [1]

Size of unit (number of employees)	Number eligible to vote	Total elections	Percent of total	Cumulative percent of total	Elections in which representation rights were won by								Elections in which no representative was chosen	
					AFL–CIO unions		Teamsters		Other national unions		Other local unions			
					Number	Percent by size class	Number	Percent by size class	Number	Percent by size class	Number	Percent by size class	Number	Percent by size class
A. Certification elections (RC & RM)														
Total RC and RM elections	570,846	8,472	100.0		2,583	100.0	1,461	100.0	372	100.0	237	100.0	3,819	100.0
Under 10	11,750	2,065	24.4	24.4	574	22.2	597	40.9	78	21.0	49	20.7	767	20.1
10 to 19	26,541	1,913	22.6	47.0	620	24.0	403	27.7	77	20.6	41	17.4	772	20.2
20 to 29	26,352	1,090	12.8	59.8	361	14.0	161	11.1	54	14.5	30	12.7	484	12.6
30 to 39	22,832	673	8.0	67.8	208	8.1	88	6.0	41	11.0	26	11.0	310	8.0
40 to 49	20,728	471	5.5	73.3	162	6.3	54	3.7	24	6.5	16	6.8	215	5.6
50 to 59	17,182	319	3 8	77 1	97	3.8	31	2.1	6	1.6	11	4.6	174	4.6
60 to 69	17,035	265	3.1	80.2	69	2.7	21	1.4	9	2.4	7	3.0	159	4.2
70 to 79	14,184	191	2.3	82.5	55	2.1	20	1.4	7	1.9	11	4.6	98	2.6
80 to 89	14,429	171	2.0	84.5	66	2.6	18	1.2	4	1.1	0	----------	83	2.2
90 to 99	13,353	142	1.7	86.2	39	1.5	13	0.9	7	1.9	4	1.7	79	2.1
100 to 109	13,944	134	1.5	87.7	47	1.8	7	0 5	8	2.2	1	0.4	71	1.9
110 to 119	9,324	82	1.0	88.7	23	0.9	6	0.4	4	1.1	3	1.3	46	1.2
120 to 129	10,778	87	1.0	89.7	33	1.3	3	0.2	4	1.1	1	0.4	46	1.2
130 to 139	9,260	69	0.9	90.6	21	0.8	4	0.3	5	1.3	1	0.4	38	1.0
140 to 149	7,489	52	0.6	91.2	14	0.5	2	0.1	5	1.3	2	0.8	29	0.8
150 to 159	10,276	67	0.8	92.0	13	0 5	3	0.2	4	1.1	2	0.8	45	1.2
160 to 169	10,001	61	0.7	92.7	16	0.6	2	0.1	4	1.1	4	1.7	35	0.9
170 to 179	8,173	47	0.5	93.2	14	0.5	5	0 3	1	0.3	2	0.8	25	0.7
180 to 189	7,326	40	0 5	93.7	9	0.3	3	0.2	2	0.5	0	----------	26	0.7
190 to 199	5,236	27	0 3	94 0	6	0 2	0	----------	2	0 5	3	1.3	16	0 4
200 to 299	56,052	234	2.8	96.8	69	2.7	12	0.8	15	4.0	8	3.4	130	3.3
300 to 399	32,373	95	1.1	97.9	28	1.1	2	0.1	2	0.5	2	0.8	61	1.6
400 to 499	25,453	57	0.7	98.6	15	0 6	2	0.1	2	0.5	3	1 3	35	0.9
500 to 599	15,626	29	0.3	98.9	5	0.2	1	0.1	1	0.3	0	----------	22	0 6
600 to 799	23,571	35	0 4	99.3	8	0.3	2	0.1	1	0.3	1	0.4	23	0 6
800 to 999	7,166	8	0.1	99.4	2	0 1	0	----------	1	0.3	1	0.4	4	0.1
1,000 to 1,999	43,352	32	0 4	99 8	7	0.3	1	0.1	3	0.8	1	0.4	20	0.5
2,000 to 2,999	12,506	6	0.1	99.9	0	----------	0	----------	1	0.3	1	0.4	4	0.1
3,000 to 9,999	29,687	7	0.1	100.0	1	0.0	0	----------	0	----------	4	1 7	2	0.1
10,000 and over	48,867	3	0.0	100.0	1	0 0	0	----------	0	----------	2	0 8	0	----------

