I count it a privilege and an opportunity to introduce this symposium issue on labor law. It contains articles notable for their diversity of viewpoint and for their uniform concern with thoughtful, temperate discussions of the vexing issues of the application of complex provisions of labor law to the problems of labor management relations.

We live in an era of accelerated change, an age of mounting technological triumphs and exploding population. In a growing and prosperous nation, we have with us the problems which growth and change create. Among these are the problems of automation, unemployment, changes in the composition of the working force, and others, flowing from the fast changing industrial scene.

These changes and problems confront labor and management and complicate the already sensitive relationship existing between them. In the midst of their struggle with these problems, the public interest intervenes, from time-to-time, demanding governmental involvement in the collective bargaining process.

Every thoughtful student of labor law must question the role of government in labor management relations in this context, in the context of our democratic traditions, and in the light of the evolution in the relationship between American labor and American management.

In the now dim past there existed in the relationship between labor and

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management in America, elements of intransigence and deep-seated hatreds that threatened destruction. That was the period of sit-down strikes and the time when pickets faced Pinkertons outside locked factory gates patrolled by armed guards. The years have been producing a change for the better—a change sometimes difficult to perceive through the turmoil of the contemporary scene but which shines with startling clarity against the background of the past.

This change made possible the statement in a Report to the President, last year, by the President's Advisory Committee on Labor-Management Policy, that "collective bargaining is an essential element of economic democracy."

In the present sensitive relationship between labor and management, we must consider whether it is not wise for the government's role to be cast in the context of voluntarism and moral persuasion; whether the law as such should have only a peripheral function in the collective bargaining process; and whether the rules of conduct laid down in labor relations laws should serve primarily as tools for the tactics in the give and take of the process of collective bargaining and labor-management relations.

On the other hand, as the complexity of our economy foists problems on labor and management too difficult for them to resolve by themselves, there arises a demand for the deeper involvement of government in the collective bargaining process. This demand arises from the "public interest" which seeks a voice in the labor-management decisions, however difficult it may be to determine exactly what the public interest may be and what decisions would serve it best.

A good illustration of the extraordinary responsiveness to the public demand for government policy formulation is the enactment of the Landrum-Griffin Act in 1959.

Many of the sponsors of the Labor-Management Reporting and Disclosure Act of 1959 accepted the common impression that labor unions are in a large part hoodlum dominated, that the labor leaders prey on the union membership, and that the union leaders characteristically force on employers demands far beyond what their membership would insist upon. There was, so far as I know, no reliable evidence that there had been either more or less corruption and abuse of power among (1) labor leaders, (2) bank officials, (3) corporate executives, or (4) government officials, local, state, and federal. However, Landrum-Griffin was a legislative translation of public sentiment of the times.

It is interesting to note, while there have been quite a few criminal
prosecutions under the Landrum-Griffin Act, that in most cases they have originated with action of the trade unions themselves who found the evidence, took disciplinary action themselves, and then, as an act of good citizenship, notified their government of the violation of the law.

Here then, as in the Taft-Hartley Act, voluntary action is the key element in the effectuation of the national labor policy. This must be the way of a democracy, the way of a civilized society. As Lord Moulton’s dictum goes: “The measure of civilization is the degree of its obedience to the unenforceable.”

This symposium on labor law, through the scholarly research and writings of its contributors, adds a more lucid understanding of the government’s impact on some of the problems of labor-management relations. It deals, of course, with the most intricate and complex problems of the law which are the province of the scholar, the expert, and the most devoted student. The strong disagreements that are evident throughout the issue do not discourage me, for it is from discussions among earnest and able advocates of conflicting views that we will ultimately forge those honorable compromises that typify the field of labor law.

Indeed this publication is a useful and constructive tool for those seeking realistic understanding of contemporary labor problems and the law.
SOME ASPECTS OF THE CURRENT INTERPRETATION OF SECTION 8(b)(7)

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INTRODUCTION

Section 8(b)(7) of the National Labor Relations Act, added in 1959, regulates organizational and recognition picketing. It bears emphasis that Congress has not prohibited such picketing, but has determined instead how and when it may be conducted. The ban does not apply at all to picketing by a labor organization "currently certified as the representative" of the employees. However, an uncertified union may not picket or threaten to picket either to secure recognition by an employer or acceptance or selection by the employees in three situations: (A) where the employer has "lawfully recognized" another labor organization and "a question concerning representation may not appropriately be raised," (B) where a "valid election" has been conducted within the preceding twelve months, or (C) where such picketing has been conducted without a representation petition being filed "within a reasonable time not to exceed thirty days from the commencement of such picketing." Situation (C) is subject to further refinements. The filing of a timely representation petition engenders an expedited election. But picketing will not be prohibited despite the failure to file a representation petition, and an expedited election will not be conducted even if a petition is filed within the thirty day period, if the picketing falls within the scope of the final proviso to (C): 2

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,


2 Cf. Department Store Employees' Union, 136 N.L.R.B. 335 (1962) (Oakland G. R. Kinney Co.). This is not to say that no election will be conducted if one purpose of the picketing is found to be to secure recognition. A representation petition will be processed to an election in the ordinary course, and this can be speedy enough even though unexpedited. Picketing for recognition which is within the scope of the final proviso does not therefore immunize a union from an election. It merely gives it somewhat more time within which to picket before the election is held.
a labor organization, unless an effect of such picketing is to induce any individual employed by another person in the course of his employment, not to pick up, deliver or transport any goods or not to perform any services.

The obvious compromise character of section 8(b)(7), as well as a certain opacity in its draftsmanship, creates difficult interpretive problems. But sound interpretation and criticism would be enhanced were it forthrightly recognized that it is compromise legislation with neither antagonist having fully prevailed in Congress. Accordingly, neither can justly complain that the Board or the courts have failed to give him the victory in the adjudicative forums that he did not succeed in winning in the legislative chambers. Moreover, it must be realized that there are drafting lapses which have no significance other than to denote deficient composition.

At the outset, two interesting interpretive problems have emerged. First, what are objects of picketing which are not organizational or recognition in character so that they are altogether outside the purview of section 8(b)(7)? Second, what is the scope of the final proviso to (C)? Also significant is the pedestrian but all-important question of fact-finding in the administration of section 8(b)(7). For the rules are not nearly so unruly—to use Judge Jerome Frank’s phrase—as the unpredictability of the way the Board will find the facts. This paper will treat each of these three problems.

** Objects of Picketing Which are not Organizational or Recognition

As the Board has stated, “the thrust of all the section 8(b)(7) provisions, both structurally and grammatically, is directed only against picketing for recognition, bargaining, or organization and not against picketing for other objects.”8 It is therefore imperative to define those objects which do not fall within the proscribed class.

** Picketing against Unfair Labor Practices

Section 8(b)(7) is not directed at “so-called protest picketing against unfair labor practices. There is ample legislative history to substantiate the proposition that Congress did not intend to outlaw picketing against unfair labor practices as such.”4

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8 Waiters Local 500, 140 N.L.R.B. 433 (1963) (Mission Valley Inn), paraphrasing the basic decision, International Hod Carriers Union, 135 N.L.R.B. 1153, 1159 (1962) (C. A. Blinne Constr. Co.).
4 C. A. Blinne Constr. Co., supra note 3, at 1168 n.29. See also Mission Valley Inn, supra note 3, at 437.
Behind this simple-sounding proposition much complexity lurks. An employer commits an unfair labor practice if he refuses to recognize a majority union in an appropriate unit but entertains no good faith doubt of its representative status. Picketing to compel recognition which has been wrongfully withheld is classically picketing to protest and redress an unfair labor practice. But it is also clearly recognition picketing within the express terms of section 8(b)(7), which excepts such picketing from its ban only when conducted by a union which is "currently certified as the representative of such employees." The Board resolves the dilemma by holding that, if the union files a refusal-to-bargain unfair labor practice charge which is found to be meritorious, then the union may picket for recognition without also filing a representation petition.\(^5\) On the other hand, if the charge is found to lack merit, recognition picketing even by a majority union is forbidden unless the union has filed a representation petition no later than thirty days from the commencement of picketing.\(^6\) And so, in this situation, the union would be free of the applicability of section 8(b)(7) only if it guesses right that the recognition withheld by the employer, despite the union's majority status within an appropriate unit, will be found by the Board (which means the General Counsel in the first instance) to have been withheld in bad faith. Obviously the union's only safe course, if it undertakes to picket, is also to file a representation petition and a refusal-to-bargain charge. Furthermore, recognition picketing which is not within the sanctuary of such a petition and charge is prohibited despite the employer's commission of other unfair labor practices.\(^7\) But a charge of engagement in such other unfair labor practices is not irrelevant. Until the charge is resolved, either by dismissal of a meritless charge or redress of a meritorious one, no election will be conducted and picketing may continue.\(^8\) For, "pending a resolution of the merits of the union's charge, it would be little short of farcical to conduct an election in the face of an undetermined question whether the condition of unimpaired choice essential to an election has been destroyed."\(^9\)

The upshot is that, under the law as expounded by the Board, picketing to protest wrongfully withheld recognition is outside the proscription of

\(^5\) International Hod Carriers Union, 135 N.L.R.B. 1153, 1166 n.24 (1962) (C. A. Blinne Constr. Co.).

\(^6\) Id. at 1162. This proposition was recently affirmed in Dayton Typographical Union v. NLRB, No. 17058, D.C. Cir., Nov. 14, 1963.

\(^7\) International Hod Carriers Union, 135 N.L.R.B. 1153, 1163-67 (1962) (C. A. Blinne Constr. Co.).

\(^8\) Ibid.

section 8(b)(7) only if a refusal-to-bargain charge is filed which is found to have merit. A related question is the effect to be given to the General Counsel's administrative determination that recognition has not been wrongfully withheld or that no unfair labor practices preventing a fair election have been committed. The Board's view that his decision is the last word has not gone unchallenged. The Court of Appeals for the Second Circuit expressed its skepticism in *NLRB v. Local 182, Int'l Bhd. of Teamsters.*

Rejecting a defense to a section 8(b)(7)(B) complaint that unremedied unfair labor practices precluded a "valid election," the Board observed that "the General Counsel had dismissed the unfair labor practice charges against the employer under § 8(a)(2) and (5)," and concluded that it "did 'not believe it incumbent upon the trier of the facts in one case to reexamine an administrative determination reached in another case.'" The Second Circuit was unimpressed with the conclusiveness of this reasoning, and explained that

> Although we appreciate the difficulties, which arise from the internal bifurcation of the Board and have led to a similar holding in another context . . . we are not sure the issue can always be settled in such summary fashion. Section 8(b)(7)(B) applies only to picketing for the forbidden object within the twelve months after "a valid election." The Board's brief concedes, properly we think, that in an unfair labor practice proceeding under § 8(b)(7)(B), "all questions relating to the validity of the election, including the propriety of directing it, are open to Board and judicial review" . . . [W]e cannot suppose that Congress was concerned only with validity in the formal sense; [for] . . . an election in which a union has in fact been strong-armed by tactics violating § 8(a) would hardly be "valid" under § 8(b)(7)(B)—even in the unlikely event that the General Counsel had refused to issue a complaint, and even though the Board could not make him issue one and his refusal would not be reviewable by a court of appeals under § 10(f) . . . and only dubiously so by a district court . . . . However, a union wishing to argue that an election is invalid because of the employer's unremedied unfair labor practices, despite the General Counsel's refusal to act upon its charges, must do more than prove it has filed charges which the General Counsel has dismissed; there must be something to indicate that he was wrong in doing so and that unfair labor practices in fact prevented a fair election."

What is the status of picketing against unfair labor practices not embracing a refusal-to-bargain? "Insofar as picketing is directed against unfair labor practices not involving an object of recognition, bargaining,

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10 314 F.2d 53 (2d Cir. 1963).
11 Id. at 60.
12 Id. at 60-61.
or organization, it falls plainly outside the area proscribed by Section 8(b)(7).” How plainly is plain? The question is evidentiary. The issue is whether picketing said to protest an unfair labor practice is in fact an artifice to conceal a present organizational or recognition object.

To illustrate, an employer engages in acts of interference which cause the union to lose a representation election. After the election the union enters into a settlement agreement remedying the unfair labor practices, and the employer promises to desist from the wrong and to post notices to that effect. Contemporaneously, the union pickets the employer to protest the unfair labor practices. The Board holds that in such circumstances the picketing is not a ruse to pursue the pre-election recognition objective but is designed to publicize the employer’s commission of unfair labor practices in order to stimulate the community’s displeasure with the employer.14

Another case focuses the problem differently. An employer reinstates some, but not all, unfair labor practice strikers, placing the remainder on a preferential hiring list. Over the union’s protest, the Regional Director enters into a settlement agreement with the employer accepting this disposition as sufficient redress of the unfair labor practices charged; the union continues to picket to secure the immediate reinstatement of all the strikers. The Board holds that the picketing is not proscribed by section 8(b)(7), not because the picketing is in protest against unfair labor practices, but because reinstatement of strikers (whether unfair labor practice or economic strikers) is not an aim which embraces a forbidden recognition or organizational object.15

The Board’s reason for declining to treat the picketing as a protest against unfair labor practices is troubling. It stated:

We note that the Union, contemporaneously with its picketing, filed unfair labor practice charges against Mission [the employer] with the General Counsel; that the Regional Director and Mission entered into an informal settlement agreement with respect to these charges, thus obviating the necessity for issuing a complaint; that Mission complied with the terms of this settlement agreement; and that the Regional Director thereupon closed the case. Granted that the Union was not a party to the informal settlement agreement, that at all times it resisted the settlement, and that, particularly, it protested the failure to reinstate all the strikers encompassed in the unfair labor practice charges, the fact remains that under established and regular administrative procedures, any unfair labor practices embraced in the charges must be deemed to have been remedied, and the

14 Teamsters “General” Local 200, 134 N.L.R.B. 670 (1961) (Bachman Furniture Co.).
case has been closed. For the Board to accord recognition to a continued protest against unfair labor practices thereafter would be inconsistent with its obligation to respect established administrative practice and would impinge upon the statutory authority of the General Counsel..."

[Hence,] the picketing after settlement and compliance . . . may not be considered to have been . . . for the object of protesting unfair labor practices . . . .

According to the Board, therefore, once the General Counsel administratively determines to settle or dismiss a charge, that act conclusively determines the status of the unfair labor practices alleged in the charge for the purpose of section 8(b)(7). Picketing cannot be said, the argument runs, to be in protest against unfair labor practices if that ascription is inconsistent with the General Counsel’s disposition of the charge. And so, the argument necessarily concludes, if the General Counsel dismisses a charge, it must therefore be assumed that no unfair labor practice exists; accordingly, by hypothesis, the picketing cannot be for the purpose of protesting a nonexistent unfair labor practice.

This line of reasoning is somewhat less than imposing. If the General Counsel settles or dismisses a charge, it means only that this disposition satisfies him. It does not mean that the charging party cannot be, with reason, thoroughly displeased with the disposition, and manifest its displeasure by pursuing its quest for relief by the self-help route of picketing. Nor does it mean that the Board, when the question reaches it in its adjudicatory capacity, must accept the General Counsel’s determination, any more than it accepts his determination just because he issues a complaint. The General Counsel may have exclusive authority to determine whether a complaint should issue. He has no authority, much less exclusive authority, to determine a fact relevant to the Board’s exercise of its adjudicatory responsibility.

Furthermore, concentration upon the action taken by the General Counsel detours the relevant inquiry. The question is whether picketing is for a proscribed recognition or organizational objective, on the one hand, or to protest unfair labor practices, on the other. The existence in fact of unfair labor practices is not the point. The factual basis of the unfair labor practices alleged is germane only as it bears on determining whether the picketing union is actually pursuing the objective it professes. If the claim of an unfair labor practice is insubstantial, then it is fair to infer that the union’s claimed objective is feigned and its real objective is that prohibited by the statute. But if the claimed objective, upon impartial

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16 Id. at 438.
examination, may be entertained reasonably and in good faith, then the only remaining question is whether, in the light of all the circumstances, other factors nevertheless negate it as the genuine aim. But this question cannot be answered by looking to the General Counsel's reasonable and bona fide entertainment of a different view of the merits of the alleged unfair labor practice than is held by the union. Indeed, it is quite irrelevant to the question. It is commonplace that equally sincere and reasonable individuals can have quite disparate ideas on the same subject.

PICKETING TO SECURE THE REINSTATEMENT OF STRIKERS OR DISCHARGED EMPLOYEES

The Board holds that picketing to secure the reinstatement of strikers or discharged employees, although no unfair labor practice is connected with their separation, is not recognition or organizational picketing. This holding has a history that takes us back to section 8(b)(4)(C), the 1947 precursor of the 1959 enactment of section 8(b)(7). Section 8(b)(4)(C) prohibits a union from striking or picketing an employer where an object is to force or require that employer "to recognize or bargain" with it if another union has been certified as the representative. In 1956, a divided Board held that section 8(b)(4)(C) was violated by picketing which was aimed at two objectives: (1) recognition in the face of another union's certification; and (2) reinstatement of certain discharged employees. The reinstatement objective was found to be a separate and independent basis for the violation. Said the Board:

[T]he second of the Union's dual objectives, namely, striking to force the Employer to reinstate certain dischargees, is equally violative of Section 8(b)-
(4)(C). Whether or not the demand for reinstatement of these employees be considered a grievance, the Union's strike for such a purpose necessarily... is a strike to force or require the Employer to recognize and bargain with the [Union]... as to this matter. ... [T]he Union's objective in striking the Employer is subject to a dichotomy of purpose, that of achieving overall bargaining and settling a specific dispute. We do not believe, however, that the second of these objectives may be further dichotomized and limited to a finding that this object was merely the "adjustment of a grievance." Such a finding ignores the fact that recognition and bargaining are essential elements of this objective without which it would be impossible for the [Union]... to satisfactorily settle its specific dispute.

17 Waiters Local 500, 140 N.L.R.B. 433 (1963) (Mission Valley Inn).
20 Id. at 892-93.
In 1961 a differently constituted Board took a different view. A union picketed to protest an employee's discharge and to have him returned to work. The Board held that this object did not embrace recognition or organization within the meaning of section 8(b)(7), and, recognizing that in this respect no difference in principle existed between sections 8(b)(7) and 8(b)(4)(C), it overruled its earlier decision. Said the Board:

It may not be gainsaid, of course, that picketing for an employee's reinstatement may in some circumstances be used as a pretext for attaining recognition as collective-bargaining representative of all the employees in a certain unit. But before we are willing to infer such broader objective, some more affirmative showing of such object must be made than exists here. So far as this record indicates, [the Union's] ... picketing would have ceased if the Employer without recognizing or, indeed, exchanging a word with the [Union] ... had reinstated the [employee]. ... We find in this case that the picketing was directed solely at securing [the employee's] ... reinstatement. We further find that such conduct does not violate Section 8(b)(7) of the Act.

PICKETING FOR AREA STANDARDS

In the jargon of the trade, picketing for area standards means picketing aimed at causing the picketed employer to adopt employment terms at his enterprise commensurate with those prevailing in his locale. The Board's holding that such picketing is not for organizational or recognition purposes within the meaning of section 8(b)(7) again takes us back to section 8(b)(4)(C). The question under section 8(b)(4)(C) is whether picketing for area standards, where another union is the certified representative but the union conducting the picketing disclaims an intention to act as the representative, is nevertheless picketing to force the employer "to recognize or bargain" with the uncertified union.

The question arose in International Hod Carriers Union (Calumet Contractors Ass'n). In its first decision, the Board found that section 8(b)(4)(C) had been violated. It reasoned:

While, clearly, no express demand for recognition or bargaining was made, it is equally clear that one of the objects of ... picketing was to force [the employer] ... to meet the "prevailing rate of pay and conditions" for the area. It is well established that a union's picketing for prevailing rates of pay and

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22 Local 259, Int'l Union, UAW, 133 N.L.R.B. 1468 (1961) (Fanelli Ford Sales, Inc.).
23 Id. at 1468-69.
conditions of employment constitutes an attempt to obtain conditions and concessions normally resulting from collective bargaining, and constitutes an attempt by the union to force itself on employees as their bargaining agent. [The picketing union's] . . . disclaimer of interest in the bargaining unit, indeed its affirmative statement that it would never bargain in such a unit, is, therefore, in the circumstances here present, an inadequate defense; for despite . . . disclaimer, the picketing necessarily had as its ultimate end the substitution of [the picketing union] . . . for the . . . certified bargaining agent.25

On reconsideration, a differently constituted Board reversed and found no violation of section 8(b)(4)(C). The Board said:

We hold that [the picketing union's] . . . admitted objective to require the [employer] . . . to conform standards of employment to those prevailing in the area, is not tantamount to, nor does it have an objective of, recognition or bargaining. A union may legitimately be concerned that a particular employer is undermining area standards of employment by maintaining lower standards. It may be willing to forgo recognition and bargaining provided subnormal working conditions are eliminated from area considerations. We are of the opinion that Section 8(b)(4)(C) does not forbid such an objective.26

*Calumet II*, the decision on reconsideration, departed from a substantial line of then existing precedent dating back to *Retail Clerks Ass'n (Petrie's)*,27 decided in 1954. In *Petrie's*, the union picketed an employer stating that it desired the employer to adopt union standards, that it would remove the pickets if the employer instituted union standards, and that it had no interest in organizing or representing the employees. The employer petitioned the Board to conduct an election to determine whether the union represented its employees, and, over the union's objection that it had not requested recognition, the Board directed an election. The Board explained that

[T]he Union is attempting to secure by means of picketing what is normally obtained at the bargaining table. This case must therefore be distinguished from those cases in which a union merely engages in organizational picketing. The conditions which the Union here stipulates for the removal of the pickets are inherently demands which are resolved through collective-bargaining negotiations between the Employer and the bargaining representative of his employees. The fact that the Union states that it will remove the pickets if the Employer accedes to its demands indicates persuasively that it is in reality attempting to force the Employer to bargain with it without regard to its majority status. Accordingly, we must equate the Union's activity to a demand for recognition.28

25 130 N.L.R.B. at 81-82.
28 Id. at 1319.
While Petrie's was a representation proceeding to decide whether to direct an election, rather than an unfair labor practice proceeding to decide whether section 8(b)(4)(C) had been violated, the underlying question whether the picketing had a recognition object was the same in both proceedings.

Petrie's was itself a reversal of then existing precedent. While the Board in Petrie's stated that the picketing in that case was to "be distinguished from . . . merely . . . organizational picketing," it was not realistically different from picketing which the Board had theretofore described as at most organizational;\(^2^9\) i.e., picketing by a minority union to obtain the adherence of a majority without a current claim to recognition as the bargaining representative. And, as the law stood at that time, to define the picketing as at most organizational was to say that it was legal, so that no more precise inquiry into the attributes of the picketing was required. Accordingly, when the Board on reconsideration in Calumet concluded that picketing for area standards did not have a recognition object, it in effect reversed a reversal. However, when the second decision in Calumet was rendered in 1961, section 8(b)(7) had been enacted regulating both organizational and recognition picketing, and it was therefore no longer possible without legal consequences to dismiss picketing for area standards as at most organizational. Presumably for that reason the Board in Calumet II was silent as to the possible organizational attributes of such picketing. When the question did later arise in a section 8(b)(7) case, and an answer was therefore relevant, the Board in reliance on Calumet II decided that area standards picketing did not have either an organizational or recognition objective.\(^3^0\)

THE BOARD'S RATIONALE FOR CONCLUDING THAT PICKETING AGAINST UNFAIR LABOR PRACTICES, TO SECURE THE REINSTATEMENT OF STRIKERS AND DISCHARGED EMPLOYEES, AND FOR AREA STANDARDS DOES NOT EMBRACE A FORBIDDEN RECOGNITION OR ORGANIZATIONAL OBJECT

In concluding that, of itself, picketing to protest unfair labor practices, to secure the reinstatement of strikers or discharged employees, or to

\(^2^9\) E.g., General Paint Corp., 95 N.L.R.B. 539 (1951); Hamilton's Ltd., 93 N.L.R.B. 1076 (1951).

\(^3^0\) Houston Bldg. Trades Council, 136 N.L.R.B. 321 (1962) (Claude Everett Constr. Co.); cf. Alton-Wood River Bldg. Trades Council, 144 N.L.R.B. No. 59 (1963) (Jerseyville Retail Merchants Ass'n), where the Board held that community picketing, not directed at specific stores but designed to persuade consumers not to patronize identified stores with substandard working conditions, was not organizational or for recognition.
obtain area standards is not forbidden because organizational or recognition in character, the Board rejects the view that organization or recognition is inherent in these demands simply because they are of a kind which "could be made through the process of collective bargaining . . . ." It states:

We might well concede that in the long view all union activity, including strikes and picketing, has the ultimate economic objective of organization and bargaining. But we deal here not with abstract economic ideology. Congress itself has drawn a sharp distinction between recognition and organization picketing and other forms of picketing, thereby recognizing, as we recognize, that a real distinction does exist.\footnote{32}

The distinction the Board is apparently articulating is that, unless acquisition of representative status is a fairly immediate and tangibly realizable aim of picketing, it will not be deemed to have recognition or organization as "an object" simply because it trends in that direction.