B. Decertification elections (RD)

Total RD elections	20,790	451	100.0		79	100.0	36	100.0	13	100.0	6	100.0	317	100.0
Under 10	715	120	26.6	26.6	8	10.1	10	27.8	0		0		102	32.2
10 to 19	1,432	102	22.6	49.2	12	15.2	4	11.1	1	7.7	1	16.7	84	26.5
20 to 29	1,333	56	12.4	61.6	7	8.9	6	16.7	1	7.7	1	16.7	41	12.9
30 to 39	1,211	36	8.0	69.6	9	11.4	4	11.1	2	15.3	1	16.7	20	6.3
40 to 49	1,021	23	5.1	74.7	6	7.6	3	8.3	1	7.7	1	16.7	12	3.8
50 to 59	1,091	20	4.4	79.1	3	3.8	3	8.3	0		0		14	4.4
60 to 69	1,470	23	5.1	84.2	8	10.1	3	8.3	1	7.7	1	16.6	10	3.2
70 to 79	1,247	17	3.8	88.0	5	6.3	0		0		1	16.6	11	3.5
80 to 89	423	5	1.1	89.1	2	2.5	1	2.8	0		0		2	0.6
90 to 99	771	8	1.8	90.9	2	2.5	0		2	15.4	0		4	1.3
100 to 109	1,048	10	2.2	93.1	3	3.8	0		1	7.7	0		6	1.9
110 to 119	117	1	0.2	93.3	1	1.3	0		0		0		0	
120 to 129	486	4	0.9	94.2	2	2.5	1	2.8	1	7.7	0		0	
130 to 139	139	1	0.2	94.4	0		0		0		0		1	0.3
150 to 159	466	3	0.7	95.1	1	1.3	0		0		0		2	0.6
160 to 169	486	3	0.7	95.8	2	2.5	0		0		0		1	0.3
170 to 199	530	3	0.7	96.5	1	1.3	1	2.8	0		0		1	0.3
200 to 299	1,589	7	1.5	98.0	3	3.8	0		0		0		4	1.3
300 to 399	1,768	5	1.1	99.1	2	2.5	0		2	15.4	0		1	0.3
500 to 799	2,133	3	0.7	99.8	1	1.3	0		1	7.7	0		1	0.3
800 and over	1,314	1	0.2	100.0	5	1.3	0		0		0		0	

[1] See "Glossary" for definitions of terms.

Table 18.—Distribution of Unfair Labor Practice Situations Received, by Number of Employees in Establishments, Fiscal Year 1972 [1]