**The Scope of the Final Proviso to Subsection (C)**

The final proviso to subsection (C) states:

[N]othings 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.

Thus, picketing which avowedly has an organizational or recognition object is not proscribed if it otherwise satisfies the conditions enumerated in the proviso.\footnote{33} As interpreted by the Board, to constitute "an effect" prohibited by the proviso the consequence of the picketing must be sufficiently substantial to have "disrupted, interfered with, or curtailed the employer's business."\footnote{34} Given that consequence, however, it makes

\footnote{31} International Hod Carriers Union, 135 N.L.R.B. 1153, 1168 n.29 (1962) (C. A. Blinne Constr. Co.).

\footnote{32} Ibid.


\footnote{34} Retail Clerks Union, 138 N.L.R.B. 478, 491 (1962) (Barker Bros.); see Dunau, A Preliminary Look at Section 8(b)(7), 48 Georgetown L.J. 371, 378 (1959):

A question which this proviso poses is the scope of the words "an effect." Does the proviso mean any effect or a substantial effect? The refusal of one employee in the course of two weeks' picketing to cross the line is "an effect." If "an effect" means "any effect" this one refusal may suffice to invalidate the picketing. So aseptic a reading would significantly reduce the utility of the proviso. On the other hand, if the proviso is properly read to contemplate a substantial effect, then internal union
no difference that the effect is unintended. The interesting question which remains is whether, although no refusal to service the picketed establishment by employees of others in fact materializes, the picketing is nevertheless invalid because that effect was intended even if unrealized.

Consideration of this question may begin with the opinion of the Court of Appeals for the Second Circuit in NLRB v. Local 3, Int'l Bhd. of Elec. Workers. The Board had found that certain picketing was not saved by the final proviso because "it did not have . . . an information purpose" limited to "truthfully advising the public (including consumers) that an employer does not employ members of, or have a contract with a labor organization" but "was focused on the employees of secondary employers"; the picketing was therefore bad without regard to whether it had a prohibited effect. Although not disagreeing with the conclusion, the Second Circuit on review was uncertain whether the Board had reached it by application of proper statutory standards. The court explained that in its view the final proviso excepted "a comparatively innocuous species of picketing having the immediate purpose of informing or advising the public, even though its ultimate object was success in recognition and organization." Elaborating this thought the court stated:

This proviso gives the union freedom to appeal to the unorganized public for spontaneous popular pressure upon an employer; it is intended, however, to exclude the invocation of pressure by organized labor groups or members of unions, as such.

The permissible picketing is, therefore, that which through the dissemination of certain allowed representations, is designed to influence members of the unorganized public, as individuals, because the impact upon the employer by way of such individuals is weaker, more indirect and less coercive.

In this connection what is meant by "advising the public," as used in the second proviso, is highly pertinent. Congress expressly provided that the word "public" should not be so narrowly construed as to exclude consumers, but the whole context of the phrase in which it appears makes it clear that it was not intended to be so broadly defined as to include organized labor groups which, discipline and cooperation should be sufficiently strong to permit consumer picketing without risking its invalidation from unwanted observance of the picket line by employees of others.

In Barker Bros. supra, while reaching a probably correct result on the facts, it may be that the Board overstated the magnitude of the consequence necessary to constitute a substantial effect.

36 317 F.2d 193 (2d Cir. 1963).
38 317 F.2d at 197.
at a word or signal from the picketeers [sic], would impose economic sanctions upon the employer; otherwise Section 8(b)(7) would be, in effect, almost entirely emasculated. By this latest amendment to the Taft-Hartley Act Congress sought to circumscribe a kind of picketing which, by its nature, could in most cases bring an employer to his knees by threatening the destruction of his business and which, because of the attendant loss of employment, had a material tendency to coerce employees in their freedom to accept or reject union membership or freely select the union they wanted to represent.\textsuperscript{39}

The court remanded the case to the Board with instructions to "approach its conclusion as to whether or not the picketing was 'for the purpose of truthfully advising the public' by way of a finding of whether or not the union's tactical purpose was to signal economic action, backed by organized group discipline."\textsuperscript{40} On the remand, the Board embraced the court's analysis as in fact the one it had been following, and concluded that, without regard to whether a proscribed effect had ensued, the picketing was invalid because "not directed at achieving the limited purpose of communicating with the public, but was also intended to be precisely that 'signal' to organized labor which Congress sought to curtail."\textsuperscript{41}

Denigration of proviso picketing as a "comparatively innocuous species" is not a satisfactory rationale of its scope. "Peaceful picketing is the workingman's means of communication."\textsuperscript{42} The "ingredients in it that differentiate it" from pure expression\textsuperscript{43} do not detract from its character as at least "in part an exercise of free speech guaranteed by the Federal Constitution."\textsuperscript{44} And speech is safeguarded as an "opportunity to persuade to action, not merely to describe facts."\textsuperscript{45} It diminishes in quality as "the workingman's means of communication" almost to the vanishing point to cast proviso picketing in an "innocuous" role and to protect it because it does not amount to much.

The active role that proviso picketing has is easily inferrible from its terms. To advise the public that "an employer does not employ members of, or have a contract with, a labor organization," is to inform it of the firm's nonunion status. To prohibit that effect of the picketing which evokes from employees of others a refusal to service the picketed firm is to disallow it as an appeal to the workers to observe the picket line by

\textsuperscript{39} Id. at 198-99.
\textsuperscript{40} Id. at 200.
\textsuperscript{41} Local 3, Int'l Bhd. of Elec. Workers, 144 N.L.R.B. No. 9, at 5 (1963) (Jack Picoult).
\textsuperscript{42} Milk Wagon Drivers Union v. Meadowmoor Dairies, Inc., 312 U.S. 287, 293 (1941).
\textsuperscript{43} Hughes v. Superior Court, 339 U.S. 460, 465 (1950).
\textsuperscript{44} Building Serv. Union v. Gazzam, 339 U.S. 532, 536-37 (1950).
\textsuperscript{45} Thomas v. Collins, 323 U.S. 516, 537 (1945).
withholding their labor. Every other evocation of the appeal is left undis-
turbed. And in practical terms this means that the picketing may freely 
induce customers to withhold their patronage from the firm because it is 
nonunion. In retail establishments in unionized communities this is hardly 
innocuous.

The role of proviso picketing as a concrete call to action to consumers 
to withhold their patronage, and not simply as disembodied information 
to an amorphous public, readily fits the economic scene. That a firm and 
its employees may prefer to remain nonunion does not detract from the 
threat to the welfare of organized labor that the firm’s nonunion status 
exerts. “Unions obviously are concerned not to have union standards 
undermined by non-union shops.”46 “The interdependence of economic 
interest of all engaged in the same industry has become a commonplace.”47

For union organization to be

at all effective, employees must make their combination extend beyond one shop.
It is helpful to have as many as may be in the same trade in the same community 
united, because in the competition between employers they are bound to be 
affected by the standard of wages of their trade in the neighborhood. Therefore, 
they may use all lawful propaganda to enlarge their membership and especially 
among those whose labor at lower wages will injure their whole guild.48

And since, “in order to render a labor combination effective it must elimi-
nate the competition from non-union made goods . . . elimination of 
price competition based on differences in labor standards is the objective 
of any national labor organization.”49 Indeed, the policy of the National 
Labor Relations Act is based upon explicit recognition that an evil against 
which the statute is directed is “preventing the stabilization of competitive 
price rates and working conditions within and between industries.”50

Thus, when a union by picketing publicizes the nonunion status of a 
firm, and explicitly or implicitly urges consumers not to buy its products, 
it is exercising its freedom of expression to support a valid economic 
interest. The union is as free to communicate the firm’s nonunion status 
to consumers as the firm is free to urge those same consumers that this is 
not a consideration which should deter them from buying the firm’s 
products. It is for the community of consumers in which the firm and the 
union both operate to decide on which side the consumer chooses to align

49 Apex Hosiery Co. v. Leader, 310 U.S. 469, 503 (1940).
himself. "'It is true that business operations employing union labor will be preferred by some customers and avoided by others solely upon the basis of that factor.'"

The meaning of free speech—and picketing is at least in part free speech—is that the firm and the union may both seek customer support by appealing for it. Accordingly, if the union's propaganda wins enough adherents among consumers, the business pinch that the firm and its employees may then feel may cause them to reconsider the wisdom of their nonunion preference. The employees may choose, and the firm is free to persuade them to choose, union representation. If the employees prefer retention of their nonunion status to alleviation of the pinch, that too is their right, but it is just as much the right of the union to continue to persuade the consumers to shun the nonunion product. Each element of the population is free to win the support of others. There is in our society no escape for anyone, consistent with constitutional protection for all, from the interacting influences and reactions of different elements of our reticulated community.

To be sure, if union standards are threatened by nonunion firms and consumer picketing to induce withholding of patronage is allowable on that account, the logic of this economic premise should lead as well to allowance of picketing designed to induce employees of others not to service the picketed establishment. But this is the precise point of the compromise embodied by the proviso. The compromise excludes pressure exerted on the nonunion firm by substantial curtailment of the work services of the employees of others. Since picketing with that effect is prohibited, it is a fair reading of the statute that picketing intended to have the effect, regardless of materialization, is likewise prohibited. But that reading is deceptive if it is taken to mean that the intention can be inferred simply from the establishment of a picket line at entrances used exclusively or almost so by employees of others. For employees of others are still part of the public. Indeed, the handbilling of "the public" allowed by section 8(b)(4) explicitly includes "consumers and members of a labor organization," and the generality of the same term "the public" in section 8(b)(7) is not cut down by limiting the illustration in that section to "consumers." The inclusiveness of the genus is not reduced by less-than-full enumeration of the species. As part of the public, employees of others are entitled to be informed, and the picketing union is entitled to inform them, of the nonunion status of the firm. In their capacity as consumers, the picketing may rightfully seek to induce employees of others to

51 NLRB v. International Ass'n of Machinists, 263 F.2d 796, 799 (9th Cir. 1959), cert. denied, 362 U.S. 940 (1960).
withhold their patronage from the firm as well as to pass on to others the information imparted by the picketing with a view toward persuading those others to withhold theirs. But in their capacity as employees, the picketing is bad if it has the effect of causing them to withhold their work services. Without that effect, however, the employees of others, no less than other members of the public, may properly be informed by picketing of the firm's nonunion status. Accordingly, in the absence of independent evidence to show that the picketing is intended to cause them to withhold their work services, the mere fact of picketing directed at employees of others should not suffice to establish that it is activated by a prohibited purpose. For it is invalid to infer an illicit intention from conduct which, indivisible in its outward manifestation, inherently has a dual aspect, one part of which is perfectly lawful. The statute cuts down the unlawful part by prohibiting the effect regardless of intention. To cut down the lawful part without independent evidence of a forbidden intention and irrespective of effect partially nullifies the compromise effectuated by the proviso.

The Role of Fact-Finding in the Administration of Section 8(b)(7)

"To experienced lawyers it is commonplace that the outcome of a lawsuit—and hence the vindication of legal rights—depends more often on how the factfinder appraises the facts than on a disputed construction of a statute or interpretation of a line of precedents."52 A right is pointless if facts are so interpreted that there is no meaningful way to exercise the right. Principles are unprincipled if essentially similar conduct cannot be expected predictably to lead to identical results. To be sure, sound principles do not preclude nice differences, but there is then an inescapable necessity of careful explanation disclosing a reasoned and justifiable basis for the difference. In the generality of cases the Board's performance as a factfinder is, therefore, far more significant than the rules it expounds. Too often that performance is disappointing.

I take for my text Warehouse Employees (Aetna Plywood & Veneer Co.).53 The Board found that the union violated section 8(b)(7)(B), the prohibition against organizational or recognition picketing within twelve months of a valid election in which the employees have rejected

53 140 N.L.R.B. 707 (1963). I have chosen this case because of my familiarity with it. It should be noted that I participated on the losing side and for this reason the reader may wish to temper the analysis.
union representation. The decision was rendered on January 22, 1963. The Board adopted pro forma, without any independent explanation, the trial examiner's intermediate report. Three weeks before the Board had decided *Waiters Local 500 (Mission Valley Inn).* In dismissing a complaint alleging a violation of section 8(b)(7)(B), the Board authoritatively confirmed three propositions: (1) picketing to secure the reinstatement of strikers is not for an object prescribed by section 8(b)(7); (2) it is irrelevant to the legality of that object that the employees for whom reinstatement is sought are not unfair labor practice strikers; and (3) picketing is not to be presumed to retain a recognition or bargaining object simply because that object existed at its outset. There was, hence, no question about the rules. Any difference in result in *Aetna* would have to be accounted for by a difference in the facts. What were the facts?