Size of establishment (number of employees)	Total number of situations	Total		Type of situations															
				CA		CB		CC		CD		CE		CP		CA–CB combinations		Other C combination	
		Percent of all situations	Cumulative percent of all situations	Number of situations	Percent by size class	Number of situations	Percent by size class	Number of situations	Percent by size class	Number of situations	Percent by size class	Number of situations	Percent by size class	Number of situations	Percent by size class	Number of situations	Percent by size class	Number of situations	Percent by size class
Total	[2] 23,637	100.0		15,548	100 0	4,032	100 0	1,503	100.0	457	100.0	58	100.0	387	100.0	1,349	100.0	303	100.0
Under 10	5,907	25.0	25.0	3,650	23.5	1,027	25.5	514	34.2	135	29.5	31	53.4	141	36.4	318	23.6	91	30.0
10 to 19	2,482	10.5	35.5	1,777	11.4	270	6 7	184	12.2	57	12.5	1	1.7	66	17.0	89	6.6	38	12.5
20 to 29	1,816	7.7	43 2	1,248	8.0	236	5.9	143	9.5	41	9.0	2	3.4	42	10.3	75	5.6	29	9.6
30 to 39	1,341	5.7	48.9	964	6.2	170	4.2	79	5.3	17	3.7	1	1.7	25	6.5	66	4.9	19	6.3
40 to 49	909	3.8	52.7	647	4.2	120	3.0	53	3.5	19	4.2	1	1.7	18	4.6	37	2.7	14	4.6
50 to 59	1,043	4.4	57.1	710	4.6	140	3.5	70	4.7	31	6.8	2	3.4	18	4.6	52	3.9	20	6.6
60 to 69	638	2.7	59.8	468	3.0	72	1.8	34	2.3	9	2.0	2	3.4	15	3.9	27	2.0	11	3.6
70 to 79	534	2.3	62.1	378	2.4	79	2.0	20	1.3	15	3.3	0	-------	3	0.8	37	2.7	2	0.7
80 to 89	424	1.8	63.9	309	2.0	48	1.2	20	1.3	9	2.0	1	1.7	11	2.8	22	1.6	4	1.3
90 to 99	252	1.1	65.0	205	1.3	22	0.5	6	0.4	4	0.9	0	-------	0	-------	11	0.8	4	1.3
100 to 109	897	3.8	68.8	517	3.3	200	5.0	57	3.8	24	5 3	6	10.3	13	3.4	72	5.3	8	2.6
110 to 119	149	0.6	69.4	103	0.7	27	0.7	6	0.4	1	0.2	0	-------	3	0.8	6	0.4	3	1.0
120 to 129	329	1.4	70.8	258	1.7	41	1 0	6	0.4	1	0.2	0	-------	2	0.5	19	1.4	2	0.7
130 to 139	148	0.6	71.4	117	0.8	14	0.3	9	0.6	0	-------	0	-------	0	-------	5	0.4	3	1.0
140 to 149	112	0.5	71.9	91	0.6	11	0.3	5	0.3	1	0.2	0	-------	2	0.5	1	0.1	1	0.3
150 to 159	503	2.1	74.0	343	2.2	94	2.3	19	1 3	10	2.2	0	-------	2	0.5	33	2.4	2	0.7

160 to 169	115	0.5	74.5	93	0.6	12	0.3	2	0.1	0	-------	0	-------	2	0.5	6	0.4	0	-------
170 to 179	143	0.6	75.1	105	0.7	24	0.6	5	0.3	2	0.4	0	-------	0	-------	7	0.5	0	-------
180 to 189	80	0.3	75.4	61	0.4	12	0.3	5	0.3	1	0.2	0	-------	0	-------	1	0.1	0	-------
190 to 199	40	0.2	75.6	30	0.2	5	0.1	2	0.1	0	-------	0	-------	0	-------	3	0.2	0	-------
200 to 299	1,278	5.4	81 0	826	5.3	270	6.7	64	4.3	15	3.3	3	5.2	7	1.8	81	6.0	12	4.0
300 to 399	716	3.0	84.0	463	3.0	155	3.8	23	1.5	18	3.9	0	-------	1	0.3	51	3.8	5	1.7
400 to 499	432	1.8	85.8	279	1.8	102	2.5	12	0.8	5	1.1	1	1.7	2	0.5	31	2.3	0	-------
500 to 599	430	1.8	87.6	258	1.7	100	2.5	18	1.2	7	1.5	0	-------	0	-------	44	3.3	3	1.0
600 to 699	280	1.2	88.8	191	1.2	47	1.2	15	1.0	1	0.2	2	3.4	2	0.5	20	1.5	2	0.7
700 to 799	158	0.7	89.5	101	0.6	42	1.0	3	0.2	0	-------	0	-------	1	0 3	11	0.8	0	-------
800 to 899	177	0.7	90.2	113	0.7	39	1.0	8	0.5	2	0.4	0	-------	1	0.3	13	1.0	1	0.3
900 to 999	80	0.3	90.5	48	0.3	13	0.3	4	0.3	5	1.1	0	-------	1	0.3	7	0.5	2	0.7
1,000 to 1,999	774	3.3	93.8	424	2.7	204	5.1	45	3.0	13	2.8	0	-------	1	0.3	72	5.3	15	5.0
2,000 to 2,999	371	1.6	95.4	193	1.2	101	2.5	30	2.0	5	1.1	1	1.7	1	0.3	35	2.6	5	1.7
3,000 to 3,999	245	1.0	96.4	123	0.8	80	2.0	8	0.5	2	0.4	3	5.2	1	0.3	25	1.9	3	1.0
4,000 to 4,999	136	0.6	97.0	73	0 5	48	1.2	3	0.2	2	0 4	1	1.7	0	-------	9	0.7	0	-------
5,000 to 9,999	302	1.3	98.3	146	0.9	104	2.6	13	0.9	3	0.7	0	-------	1	0.3	34	2.5	1	0.3
Above 9,999	396	1.7	100.0	236	1.5	103	2.6	18	1.2	2	0.4	0	-------	5	1.3	29	2.1	3	1.0

[1] See "Glossary" for definitions of terms.

[2] Based on revised situation count which absorbs companion cases, cross-filing and multiple filings as compared to situations shown in charts 1 and 2 of chapter I, which are based on single and multiple filings of same type of case.

Table 19.—Litigation for Enforcement and/or Review of Board Orders, Fiscal Year 1972 and Cumulative Totals, Fiscal Years 1936–72

	Fiscal year 1972									July 5, 1935–June 30, 1972	
	Number of proceedings [1]					Percentages					
	Total	Vs. employers only	Vs unions only	Vs both employers and unions	Board dismissal [2]	Vs. employers only	Vs. unions only	Vs. both employers and unions	Board dismissal	Number	Percent
Proceedings decided by U.S. courts of appeals	361	283	64	2	12						
On petitions for review and/or enforcement	341	268	61	0	12	100.0	100.0		100.0	5,049	100.0
Board orders affirmed in full	239	180	49	0	10	67.2	80.3		83.3	3,062	60.6
Board orders affirmed with modification	39	36	3	0	0	13.4	4.9			920	18.2
Remanded to Board	16	11	3	0	2	4.1	4.9		16.7	216	4 3
Board orders partially affirmed and partially remanded	5	3	2	0	0	1.1	3.3			75	1.5
Board orders set aside	42	38	4	0	0	14.2	6.6			776	15.4
On petitions for contempt	21	16	3	2	0	100.0	100.0	100.0			
Compliance after filing of petition, before court order	15	13	0	2	0	81.3		100.0			
Court orders holding respondent in contempt	4	1	3	0	0	6.2	100.0				
Court orders denying petition	2	2	0	0	0	12.5					
Proceedings decided by U.S Supreme Court [3]	5	4	1	0	0	100.0	100.0				
Board orders affirmed in full	2	1	1	0	0	25.0	100.0				
Board orders affirmed with modification	1	1	0	0	0	25.0					
Board orders set aside	1	1	0	0	0	25.0					
Remanded to Board	0	0	0	0	0						
Remanded to court of appeals	1	1	0	0	0	25.0					
Board's request for remand or modification of enforcement order denied	0	0	0	0	0						
Contempt cases remanded to court of appeals	0	0	0	0	0						
Contempt cases enforced	0	0	0	0	0						

[1] "Proceedings" are comparable to "cases" reported in annual reports prior to fiscal year 1964. This term more accurately describes the data inasmuch as a single "proceeding" often includes more than one "case." See "Glossary" for definitions of terms.

[2] A proceeding in which the Board had entered an order dismissing the complaint and the charging party appealed such dismissal in the courts of appeals.

[3] Supreme Court, also, decided *N.L.R.B* v. *Nash-Finch Co.*, 404 U.S. 138, which held that the Board, as an agency of the United States, was immune from the limitations imposed by 28 U.S.C. 2283 on injunctions against state court proceedings.

Table 19A.—Proceedings Decided by Circuit Courts of Appeals on Petitions for Enforcement and/or Review of Board Orders, Fiscal Year 1972 Compared With 5-Year Cumulative Totals, Fiscal Years 1967 Through 1971 [1]