The essential predicate for the Board's conclusion that the union violated section 8(b)(7)(B) was that the picketing which began on March 23, 1960 had a recognition and bargaining objective which continued through March 6, 1962, when it was rendered illegal by the Board's certification that the union had lost a representation election conducted on November 14, 1961. If the picketing begun on March 23, 1960 did not have a recognition or bargaining objective, the basis for a finding of a violation vanished. It is therefore indispensable to focus on the status of events which pre-existed the commencement of picketing on March 23, 1960 to determine its object.

In July 1958, negotiations between the company and the union having stalemated, the union struck and picketed in furtherance of its economic demands on behalf of the warehouse employees whom it represented. (St. A-C). On March 23, 1959, the company wrote the warehousemen to inform them that they had been replaced and discharged, and on the same day it filed a representation petition with the Board to determine whether or not the union represented a majority of the new warehousemen. (St. D, E). Thereafter, on April 27, 1959, the union filed an unfair labor practice charge claiming a refusal to bargain and a discriminatory termination of the strikers. A complaint based on the charge issued; a hearing was held; and the matter was pending undetermined before a trial examiner on March 14, 1960. (St. F-H, Ex. S-1).

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The events beginning on March 14, 1960 are of crucial significance. Before then, the company having withdrawn recognition, it is fair to say that the picketing, in addition to its initial object of securing satisfactory contract terms, also sought resumed acknowledgment of the union's representative status. On March 14, however, all picketing of the company's premises ceased. (St. H). On that same day the union wrote the company explicitly informing it that (a) "the strike concerning your Elston Avenue, Chicago, Illinois, operation, which commenced July 22, 1958, is terminated as of this date and that, concurrently with the mailing of this letter, all pickets are being removed"; (b) "all employees who participated in the ... strike and who desire to return to work," identified by name in the letter, make "an unconditional and unqualified offer to return to work"; and (c) if within five days of receipt of the letter "we have not been notified ... that satisfactory steps have been taken to implement the return to work of the ... strikers in accordance with the law, we shall be forced to consider the picketing of your premises because of your refusal to act upon the offer to return to work." (Ex. S-2). About March 22, 1960, the company verbally notified the union of its intention not to take back the strikers. (St. I). Accordingly, on March 22, 1960, in response to this verbal notification, the union wrote the company that "your refusal to take steps to effect the return to work of the ... strikers constitutes an unfair labor practice under the National Labor Relations Act. Consequently, the ... strikers have directed us to inform you, and you are hereby notified, that a strike and picketing in protest of the commission by you of the unfair labor practice ... will be initiated and will continue until you have taken affirmative steps to cure the same." (Ex. S-3). On March 23, 1960 picketing of the employer commenced with a sign bearing the legend that (St. J):

AETNA PLYWOOD CO. REFUSES TO TAKE BACK MEMBERS OF 743 TEAMSTERS UNION, INTERNATIONAL BROTHERHOOD OF TEAMSTERS.58

The evidence at this stage seems clear that the picketing which began on March 23, 1960, had the return of the strikers to work as its single objective. The union had terminated the strike and picketing on March 14, 1960. The strike until then had lasted twenty months and was an obvious failure. The union now sought by self-help only one end, to recover the

56 Emphasis added.
57 Emphasis added.
58 Emphasis added.
jobs that the strikers had lost. It therefore made on behalf of the strikers "an unconditional and unqualified offer to return to work"; it warned that if "satisfactory steps" were not taken by the company "to implement the return to work," the union would "be forced to consider the picketing of your premises because of your refusal to act upon the offer to return to work"; the company refused to take back the strikers; deeming the "refusal to take steps to effect the return of the . . . strikers" to be an unfair labor practice, the union notified the company "that a strike and picketing in protest of the commission by you of the unfair labor practice will be initiated and will continue until you have taken affirmative steps to cure the same"; and in the picketing that then began the signs plainly protested that the company "Refuses To Take Back" the men.

The evidence is thus straightforward that the picketing which began on March 23, 1960, was devoted exclusively to returning the strikers to work. The context confirms and strengthens this single object of the picketing. Tying the picketing to a return to work could not be a stratagem to conceal an ulterior purpose. There was at that time no legal compulsion to confine the picketing to this end. Its purpose could have been legally proliferated to embrace recognition and bargaining. Restricting the picketing to the one object of regaining the work was therefore evidently based on a decision that the best hope of realizing a return to work was by limiting self-help efforts to achievement of that goal alone.

Events subsequent to the picketing which began on March 23, 1960, in themselves show that in origin and continuance the picketing was confined to securing a return to work.

1. On May 3, 1960, the trial examiner issued his intermediate report finding that the company had failed to bargain in good faith, that this failure converted the economic strike into an unfair labor practice strike, and that the discharge of the striking warehousemen was consequently discriminatory.59 He therefore recommended an order requiring the full reinstatement of the strikers upon request.60 The union then wrote the company on May 20, 1960. (Ex. S-4). It reminded the company that the strike had been "terminated as of March 14, 1960," that on that date "all pickets were removed from around your company premises," that on that date the named strikers "had offered to return to work" and that the "offer to return to work . . . was unconditioned and unqualified," and that the offer not having been honored the company was informed on March 22, 1960 that "your refusal to allow the . . . employees to return to work

60 Id. at 342.
constituted an unfair labor practice under the law and that *picketing in protest of same would commence and would continue until you took affirmative steps to remedy this situation.*”\(^61\) The union then explicitly informed the company that the offer to return to work which had been made continued in being as an unconditional and unqualified application:

So that there be no misunderstanding we emphasize that the offer to return to work by the employees involved communicated to you by our letter of March 14, 1960, is a continuing offer which at no time has been withdrawn. Consequently, it is intended and you should regard the said offer to return to work as being in force and effect and outstanding at all times since March 14, 1960, and remaining as such until you are notified to the contrary. We would remind you that this continuing offer to return to work by the employees involved is unconditional and unqualified. (Ex. S-4).

2. On February 16, 1961, the Board issued its decision. Reversing the trial examiner, the Board found that the company had not failed to bargain in good faith and that the strikers had been replaced before they were terminated so that their severance from employment was lawful.\(^62\) On March 20, 1961, the union petitioned the Court of Appeals for the District of Columbia Circuit to review the Board’s order. On January 23, 1962, that court, Judge Washington dissenting, affirmed.\(^63\)

Meanwhile, on March 3, 1961, two weeks after the Board’s decision, the union filed a new unfair labor practice charge protesting that, notwithstanding the unconditional and unqualified offer to return to work, the company had hired new employees in preference to the strikers:

On or about March 10, 1960, the Employer was advised that each and every of its employees then engaged in a lawful strike had unconditionally and unqualifiedly offered to return to work. Such offer to return to work on the part of the said employees has never been withdrawn or otherwise abrogated in any manner. Notwithstanding the said offer to return to work, the Employer has since the time of such offer continually hired new employees to perform the work theretofore done by the said strikers and has refused to rehire or reinstate the said striking employees for that purpose.

By these and other acts the Employer has discriminated against its employees in regard to hire and tenure of employment because the said employees have engaged in concerted activities for their mutual aid and protection. (St.L., Ex. S-5).

The Regional Director refused to issue a complaint based on this new charge. In appealing to the General Counsel from that refusal, counsel

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\(^61\) Emphasis added.


\(^63\) Warehousemen & Mail Order Employees v. NLRB, 302 F.2d 865 (D.C. Cir. 1962).
for the union unmistakably expressed the warehousemen's unreserved wish to return to work:

It should be remembered that no claim is made or ever was made in connection with the instant charges that the strikers were ever entitled to reinstatement as unreplaced economic strikers or as unfair labor practice strikers. The theory of the charges herein is solely that the employer violated the Act by virtue of its refusal to reemploy the strikers after their applications for reemployment when vacancies occurred in the jobs they were qualified to perform. (Ex. S-6, p. 4). . . .

The requests here were in express terms "unconditional and unqualified." It could not be more clearly stated that the strikers would return to the Company on any terms the employer imposed—including starting as new employees. . . .

In the instant case, the strikers had only an obligation to make it clear that they would take anything. They were not required to ask initially for the worst possible deal they could hope to attain. If the employer had any doubts about the nature of the request (and it never said that it did) or whether the men would return as new employees, "... the Respondent had the power readily to ascertain the truth but elected that its question be unanswered." Patterson Steel & Forge Co., 96 NLRB 129, 130. Further, it is clear from the language employed in informing the employer that the Union was authorized to receive notice when "each" of the men should report for work, that the offer was not an "all or none" arrangement. Pacific American Shipowners Assn., 98 NLRB 582, 599. The same language also demonstrates that, expecting that the men will go back to work at different times, it was intended that the men be placed when openings occurred.

It should also be noted in this regard that the letters by which the strikers sought jobs (Exhibits A, B, and C) requested only that the Employer "take steps to effect" their return to work. The Employer should reasonably have understood this to mean that an indication on its part that the strikers could come back as soon as openings occurred would have been sufficient "steps" toward the desired end. On the contrary, the reaction of the Employer was just the opposite—it expressed a firm opposition to ever reemploying the strikers. This—the announcement by the Employer of its intention to discriminate forever against the strikers—was the reason for the resumption of the picketing on March 23, 1960. (Ex. S-6, pp. 9-10).64

3. On March 6, 1962, the Board certified that the union had lost a representation election conducted on November 14, 1961. (St. P, T). The picketing which had begun on March 23, 1960, continued after March 6, 1962. (St. U). On May 7, 1962, an application for a preliminary injunction pursuant to section 10(l) of the act based on an alleged violation of section 8(b)(7)(B) of the act was heard by United States District Judge Michael L. Igoe. In the course of colloquy among the district judge and counsel for the General Counsel, the company, and the union, the limita-

64 Emphasis added.
tion of the picketing to the single objective of securing a return to work was revealed with crystal clarity.

In his opening statement, noting that the president of the company was present in the court room, counsel for the union explained:

Four years ago, fourteen people went out on strike in support of their desires to engage in collective bargaining and take whatever economic means they could to promote their own interests in collective bargaining. Two years later, in 1960, they decided to call it off. Two years was enough; nothing happened. Then, they asked to go back to work with Aetna with their own employer. Aetna said, “No, we are not going to take you back to work.”

If it need be any clearer what our object is, the president of the charging party is here in Court. I will make a commitment to him, and we did this two years ago, but I will do it in open Court, if he guarantees that—there is only about eight of them left, three of them died and some of the others found employment elsewhere, but there is only about eight of them that want to come back to work at Aetna—if they tell us that as soon as they have openings, he will take those people back, the picket line will be off in five minutes.

We thought we made that clear two years ago. I will tell the Court that if we can have such a guarantee, and we think it is fair, there is no reason why these people shouldn’t go back to work.

We will say at this time that the picket line will be off in five minutes, if he will make a representation in open court that he will take these people back just as soon as there are openings.

Now, I don’t think anything could frame the issues more clearly. (Tr. 11-13).

The district judge asked, “What about that offer?” (Tr. 13). Counsel for the General Counsel responded, “This is nothing new. . . . Aetna is under no legal obligation to take these people back to work.” (Tr. 13-14). The district judge observed that “he admits that, but he wants to know that if an opening occurs you will take them back.” (Tr. 14). Counsel for the union similarly observed:

That is right. We just think it is immoral and the only way we have to protest it is through picketing and we will continue to picket until we can get a commitment that they will go back when there are openings. We don’t say they have to. But to promote the interest of these people, we will continue to picket and continue to do so. We will call it off as soon as they make a commitment that they can go back to work. (Tr. 14).

Counsel for the union and the company then explored the union’s offer:

MR. SCHOONHOVEN (counsel for the company): As I understand, you made an offer that if the employer would put these remaining strikers, eight or what-

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65 “Tr.” as used throughout this article refers to the transcript of the hearing, Madden v. Warehouse Employees, No. 62C 866, N.D. Ill., May 7, 1962.
ever number there were, what I designated as a preferential hiring list, I assume that is a correct designation, that the picket line would be called off. Is that first understanding correct?

MR. ROSENBLOOM (counsel for the union): Before you get back to the office, it will be off.