Circuit courts of appeals (headquarters)	Total fiscal year 1972	Total fiscal years 1967–71	Affirmed in full				Modified				Remanded in full				Affirmed in part and remanded in part				Set aside			
			Fiscal year 1972		Cumulative fiscal years 1967–71		Fiscal Year 1972		Cumulative fiscal years 1967–71		Fiscal Year 1972		Cumulative fiscal years 1967–71		Fiscal Year 1972		Cumulative fiscal years 1967–71		Fiscal Year 1972		Cumulative fiscal year 1967–71	
			Number	Percent	Number	Percent	Number	Percent	Number	Percent	Number	Percent	Number	Percent	Number	Percent	Number	Percent	Number	Percent	Number	Percent
Total all circuits	341	1,601	239	70.1	1,031	64.4	39	11.4	276	17.2	16	4.7	73	4.6	5	1.5	33	2.1	42	12.3	188	11.7
1. Boston, Mass.	11	62	8	72.7	42	67.7	0	0.0	6	9.7	0	0.0	3	4.8	0	0.0	2	3.3	3	27.3	9	14.5
2. New York, N.Y.	20	128	15	75.0	93	72.7	4	20.0	18	14.1	0	0.0	4	3.1	0	0.0	3	2.3	1	5.0	10	7.8
3. Philadelphia, Pa.	21	65	15	71.4	46	70.8	1	4.8	4	6.2	3	14.3	7	10.8	0	0.0	1	1.5	2	9.5	7	10.7
4. Richmond, Va.	27	139	17	63.0	89	64.0	2	7.4	35	25.2	3	11.1	2	1.4	0	0.0	0	0.0	5	18.5	13	9.4
5. New Orleans, La.	61	308	49	80.4	190	61.7	2	3.3	64	20.8	3	4.9	13	4.2	1	1.6	7	2.3	6	9.8	34	11.0
6. Cincinnati, Ohio	47	274	30	63.8	160	58.4	10	21.3	55	20.1	0	0.0	7	2.6	0	0.0	5	1.7	7	14.9	47	17.2
7. Chicago, Ill.	24	139	21	87.5	96	69.1	3	12.5	20	14.4	0	0.0	1	0.7	0	0.0	1	.7	0	0.0	21	15.1
8. St. Louis, Mo.	34	108	16	47.1	43	39.8	10	29.4	38	35.2	2	5.9	7	6.5	0	0.0	2	1.9	6	17.6	18	16.6
9. San Francisco, Calif.	60	175	42	70.0	134	76.6	6	10.0	9	5.1	3	5.0	15	8.6	1	1.7	2	1.1	8	13.3	15	8.6
10. Denver, Colo.	18	80	13	72.2	52	65.0	0	.0	16	20.0	0	0.0	4	5.0	1	5.6	1	1.3	4	22.2	7	8.7
Washington, D.C.	18	123	13	72.2	86	69.9	1	5.6	11	8.9	2	11.1	10	8.2	2	11.1	9	7.3	0	.0	7	5.7

[1] Percentages are computed horizontally by current fiscal year and total fiscal years.

Table 20.—Injunction Litigation Under Section 10(e), 10(j), and 10(l), Fiscal Year 1972