MR. SCHOONHOVEN: My next question, are these employees, if we concede to this offer, are these employees or people to be considered as new employees hired on the basis of which one is going to make the best employee, or is it seniority or what?

MR. ROSENBLOOM: I can tell you our preference, which would be that you take them back in accordance with the seniority with your firm and that you would take them all back at once. But, you can take them back under any condition that you desire. It is your company, not ours. All we want is that they can have the right to work where they choose to work, and they were working at the time they engaged in what they believed was lawful activity to promote their own interests. It is not our company and we cannot control what you do.

MR. SCHOONHOVEN: My next question is if this is a true preferential situation, it may be that we don’t need any more employees, for a year or a year and a half. Nobody quits, nobody dies, and maybe it will go two years, who knows. Three years, I mean, it seems ridiculous but it could go a great length of time.

Do I assume there would be no picketing on the part of the Union to force us to hire somebody in the interim if we don’t need them?

MR. ROSENBLOOM: No, then we have no squawk coming. The only time we would feel you are violating what would be our agreement would be if you hired somebody rather than them, one of those people who were yet to be hired. If you just didn’t need anybody for two years, then we would have no squawk coming. (Tr. 19-21).

But the company rejected the offer. All that it was willing to do was to put three of the men “on a preferential hiring list,” but no others, the rest to “take their chances.” (Tr. 31). The union refused, observing that “they are asking us that we tell those people to go take a walk.” (Tr. 32).

The issue dividing the company and the union could thus hardly be clearer. The union wanted the men returned to work and the company refused. As the president of the union testified without contradiction,

Q. Now, did we ever stop picketing... in pursuit of our contention that Aetna had refused to bargain with us?

. . . .

A. Yes, in March of 1960.

Q. Was there a period of time... in March 1960, when there was no picketing at Aetna?

A. Right, the day I sent that letter to the Company I stopped all picketing.
Q. And then, was the picketing resumed after that?
A. You informed me that the attorney for the company said they would never hire any of those strikers back. We then started picketing again.

Q. It was approximately how many days after the picketing had ceased?
A. More than a week, ten days.

Q. What was the purpose of the second picketing which resumed nine days after the first began?
A. To get the men back on the job.

Q. Well, after March 23rd, 1960, when picketing started again with new signs, what was that picketing for?
A. To put men back to work. (Tr. 47-48, 56).

In the district court, resisting this evidentiary showing, the heart of the position of counsel for the General Counsel was that the union’s “real objective” was not to secure the return of the men to work for its own sake but to achieve bargaining status. “The union desires of getting these people back to work to then re-establish its majority and, therefore, the duty on the part of Aetna to bargain with it.” (Tr. 14). The district judge rejected that argument.

The whole theory of the Government seems to be that because these pickets are picketing these premises of this Company involved in this lawsuit, it may safely be presumed that they are picketing not for the purpose of having the men re-instated in the employment, but for the purpose of getting control of the union [unit], for the purpose of having an election, and for the purpose of having their particular union designated as the bargaining agent between the employees and the employer in this matter.

There are too many inferences that they ask me to draw from the meager testimony that has been put into this case, and therefore, their motion for an injunction will be denied. (Tr. 82).

What was too “meager” before the district court should also have been too barren before the Board. The interest in returning to work is too obvious and important to treat it without any supporting evidence as a ruse to disguise an ulterior purpose. To use the Board’s language in Mission Valley Inn:

This object cannot reasonably be regarded as in the nature of a pretext to mask a covert demand for recognition and bargaining. The existence of strikers was a fact. The refusal to reinstate them was a fact. Even if they are to be regarded as economic strikers, the demand to reinstate them was a proper and permissible objective and was the sole and exclusive objective of the picketing, not only
after the critical date of . . . [the Board's certification of the election results on March 6, 1962], but as far back as . . . [March 23, 1960], long before . . . the date of the election herein on . . . [Nov. 14, 1961].

What then was the basis for the Board's contrary conclusion in *Aetna*? It is a truism that tends to be overlooked that it is the General Counsel's burden to prove, and not the respondent's to disprove, that picketing has a proscribed object. It therefore distorts the inquiry heavily in favor of the General Counsel to say that the evidentiary showing that has been related easily preponderates in favor of a finding that the picketing was exclusively aimed at securing a return to work. For the fundamental threshold question is what evidence has the General Counsel adduced which prima facie discharges his burden of persuasion. This is no semantic quibble. In almost so many words the premise of the intermediate report, adopted by the Board, is that the trial examiner is not satisfied that the union's evidence disproves the General Counsel's allegation. Thus, after reciting the rival contentions of the General Counsel and the union, he then states that "I am not persuaded by Respondent's [union's] argument." Beginning with this upside-down approach, the picketing is found to have a proscribed object in reliance on five factors:

1. The solid evidence that a return to work was the object of the picketing is deprecated as the union's "own assertion" and dismissed as "self-serving language on a picket sign or statements of union officials." It is hard to know how any person can manifest his intent except by his words and acts. If these do not count, he is practically helpless to pursue the object which he is legally free to follow. In this case what more could the union have said or done to demonstrate the true object of its conduct?

A simple analysis shows the untenability of the intermediate report's disregard of the only evidence which is genuinely cogent. Suppose that the union had done nothing until the Board's publication of the election results on March 6, 1962. At that point it then did precisely what it had already done two years before. It ceased picketing; it made an unqualified and unconditional request on behalf of the strikers that they be returned to work; it warned that if that request were not honored it would begin and continue picketing until it were; nine days later, after the employer had refused to return the strikers to work, it began to picket with signs

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66 140 N.L.R.B. at 441.
68 Ibid.
stating the employer "Refuses To Take Back" the workers. There could then be no possibility of a finding of a violation except by entertainment of the repeatedly rejected conclusive presumption that an object of picketing which exists at its inception continues forever after.

Neither the Board nor the court, however, may rely upon the presumption that the initial object continues to the present, unless this presumption is supported by independent evidence of events and representations subsequent to the resumption of the picketing.69

Accordingly, other than to strengthen the union's position, it surely cannot make a difference that the union had already done two years before what it was not legally obliged to do until two years later.

2. The intermediate report states that the union did not disclaim its status as the representative or its desire to bargain on behalf of the strikers.70 To show this the report relies upon the union's efforts through the unfair labor practice route of recourse to the Board and review in the court of appeals to establish that the company had failed to bargain in good faith, and the union's efforts to resist the company's use of the representation route to establish by an election conducted among the replacements that respondent had been ousted as the representative.71

This is an untenable basis upon which to attribute a bargaining or recognition objective to the picketing. Limitation of picketing to securing a return to work is entirely consistent with the use of the unfair labor practice and representation proceedings to maintain representative status. One is the self-help route, the other is the administrative-court route. To use the self-help route for one purpose and the administrative-court route for another purpose is completely compatible. Indeed, the true dilemma is created by inferring a prohibited purpose in the use of the self-help route from a legitimate purpose in the use of the administrative-court route. Picketing to secure a return to work is entirely legal. The use of the administrative-court route to maintain representative status is entirely legal. The exercise of two legal rights cannot create a legal wrong. Otherwise a union could safely exercise its right to follow one route only by relinquishing its right to follow the other route. If the union chooses the self-help route it must forego the administrative-court route lest its picketing be found illegal because of the adverse inferences drawn from self-protective positions taken for a different purpose before the Board.

69 Graham v. Retail Clerks Int'l Ass'n, 188 F. Supp. 847, 856 (D. Mont. 1960), and cases cited therein.
71 Ibid.
or in court. And for the same reason, if the union chooses the administrative-court route it must forego the self-help route lest it be accused of illegal picketing. Yet the law makes both routes equally available for their separate purposes. The law is not so stultifying that it impales a party on the horns of so implacable a dilemma that to exercise the dual rights that it has, it must give up one of them.

3. The intermediate report states that "The legend on its [the union's] picket sign has not changed since its pickets were first posted."72 Depending on what this statement means it is either wrong or irrelevant. If it means that the picket sign was not changed when picketing began on March 23, 1960, over what it had been before, it is wrong. It was testified and stipulated that the sign had been changed. (Tr. 48, 56). If the statement means that the picket sign was not changed on March 6, 1962, when the Board certified the election results, over what it had been on March 23, 1960, it is irrelevant. The picket sign on March 23, 1960 read that the company "Refuses To Take Back" the workers, and there was obviously no occasion to change that sign on March 6, 1962.

4. The intermediate report states:

During the course of the proceedings for injunctive relief brought by the Regional Director and heard on May 7, 1962, Respondent advanced, for the first time, the claim that its picketing was for the purpose of securing preferential hiring for the pickets.73

This is irrelevant and wrong. It is irrelevant because, beginning March 14, 1960, and thereafter, the union had repeatedly and unmistakably stated that the strikers desired to return to work. Whether they desired immediate reinstatement or would be content with preferential hiring as vacancies occurred makes no difference to the legality of the object. Indeed, the picketing sanctioned in Mission Valley Inn was precisely to secure immediate reinstatement instead of preferential hiring. "[T]he picketing in which the Union engaged had as its sole object the immediate reinstatement of those employees who had been denied such reinstatement and, instead, had been placed on a preferential hiring list with only putative or speculative prospects of actual reemployment."74

The statement in the intermediate report is in any event wrong. Counsel for the union had informed the General Counsel on August 12, 1961, well before the election or the certification of election results, that the request

72 Ibid.
73 Id. at 5.
74 140 N.L.R.B. at 441.
to return to work "was not an 'all or none' arrangement" but would be satisfied if the "strike could come back as soon as openings occurred." (Ex. S-6, p. 10).

5. The intermediate report quotes the statement ascribed to one picket made on March 15, 1962, that "We have been on strike here for years, it is the same strike." A picket is not an agent of a union. Nor is a lay description of an event especially probative as to its meaning or significant as to its legal attributes. And since the statement was made on March 15, 1962, and the picketing at issue had begun almost two years before on March 23, 1960, it was in any event not inaptly described as having gone on "for years." Reliance on this kind of statement is a high order of adjudicatory flyspecking.

These five items are the sum—and all of it—of the basis for a finding that the picketing had a proscribed object. It is hard to believe that it makes a prima facie showing. It is more difficult to believe that it can withstand the solid and forthright evidence that a return to work was the object of the picketing. The object of activity is that which satisfies its aim. A return to work would satisfy the union's aim in picketing. That is therefore the object of the picketing. To attribute any larger purpose to it is to strain to find illegality.

This case sufficiently illustrates the quandary of counsel who, knowing the rules, cannot know how the Board will find the facts in applying the rules. It reminds that Judge Jerome Frank spent a lifetime teaching the importance of fact-finding. He elaborated what every knowledgeable lawyer knows at least in mean outline to his joy and to his despair. It is not surprising that this refractory stuff of litigation should emerge as probably the single most important ingredient in the administration of section 8(b)(7) as in the administration of the statute generally.

FEDERAL REGULATION OF RECOGNITION PICKETING

Earle K. Shawe*

INTRODUCTION

In the area of labor-management relations, recognition picketing refers to a labor union’s use of the picket line as a means of applying economic pressure on an employer to require the employer to recognize and deal with the union as the bargaining agent of its employees. Society’s and, therefore, the law’s concern with the problem of recognition picketing certainly pre-dates comprehensive regulation of labor-management relations by the federal government. Before enactment of the 1959 amendments to the National Labor Relations Act, federal law dealt directly only with a limited aspect of the problem: Section 8(b)(4)(C) of the National Labor Relations Act proscribed picketing and other activity by a union that had an object of forcing or requiring an employer to recognize or bargain with that union, where its employees were already represented by another union which had been certified by the National Labor Relations Board as the exclusive bargaining agent of those employees.

In addition, after ten years of experience under the National Labor Relations Act, as amended, the Board undertook to regulate recognition picketing beyond the limited mandate of section 8(b)(4)(C) by invoking section 8(b)(1)(A) of the act. Section 8(b)(1)(A) makes it an

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1 See, e.g., United Shoe Mach. Corp. v. Fitzgerald, 237 Mass. 537, 130 N.E. 86 (1921) (picketing to force employer to bargain with union instead of entering into individual contracts with employees, enjoined).


3 NLRA § 9(c)(1), 49 Stat. 453 (1935), as amended, 29 U.S.C. § 159(c)(1) (1958), provides for certification by the NLRB of a union which has been designated as exclusive bargaining agent by the majority of employees in an appropriate bargaining unit, in a secret ballot election conducted by the Board. An employer may recognize a union which represents the majority of its employees without a Board-conducted election and certification and, in certain circumstances, the Board will order an employer to bargain with a union which has not been certified. See, e.g., Joy Silk Mills, Inc., 85 N.L.R.B. 1263 (1949), enforced, 185 F.2d 732 (D.C. Cir.), cert. denied, 341 U.S. 914 (1950).

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unfair labor practice for a union to restrain and coerce employees in the exercise of their rights under section 7 of the act.4 Section 7 of the act declares, inter alia, that employees have the right to refrain from engaging in collective bargaining and other forms of union activity.6 The Board’s theory was that when a union, by picketing activities, requires an employer to deal with a union against the wishes of its employees, the union is, in effect, coercing employees in the exercise of their right not to be represented by a union.6 However, in NLRB v. Drivers Local 639,7 the United States Supreme Court held that section 8(b)(1)(A) could not be invoked to prohibit peaceful recognition picketing.

Without digressing into the merits of the Supreme Court’s analysis in Drivers Local 639 it is sufficient to say that the section 8(b)(1)(A) approach to recognition picketing did not promise to be a really satisfactory solution to the problem without regular use of the seldom-invoked section 10(j) preliminary injunction by the General Counsel.8 The practical effects of picketing, particularly in a situation where it is a truly effective weapon of labor, are too dramatic and immediate to await full adjudication by the Board and are not remedied by the usual cease and

4 Sec. 8(b). It shall be an unfair labor practice for a labor organization or its agents —(1) to restrain or coerce (A) employees in the exercise of the rights guaranteed in section 7: Provided, That this paragraph shall not impair the right of a labor organization to prescribe its own rules with respect to the acquisition or retention of membership therein.

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


8 NLRA § 10(j), added by 61 Stat. 149 (1947), 29 U.S.C. § 160(j) (1958) grants the Board authority to petition an appropriate United States district court for temporary relief after a formal complaint against an alleged unfair labor practice has been issued and before the Board has adjudicated the case. According to the Board’s Annual Reports (Table 18), only 11 such injunctions were sought in fiscal year 1962; 1, in fiscal year 1961; 5, in fiscal year 1960; 5, in fiscal year 1959; and 7, in fiscal year 1958. By contrast, mandatory § 10(j) injunctions were sought in 282 cases in fiscal year 1962; 255, in fiscal year 1961; 219, in fiscal year 1960; 129, in fiscal year 1959; and 127, in fiscal year 1958.
desist order issued a year or more after the picketing has ceased and the underlying labor dispute has been resolved.

THE STRUCTURE OF SECTION 8(b)(7)

In response to the accumulated experience of almost twenty-five years of comprehensive federal regulation of labor-management relations, Congress, by adding section 8(b)(7) to the NLRA, attempted to provide a fundamental basis for the regulation of recognition picketing.

Section 8(b)(7) declares it to be an unfair labor practice for a labor organization or its agents, in three specified circumstances,

to pick or cause to be picketed, or threaten to pick or cause to be picketed, any employer where an object thereof is forcing or requiring an employer to recognize or bargain with a labor organization as the representative of his employees, or forcing or requiring the employees of an employer to accept or select such labor organization as their collective bargaining representative, unless such labor organization is currently certified as the representative of such employees:

(A) where the employer has lawfully recognized in accordance with this Act any other labor organization and a question concerning representation may not appropriately be raised under section 9(c) of this Act.


10 In addition to the enactment of § 8(b)(7), Congress revealed the particular seriousness with which it views recognition picketing by its amendment of § 10(l) of the NLRA. Labor Management Reporting and Disclosure Act of 1959 (Landrum-Griffin Act) § 704(d), 73 Stat. 544, 29 U.S.C. § 160(l) (Supp. IV, 1963). Amended § 10(l) puts alleged violations of § 8(b)(7) into the class of cases which are to receive top priority for investigation by the Board's various regional offices. In addition, amended § 10(l) requires an appropriate agent of the Board to seek injunctive relief from a United States district court, pending final adjudication of the case by the Board, whenever, on the basis of his preliminary investigation, the agent has reasonable cause to believe that there has been a violation of § 8(b)(7).

11 "[A] question concerning representation may not appropriately be raised under section 9(c) of this Act" when a petition for an election is barred by the Board's own administrative "contract bar" or "certification bar" rules. In simplest terms—and there are many intricacies to the contract bar rules themselves—the contract bar rules provide that no petition for an election may be filed during the term of a valid collective bargaining agreement except during the period ninety to sixty days prior to the expiration date of the agreement; provided that, where an agreement has a term of more than three years, a petition may be filed by a person not a party to the contract during the period ninety to sixty days prior to the third anniversary of the contract and at any time after the contract is three years old. See General Cable Corp., 139 N.L.R.B. 1123 (1962); Montgomery Ward & Co., 137 N.L.R.B. 346 (1962); Leonard Wholesale Meats, Inc., 136 N.L.R.B. 1000 (1962), modifying, Deluxe Metal Furniture Co., 121 N.L.R.B. 995 (1958). The certification bar rule provides that, except in unusual circumstances, no election petition
(B) where within the preceding twelve months a valid election under section 9(c) of this Act has been conducted,\textsuperscript{12} or
(C) where such picketing has been conducted without a petition under section 9(c) being filed within a reasonable period of time not to exceed thirty days\textsuperscript{13} from the commencement of such picketing.\textsuperscript{14}

Thus, the thrust of section 8(b)(7) is that recognition picketing is not to be tolerated where (a) it is not possible to have an election to determine the employees' choice as to representation because of the Board's contract or certification bar rules\textsuperscript{15} (sub-section 8(b)(7)(A)) or the election bar rule\textsuperscript{16} (sub-section 8(b)(7)(B)), or (b) an election may be filed before the first anniversary of a union's certification by the Board as exclusive bargaining representative. See, e.g., Mar-Jac Poultry Co., 136 N.L.R.B. 785 (1962).

\textsuperscript{12} NLRA § 9(c)(3), added by 61 Stat. 144 (1947), 29 U.S.C. § 159(c)(3) (1958), provides: "No election shall be directed in any bargaining unit or any subdivision within which, in the preceding twelve-month period, a valid election shall have been held . . . ."

\textsuperscript{13} As a general rule, the Board has adopted thirty days as the "reasonable period" in which an election petition must be filed where there is recognition picketing which falls within § 8(b)(7)(C). However, the Board has found the reasonable period to be less than thirty days where there was evidence of violence on the picket line. See Cuneo v. United Shoe Workers, 181 F. Supp. 324 (D.N.J. 1960) (Q. T. Shoe Mfg. Co.); District 65, Retail Store Union, 141 N.L.R.B. No. 85 (1963) (Eastern Camera & Photo Corp.); Local 239, Intl'l Bhd. of Teamsters, 127 N.L.R.B. 958 (1960), enforced, 289 F.2d 41 (2d Cir.), cert. denied, 368 U.S. 833 (1961) (Stan-Jay Auto Parts & Accessories Corp.). The reasonable period of time in which picketing covered by § 8(b)(7)(C) must be tolerated without an election petition being filed, of course, depends on the facts of each case. Whether the Board will consider the industry involved as affecting the "reasonable period" under § 8(b)(7)(C) is conjectural at this point, although that factor would certainly appear to be highly relevant.

\textsuperscript{14} Section 8(b)(7)(C) goes on to provide that when such a petition has been filed the Board shall forthwith, without regard to the provisions of section 9(c)(1) or the absence of a showing of a substantial interest on the part of the labor organization, direct an election in such unit as the Board finds to be appropriate and shall certify the results thereof.

Pursuant to this proviso, the Board has adopted rules for the conduct of "expedited elections" in cases where there would be a violation of § 8(b)(7)(C) but for the filing of an election petition. 29 C.F.R. §§ 101.22-.25, 102.73-.82 (1963). These rules require that there be a § 8(b)(7)(C) charge on file before an election petition will be entitled to expedited handling. "Thus, in the absence of a § 8(b)(7)(C) unfair labor practice charge, a union will not be enabled to obtain an expedited election by the mere device of engaging in recognition or organization picketing and filing a representation petition." International Hod Carriers Union, 135 N.L.R.B. 1153, 1157 (1962) (C. A. Blinne Constr. Co.). Furthermore, the § 8(b)(7)(C) charge must be bona fide, and a union cannot secure an expedited election by filing a charge against itself or having someone "fronting" for it file a charge. Reed v. Roumell, 185 F. Supp. 4 (E. D. Mich. 1960); Claussen Baking Co., No. 11-RC-1329 (unreported in N.L.R.B. published volumes, 1960).

\textsuperscript{15} See note 11 supra.

\textsuperscript{16} See note 12 supra.
is possible, but no petition for an election is filed within a reasonable period (sub-section 8(b)(7)(C)). In effect, section 8(b)(7) is a congressional endorsement of representation elections as the proper means for deciding which, if any, labor organization should be the exclusive bargaining representative of a group of employees, and an expression of policy that matters involving the representation of employees should not be resolved by demonstrations of economic strength by unions.

Finally, appended to sub-section 8(b)(7)(C) is the so-called "informational picketing" proviso which states:

[n]othing 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.

**INTERPRETATION OF SECTION 8(b)(7) BY THE BOARD**

Questions were raised as to the meaning and application of section 8(b)(7) almost as soon as it became effective. Many of the anticipated defenses of unions charged with violations of section 8(b)(7) have been disposed of without controversy among the Board members.

Thus, the Board has held that, in using the words "forcing or requiring" in section 8(b)(7), Congress did not intend to limit the prohibitions of the section to violence. Rather, "forcing or requiring an employer to recognize" refers to the object of the picketing and not the means used, and peaceful picketing for a proscribed object is as unlawful under section 8(b)(7) as violence or mass picketing for such an object. The Board has rejected the notion that recognition picketing which violates sub-sections 8(b)(7)(A) or 8(b)(7)(B) may be defended on the grounds that the picketing is merely "informational," within the meaning of the informational picketing proviso to sub-section 8(b)(7)(C), and has held that that proviso applies only to cases falling within the

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17 See, e.g., Aaron, the Labor-Management Reporting and Disclosure Act of 1959, 73 Harv. L. Rev. 1086 (1960); Cox, The Landrum-Griffin Amendments to the National Labor Relations Act, 44 Minn. L. Rev. 257 (1960); Dunau, A Preliminary Look at Section 8(b)(7), 48 Georgetown L.J. 371 (1959); Ryan, Recognition, Organizational and Consumer Picketing, 48 Georgetown L.J. 359 (1959); Smith, the Labor-Management Reporting and Disclosure Act of 1959, 46 Va. L. Rev. 195 (1960); Note, 69 Yale L.J. 1393 (1960).

scope of sub-section 8(b)(7)(C).\textsuperscript{19} The Board has also made it clear that a union may not defend against a section 8(b)(7) charge solely on the ground that it represents a majority of the picketed employer's employees; the prohibitions of the section apply equally to majority and minority unions which are not certified.\textsuperscript{20}

Other issues before the Board involving the interpretation and application of section 8(b)(7) have generated considerable controversy.

THE INFORMATION PICKETING PROVISO TO SECTION 8(b)(7)(C)

One of the most vital of these controversies has involved the interpretation a Board majority (consisting of Chairman McCulloch and Members Fanning and Brown) has given to the informational picketing proviso to sub-section 8(b)(7)(C), an interpretation to which Member Leedom and former Member Rodgers dissented and which they have characterized as creating a situation where "to all intents and purposes Section 8(b)(7)(C) has been removed from the Act."\textsuperscript{21}

The Board Members have differed among themselves principally with respect to two aspects of the proviso. One poses the question: What picketing falls within the purview of the proviso as being "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"? The other poses the question: Assuming the picketing falls within the purview of the proviso, what "effect of such picketing" is necessary before the picketing loses the protection of the proviso?

The Board used \textit{Local Joint Executive Bd. of Hotel Employees (Crown Cafeteria)}\textsuperscript{22} as its principal vehicle to answer the first question.


\textsuperscript{20} See International Hod Carriers Union, 135 N.L.R.B. 1153, 1162 (1962) (C. A. Blinne Constr. Co.). While the Board makes no distinction between majority and minority unions, the section itself permits recognition picketing by a "labor organization . . . currently certified as the representative of such employees." See note 3 supra.

\textsuperscript{21} Retail Clerks Union, 138 N.L.R.B. 478, 498 (1962) (Barker Bros.) (dissenting opinion).