	Total proceedings	Injunction proceedings		Total dispositions	Disposition of injunctions						Pending in district court June 30, 1972
		Pending in district court July 1, 1971	Filed in district court fiscal year 1972		Granted	Denied	Settled	Withdrawn	Dismissed	Inactive	
Under sec. 10(e), total	[1] 6	1	5	6	1	5	0	0	0	0	0
Under sec 10(j), total	21	2	19	18	11	2	3	1	1	0	3
8(a)(1)	1	1	0	1	0	1	0	0	0	0	0
8(a)(1)(2)	1	0	1	1	0	0	0	0	1	0	0
8(a)(1)(2)(3)	3	0	3	2	1	1	0	0	0	0	1
8(a)(1)(2)(3)(5)	2	0	2	1	1	0	0	0	0	0	1
8(a)(1)(3)	1	0	1	0	0	0	0	0	0	0	1
8(a)(1)(3)(4)	1	0	1	1	1	0	0	0	0	0	0
8(a)(1)(3)(5)	1	0	1	1	0	0	1	0	0	0	0
8(a)(1)(5)	2	1	1	2	1	0	0	1	0	0	0
8(b)(1)(A)	2	0	2	2	1	0	1	0	0	0	0
8(b)(1)(A)(2)	1	0	1	1	1	0	0	0	0	0	0
8(b)(1)(A)(3)	2	0	2	2	2	0	0	0	0	0	0
8(b)(1)(B)	1	0	1	1	1	0	0	0	0	0	0
8(b)(3)	3	0	3	3	2	0	1	0	0	0	0
Under sec. 10(l), total	261	4	257	250	99	10	93	27	12	9	11
8(b)(4)(A)	5	0	5	5	3	0	2	0	0	0	0
8(b)(4)(A)(B)	1	0	1	1	1	0	0	0	0	0	0
8(b)(4)(B)	128	4	124	121	47	5	39	19	6	5	7
8(b)(4)(B)(C)	1	0	1	1	0	0	1	0	0	0	0
8(b)(4)(B)(D)	19	0	19	18	1	0	13	2	1	1	1
8(b)(4)(B), 8(e)	5	0	5	5	1	1	3	0	0	0	0
8(b)(4)(B); 7(A)	2	0	2	2	1	0	1	0	0	0	0
8(b)(4)(B); 7(C)	1	0	1	1	1	0	0	0	0	0	0
8(b)(4)(C)	1	0	1	1	0	0	0	1	0	0	0
8(b)(4)(D)	59	0	59	57	23	3	23	5	1	2	2
8(b)(4)(D), 7(A)	1	0	1	1	1	0	0	0	0	0	0
8(b)(4)(D), 7(C)	1	0	1	1	0	0	1	0	0	0	0
8(b)(7)(A)	13	0	13	12	6	0	5	0	0	1	1
8(b)(7)(B)	4	0	4	4	2	0	2	0	0	0	0
8(b)(7)(C)	15	0	15	15	9	1	3	0	2	0	0
8(e)	5	0	5	5	3	0	0	0	2	0	0

[1] In courts of appeals.

Table 21.—Miscellaneous Litigation Involving NLRB; Outcome of Proceedings in Which Court Decisions Issued in Fiscal Year 1972

Type of litigation	Number of proceedings								
	Total—all courts			In courts of appeals			In district courts		
	Number decided	Court determination		Number decided	Court determination		Number decided	Court determination	
		Upholding Board position	Contrary to Board position		Upholding Board position	Contrary to Board position		Upholding Board position	Contrary to Board position
Totals—all types	52	47	5	25	23	2	27	24	3
NLRB-initiated actions	9	9	0	2	2	0	7	7	0
To enforce subpena	7	7	0	1	1	0	6	6	0
To restrain dissipation of assets by respondent	0	0	0	0	0	0	0	0	0
To defend Board's jurisdiction	2	2	0	1	1	0	1	1	0
Action by other parties	43	38	5	23	21	2	20	17	3
To restrain NLRB from	9	9	0	3	3	0	6	6	0
Proceeding in R case	6	6	0	3	3	0	3	3	0
Proceeding in unfair labor practice case	3	3	0	0	0	0	3	3	0
Proceeding in backpay case	0	0	0	0	0	0	0	0	0
Other	0	0	0	0	0	0	0	0	0
To compel NLRB to	27	24	3	17	15	2	10	9	1
Issue complaint	13	13	0	10	10	0	3	3	0
Seek injunction	1	1	0	1	1	0	0	0	0
Take action in R case	8	6	2	2	1	1	6	5	1
Other	5	4	1	4	3	1	1	1	0
Other	7	5	2	3	3	0	4	2	2

Table 22.—Advisory Opinion Cases Received, Closed, and Pending, Fiscal Year 1972 [1]

	Total	Number of cases			
		Identification of petitioner			
		Employer	Union	Courts	State Boards
Pending July 1, 1971	1		1		
Received fiscal 1972	8	3	4		1
On docket fiscal 1972	9	3	5		1
Closed fiscal 1972	7	2	5		0
Pending June 30, 1972	2	1	0		1

[1] See "Glossary" for definitions of terms.

Table 22A.—Disposition of Advisory Opinion Cases, Fiscal Year 1972 [1]

Action taken	Total cases closed
Total	7
Board would assert jurisdiction	2
Board would not assert jurisdiction	1
Unresolved because of insufficient evidence submitted	1
Dismissed	2
Withdrawn	1

[1] See "Glossary" for definitions of terms.

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