Both the majority and the minority agree that picketing with a recognition objective would not escape the sub-section 8(b) (7) (C) ban merely because the picket signs were couched in the language of the proviso, if the evidence proved that the picketing was really directed not at the general public but at employees qua employees or, for example, at truck drivers delivering merchandise to the employer in their status as truck drivers, such as would be the case if the pickets avoided customer entrances and concentrated at employee or delivery entrances.\textsuperscript{23} The disagreement goes to the situation where the picket signs used and the manner of picketing appear to conform to the proviso, but where there is independent evidence that, in engaging in such picketing, the union is actually pursuing a present objective of securing recognition.

The minority would hold that such picketing does not fall within the informational picketing proviso. Its theory is that the independent evidence, such as prior unsuccessful demands on the employer that it recognize the union, proves that the picketing does not really have "the purpose\textsuperscript{24} of merely advising the public that the employer has no contract with the union or does not employ union members, and actually is being used as an economic weapon to force and require the employer, at the risk of a loss of business, to recognize the union.

The majority, on the other hand, holds that such picketing is protected by the proviso. Its theory is that Congress intended the proviso to permit the use of picketing as an economic weapon to force recognition of a union, except in the special situations governed by sub-sections 8(b)(7)(A) and 8(b)(7)(B), so long as the union conforms its picket signs to the proviso language and restricts its economic pressure to that resulting from a loss of customers.\textsuperscript{25}

Neither the position of the majority nor that of the minority does substantial violence to the bare language of the statute. The difference re-
solves itself into an interpretation of the purpose of the proviso—whether, as the majority implies, the proviso was intended by Congress as a broad exception to the ban on recognition picketing to permit the resolution of questions concerning the representation of employees by the application of economic pressure on an employer, so long as the pressure is directed at the employer through a loss of customers; or whether, as is implicit in the minority position, the proviso was intended as a narrow exception to the ban on recognition picketing to insure that the new regulatory scheme does not go so far as to interfere with "pure informational picketing" that is divorced from or only ultimately connected with an objective against public policy and thereby risk violating the free speech guarantee of the first amendment.\textsuperscript{26}

To some extent, the congressional purpose behind the proviso is indicated by its "effect" clause. The proviso goes on to state that information picketing for a recognition object loses the protection of the proviso if "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." Despite the fact that the statutory language is very restrictive and uses the words "any individual" and "any services," the aforesaid Board majority has seen fit to establish a rule whereby informational recognition picketing will not be deemed to have a proscribed effect unless "the picketing has disrupted, interfered with, or curtailed the employer's business.\textsuperscript{27}


\textsuperscript{27} Retail Clerks Union, 138 N.L.R.B. 478, 491 (1962) (Barker Bros.); accord, Retail Clerks Ass'n, 138 N.L.R.B. 498 (1962) (Hested Stores Co.). See also Retail Store Employees' Ass'n, 141 N.L.R.B. No. 40 (1963) (Martino's Complete Home Furnishings); Retail Clerks Union, 140 N.L.R.B. 1344 (1963) (Jay Jacobs Downtown, Inc.). The Board has found the required "effect" to have occurred in Local 16, American Fed'n of Grain Millers, 141 N.L.R.B. No. 71 (1963) (Bartlett & Co.); San Diego County Waiters Union, 138 N.L.R.B. 470 (1962) (Joe Hunt); and Local 429, Int'l Bhd. of Elec. Workers, 138 N.L.R.B. 460 (1962) (Sam Melson). In an early decision, Local 239, Int'l Bhd. of Teamsters, 127 N.L.R.B. 958 (1960), enforced, 289 F.2d 41 (2d Cir.), cert. denied, 368 U.S. 833 (1961) (Stan-Jay Auto Parts & Accessories Corp.), the Board held that the fact that a picketing union may not have intended to produce the proscribed effect by its picketing was not determinative if, in fact, the proscribed effect actually resulted from the picketing. The efficacy of that decision is clouded somewhat today by the Board's citation, in \textit{Barker Bros.}, supra at 483, of the union's efforts to prevent interruptions to service, in support of its decision therein. For another instance in which the Board majority has added to the lan-
The Board’s reasoning in establishing that rule is perfectly consistent with its interpretation of the basic purpose of the proviso. The Board majority argues that, since, in its view, the informational picketing proviso was intended by Congress as a license for the use of picketing as an economic weapon to force recognition of a union so long as the union conforms its picket signs to the proviso language and restricts the application of the economic pressure to getting at the employer through its customers, it would have been inconsistent, even nonsensical, for Congress to provide that that important right of unions could be lost merely because a single individual was induced by the picket line not to make a delivery. Therefore, according to the Board, some more substantial effect is required than that indicated by the literal language of the statute.

The problem with the majority’s analysis is that it proves too much. The language of the “effect” clause, as written by Congress, is very restrictive. And while that restrictiveness is inconsistent with the broad purpose of the proviso as conceived by the majority, it is consistent with the purpose of the proviso as implicitly conceived by Member Leedom and former Member Rodgers. Thus, if the proviso is intended as a narrow exception to the ban on recognition picketing to accommodate that picketing which resembles most closely the pure dissemination of information, then it would be perfectly reasonable for Congress to add that, when even the purest informational picketing induces even a single proscribed effect, it becomes something more than mere “free speech” and no longer is entitled to the protection of the proviso. Indeed, the obvious incompatibility of the “effect” clause, as written by Congress, with the majority’s interpretation of the proviso suggests that the Board might, more appropriately, have conformed its interpretation of the proviso to the language of the “effect” clause, rather than conforming the “effect” clause to its interpretation of the proviso.

THE PROBLEM OF THE RECOGNITION “OBJECT”

The use of the informational picketing proviso as a means of permitting recognition picketing is, of course, limited to the sub-section 8(b)-(7)(C) situation. The other issue which has generated considerable

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guage of § 8(b)-(7)(C) in order to make the sub-section more “reasonable,” see International Hod Carriers Union, 135 N.L.R.B. 1153, 1166 n.24 (1962) (C. A. Blinne Constr. Co.) (meritorious charge of an unlawful refusal to bargain with union will be sufficient, in lieu of election petition, to justify recognition picketing in excess of thirty days under § 8(b)-(7)(C)).

28 See note 19 supra and accompanying text.
controversy concerns the threshold question in every section 8(b)(7) case—whether or not "an object" of the picketing complained of is recognition, bargaining or organization. In this connection, it is important to note that the picketing prohibited by section 8(b)(7) need have only as an object recognition, bargaining or organization. It is not necessary that recognition, bargaining or organization be the only object of the picketing, or even be the principal object. Section 8(b)(7) is relevant so long as an object of the picketing is recognition, bargaining or organization.29

By finding no proscribed object, the Board has permitted picketing in several instances seemingly covered by section 8(b)(7). For example, in Local 259, Int'l Union, UAW (Fanelli Ford Sales, Inc.)30 the Board established a rule that picketing by a union to force or require an employer to reinstate employees does not have an object proscribed by section 8(b)(7). The Board's theory was that such picketing does not have recognition or bargaining as an object because an employer may accede to the union's reinstatement demands "without recognizing or, indeed, exchanging a word with the [union]."31 Similarly, in International Hod Carriers Union (Calumet Contractors Ass'n),32 the Board, on the basis of a theory substantially the same as that in Fanelli established a rule that picketing by a union to force or require an employer to adopt so-called "area standards" of wages, hours and working conditions in its business does not have an object proscribed by section 8(b)(7).

The Board's theory does not take into account the fact that, in picketing, the union is actually making demands on the employer concerning the wages, hours, working conditions and status of its employees. The employer, of course, must consider the economic effects which the union's picketing has had or may have on its business and either agree to, not agree to or seek a modification of the demands. In any event, the union is either forcing the employer to bargain about its demands or is presenting its demands on a "take-it-or-leave-it" basis, which, after all, is a venerable bargaining technique of some unions, albeit "boulwareism" in reverse.

Moreover, in holding that picketing for the reinstatement of employees

31 Id. at 1469.
32 133 N.L.R.B. 512, reconsidering and reversing, 130 N.L.R.B. 78 (1961). The case arose under § 8(b)(4)(C), but the "area standards" rule was made applicable to § 8(b)(7) in Houston Bldg. Trades Council, 136 N.L.R.B. 321 (1962) (Claude Everett Constr. Co.).
does not have an object proscribed by section 8(b)(7), the Board had to expressly overrule a 1956 Board decision which held that such picketing does have a recognition and bargaining object. That 1956 rule was, of course, in effect when Congress was enacting section 8(b)(7) to curb picketing for recognition or bargaining objects and, it may be assumed, Congress was satisfied that its section 8(b)(7) ban would encompass picketing for reinstatement of employees.

In addition, the Board has sometimes been less than completely realistic in its failure to find on the facts of a given case that the picketing involved had a recognition objective. For example, in Teamsters "General" Local 200 (Bachman Furniture Co.) a Board majority found no recognition object in picketing which commenced only two weeks after the results of a representation election, in which the union had been defeated, became final. The union claimed its picket line had the objective of protesting the employer’s unfair labor practices. Yet, the union did not picket when the unfair labor practices were alleged to have been committed. Indeed, the union executed a settlement agreement disposing of the unfair labor practices before the picketing started. Instead, it began picketing shortly after its quest for recognition by the Board's election machinery had come to a formal and unsuccessful conclusion. Nevertheless, the Board was unable to conclude that, having failed to achieve recognition in a valid election, the union was embarking immediately on a program of achieving the same objective by exerting economic pressure on the employer. Similarly, in Alton-Wood River Bldg. Trades Council (Jerseyville Retail Merchants Ass'n), the Board could find no recognition objective in a picketing situation in which, inter alia, the organizer of the picketing urged the public to tell the employers who were the objects of the picketing that they would not be patronized until they dealt with the respective AFL-CIO or Teamster affiliates, instead of an independent union.

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33 Meat & Provision Drivers Union, 115 N.L.R.B. 890 (1956) (Lewis Food Co.).
34 Where it served its purposes, the Board has not hesitated to find congressional approval of a practice pre-dating the enactment of the 1959 amendments. See, e.g., International Hod Carriers Union, 135 N.L.R.B. 1153, 1166 n.24 (1962) (C. A. Blinne Constr. Co.).
36 144 N.L.R.B. No. 59 (1963).
37 See also Waiters Local 500, 140 N.L.R.B. 433 (1963) (Mission Valley Inn); Local 107, Int'l Hod Carriers Union, 138 N.L.R.B. 102 (1962) (Texarkana Constr. Co.); Local 741, United Ass'n of Journeymen & Apprentices of the Plumbing Indus., 137 N.L.R.B. 1125 (1962) (Keith Riggs Plumbing & Heating Contractor); Local 344, Retail Clerks Ass'n, 136 N.L.R.B. 1270 (1962) (Alton Myers Bros.). Compare Warehouse Employees, 140 N.L.R.B.
CONCLUSION

No attempt has been made herein to review all of the section 8(b)(7) cases that have been before the Board or to discuss all the section 8(b)(7) issues the Board has had to resolve or will have to resolve. Rather, the emphasis has been on the most significant areas in which the current interpretation and application of section 8(b)(7) has resulted in a considerably less effective safeguard against recognition picketing than many persons interested in labor relations had anticipated with the enactment of the 1959 amendments to the Taft-Hartley Act.\textsuperscript{38}

Obviously, some of the criticism which has been directed at the Board since mid-1961 has been more extreme than has been deserved. Nevertheless, the over-all trend of the cases in the section 8(b)(7) area does suggest that the Board has been less than vigorous in applying the section in a manner which would give full effect to the salutary results which Congress sought to achieve by its enactment.


\textsuperscript{38} See, e.g., 52 L.R.R.M. 74 (1963) (comments of Representative Robert P. Griffin).
SOME CONTEMPORARY OBSERVATIONS ON
SECTION 301

MOZART G. RATNER*

THE IMPACT OF SECTION 301 UPON INDIVIDUAL CONTRACT RIGHTS

1. THE MISCONCEPTION THAT SECTION 301 CURTAILS THE AUTHORITY OF THE BARGAINING AGENT IN FAVOR OF THE INDIVIDUAL

The emphasis upon arbitration as a solvent for disputes over contract interpretation and application in Textile Workers Union v. Lincoln Mills2 and the extension of the federal substantive law of collective bargaining contracts to individual rights in Smith v. Evening News Ass'n3 have become, in the hands of certain self-professed champions of the individual against the collective bargaining agent,4 a device for standing national labor policy on its head. If individual rights are enforceable against the employer, so the argument runs, such rights must be (a) immune to curtailment by the exclusive bargaining agent during the life of the contract without the individual's consent and (b) enforceable regardless of the wishes of the bargaining agent.5 Indeed, wherever, as in the area of seniority, the interest of some individual conflicts with others, or with an institutional interest of the bargaining agent, the agent is disqualified under historic "conflict of interest" rules to represent the individual at all. If this is true, the exclusive bargaining agent and the employer are, of course, not entitled to dispose by agreement the individual's claim. Unless the individual also agrees, he must be entitled to process his claim of infringement either through an impartial arbitration or through a court.

What is astonishing about this reasoning is its obliviousness to the central premise of statutory collective bargaining. The premise, of course, is that effective protection of employees against the employer requires

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2 353 U.S. 448 (1957).
5 Compare id. at 1494: "The prediction [sic] that individual rights are incompatible with collective bargaining is no more than a cloak for predilection."
subordination of individual interests to the collective interest as represented by the exclusive bargaining agent democratically selected by majority rule. To whatever extent individual interest prevails over collective interest, inequality of bargaining power between employer and employee necessarily survives.

Well before 1947 adjudication had recognized that if inequality of bargaining power is effectively to be diminished, collective interest must prevail over individual interest in the administration and application, as well as in the negotiation, of collective bargaining agreements.\(^7\) Were it otherwise, "statutes requiring collective bargaining would have little substance, for what was made collectively could be promptly unmade individually."\(^7\)

If the collective interest is to prevail, the authority of the bargaining agent must cover not only interpretation and enforcement of collective agreements, but also their alteration. For industrial conditions are not static, and what may satisfy the collective interest today may fall short tomorrow. Therefore, "the collective bargaining power is not exhausted by being once exercised; it covers changing the terms of an existing agreement as well as making one in the first place."\(^8\)

Exaltation of the interest of individuals in the benefits of a collective bargaining agreement as written, at the expense of the collective interest in making changes, would destroy the character of collective bargaining itself. "It is of the essence of collective bargaining that it is a continuous process. Neither the conditions to which it addresses itself nor the benefits to be secured by it remain static."\(^7\) "Collective bargaining is a continuing process. Among other things, it involves day to day adjustments in the contract . . . [and] resolution of new problems not covered by existing agreements . . . ."\(^10\) If the collective interest is to prevail, individual interest can no more defeat the power of the exclusive representative to make changes than individual contracts can defeat

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the power of the collective representative to negotiate a binding agreement superseding all individual arrangements in the first place.\textsuperscript{11}

To treat individual rights established by an agreement as immutable during its life is not only to disregard the character of collective bargaining as a "continuous process" but to elevate individual and group interests above the collective interest which by law the union is charged with protecting.\textsuperscript{12} This, the act forbids. The statutory authority of the exclusive agent completely occupies the field of bargaining over tenure and terms of employment. "The majority union is . . . vested by statute with exclusive authority to speak for and bind the individual, and his freedom of choice is limited to participating in the majority election which determines which is the union."\textsuperscript{13} Once an exclusive representative has been chosen by the unit, "all powers which the employees theretofore had to contract with their employer either individually, in groups, or through some agent of their choice [become] automatically vested exclusively in the statutory bargaining representative."\textsuperscript{14}

Individuals or groups cannot by contract limit the exclusive agent's authority or defeat it by making agreements of their own.\textsuperscript{15} Individual or group agreements must be superseded by the collective agreement because contracts made on behalf of individuals and groups do not serve the collective interest.\textsuperscript{16} For the same reason, if rights and immunities established by a collective agreement cease to serve that interest, their preservation in the interest of individuals or groups would be incompatible with the goal of the statute.

The notion that a collective bargaining agreement creates rights vested against the bargaining agent for its term is completely incompatible with the fundamental concept of the function of the written contract in the collective bargaining process. Seldom, if ever, has it been better stated than by the late Judge Parker in \textit{NLRB v. Highland Park Mfg. Co.}:\textsuperscript{17}

\textsuperscript{11} J. I. Case Co. v. NLRB, 321 U.S. 332 (1944).
\textsuperscript{12} Union News Co. v. Hildreth, 295 F.2d 658 (6th Cir. 1961).
\textsuperscript{15} J. I. Case Co. v. NLRB, 321 U.S. 332 (1944); see NLRB v. Crompton-Mills, Inc., 337 U.S. 217 (1949); May Dep't Stores Co. v. NLRB, 326 U.S. 376 (1945).
\textsuperscript{17} 110 F.2d 632 (4th Cir. 1940).
The purpose of the written trade agreement is, not primarily to reduce to writing settlements of past differences, but to provide . . . for the orderly government of the employer-employee relationship in the future. The trade agreement thus becomes, as it were, the industrial constitution of the enterprise, setting forth the broad general principles upon which the relationship of employer and employee is to be conducted. . . . [I]t provides a framework within which the process of collective bargaining may be carried on . . . [I]t permits] reason and not force . . . to have sway in industrial relationships . . . . [Collective agreements] not only provide standards by which industrial disputes may be adjusted, but they add dignity to the position of labor and remove the feeling on the part of the worker that he is a mere pawn in industry subject to the arbitrary power of the employer.18

Unfettered power in the exclusive representative to appraise the collective interest is the sine qua non of its vindication. "Unless those upon whom is placed the responsibility for protecting collective interests are given the authority needed to discharge such responsibility, the entire process is of doubtful worth."219

"The most important purpose of the Wagner Act was to create aggregations of economic power on the side of employees countervailing the existing power of corporations to establish labor standards.220 That purpose can be achieved only by subordinating individual and group interests to the collective interest, and entrusting effectuation of that interest to the democratically chosen exclusive representative. Therefore, "Congress has seen fit to clothe the bargaining representative with powers comparable to those possessed by a legislative body both to create and restrict the rights of those whom it represents."221

Moreover, the notion that conflicts of interest among constituents or between some individuals and the collective interest disqualifies the bargaining agent is wholly incompatible with the concept of statutory exclusive representation under majority rule. The very idea of binding anyone to compulsory representation by an agent he does not want is anathema to common law dogma, based as it is on freedom of choice. The only common law departure from the concept of full freedom of representation is in the true class suit, and the sine qua non is absolute identity of interest among all members of the class in the subject matter of the action.22

18 Id. at 638.
19 Union News Co. v. Hildreth, 295 F.2d 658, 667 (6th Cir. 1961); see Black-Clawson Co. v. International Ass'n of Machinists, 313 F.2d 179 (2d Cir. 1962).
When Congress decided to combat inequality of bargaining power, however, it was compelled to repudiate common law agency concepts—to subordinate individual and group interests within the bargaining unit to the common interest of the entire class. In *J. I. Case Co. v. NLRB*\(^{23}\) the Supreme Court said: "The very purpose of providing by statute for the collective agreement is to supersede the terms of separate agreements of employees with terms which reflect the strength and bargaining power and serve the welfare of the group."\(^{24}\) To the argument that "some employees may lose by the collective agreement" the Court replied:

The practice and philosophy of collective bargaining looks with suspicion on such individual advantages. . . . [A]dvantages to individuals may prove as disruptive of industrial peace as disadvantages. [I]ncreased compensation [achieved through individual bargaining] is . . . often earned at the cost of breaking down some other standard thought to be for the welfare of the group, and always creates the suspicion of being paid at the long range expense of the group as a whole. . . . The workman is free, if he values his own bargaining position more than that of the group, to vote against representation; but the majority rules, and if it collectivizes the employment bargain, individual advantages or favors will generally in practice go in as a contribution to the collective result.\(^{25}\)

Therefore, "in placing a non-consisting minority under the bargaining responsibilities of an agent selected by a majority of the workers, Congress has discarded common law doctrines of agency."\(^{26}\) "The question whether the collective agent has authority . . . does not turn on technical agency rules such as apply in the simple, individualistic situation where P deals with T through A about the sale of Blackacre."\(^{27}\)

In place of inapposite agency concepts, Congress substituted the political analogy, which vests power to bind the entire constituency in the legislator, administrator or judge elected by a majority. The very essence of the statutory function of the bargaining agent is to mediate and balance the conflicting interests of individuals and groups in the appropriate unit, to promote the welfare of all. As Solicitor General, then Professor, Cox stated:

When the interests of several groups conflict, or future needs run contrary to present desires, or when the individual's claim endangers group interests, the

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\(^{23}\) 321 U.S. 332 (1944).

\(^{24}\) Id. at 338.

\(^{25}\) Id. at 338-39.


union's function is to resolve the competition by reaching an accommodation or striking a balance.\(^{28}\)

As the Supreme Court pointed out in *Case, Ford Motor Co. v. Huffman*,\(^ {29}\) and *Aeronautical Industrial Dist. Lodge v. Campbell*,\(^ {30}\) to “create” rights for some employees is ipso facto to “restrict” the rights of others. This is the very substance of collective bargaining. As Judge, formerly Professor, Hays stated: “There are countless situations in which the very concept of collective action demands that unions have the power to influence the employer to make changes in the job status of individual employees.”\(^ {31}\)

Even enhancement of an institutional interest of the bargaining agent at the expense of individual constituents is often necessary to effectuate the collective interest. Superseniority for union stewards is justified because “they are in a special relation to collective bargaining for the benefit of the whole union. To [favor] them as such is . . . but a due regard of union interests . . .”\(^ {32}\)

The short of the matter is that to deny the exclusive representative authority to restrict or constrict “individual contract rights” is ipso facto to destroy collective bargaining, for the essence of collective bargaining is nothing more nor less than compulsory substitution of collective for individual representation.

There is thus no logical predicate for the view that because section 301 encompasses enforcement of individual rights against the employer, it guarantees those rights against change or destruction by the bargaining agent. Section 301 comprehends individual duties as well as individual rights. But the enforceability of individual duties does not mean that a stockholder can block waiver by the corporate employer of his rights or that the employer may enforce the duty by a suit for damages against individuals.\(^ {33}\) Similarly, it does not follow from the fact that section 301 creates a right to enforce individual claims against the employer, that the claims run against the bargaining agent. *Smith* holds only that section 301 does not exclude “all suits to vindicate individual employee rights arising from a collective bargaining

\(^{28}\) Cox, Rights Under a Labor Agreement, 69 Harv. L. Rev. 601, 626 (1956).

\(^{29}\) 345 U.S. 330 (1953).

\(^{30}\) 337 U.S. 521 (1949).

\(^{31}\) NLRB v. Local 294, Int'l Bhd. of Teamsters, 317 F.2d 746, 751 (2d Cir. 1963).


contract . . . ." More should be necessary to state a claim under section 301 than assertion that what is being vindicated is an individual right created by a collective bargaining contract.

2. THE MISCONCEIVED SUBSTANTIVE-PROCEDURAL CONTROVERSY

Insofar as the misconception that 301 creates an ascendancy for individual over group rights reflects more than sheer prejudice in favor of individuals as against unions, it seems traceable to the unfortunate posture in which section 301 was first presented to the Supreme Court. At the time of Association of Westinghouse Salaried Employees v. Westinghouse Elec. Corp. at least three Justices thought that section 301 presented a substantial constitutional question under article III. Their doubts were predicated upon reading the section as providing a federal forum for the vindication of contract rights created by and arising under state law, without regard to diversity. They conceded, of course, that if individual rights created by such contracts were governed by substantive federal law, no constitutional question would be presented. In their view, the question was whether section 301 evidenced a congressional intention to have the federal courts fashion a federal substantive law of collective bargaining contracts.

The dissenters in Westinghouse, and the Justices who joined them in Lincoln Mills and subsequent cases seem to have accepted this formulation of the issue. They found in section 301 an intent to have the federal courts fashion substantive contract law out of the policy of our federal labor laws. They pointed out that Congress avowedly grounded section 301 on the desirability of encouraging the making and voluntary performance of contract commitments.

The Labor Management Relations Act of 1947 represented a far-reaching and many faceted legislative effort to promote the achievement of industrial peace through encouragement and refinement of the collective bargaining process. It was recognized from the outset that such an effort would be purposeless unless both parties to a collective bargaining agreement could have reasonable assurance that the contract they had negotiated would be honored. Section 301(a) reflects congressional recognition of the vital importance of assuring the enforceability of such agreements.

34 371 U.S. at 200 (1962). (Emphasis added.)
35 See Blumrosen, supra note 4, at 1445-50.
37 Id. at 442. Two Justices thought that the claims characterized in Westinghouse as "uniquely personal" did not arise under the collective bargaining contract at all, but under separate individual contracts of employment.
38 Charles Dowd Box Co. v. Courtney, 368 U.S. 502, 509 (1962). See also Drake
So viewed, section 301 is an adjunct of Congress' policy of promoting collective bargaining affecting interstate commerce, not an essay in federal enforcement of state-law contracts. In this respect, section 301 resembles, and its article III status is the same, as Section 501 of the Labor Management Reporting and Disclosure Act of 1959.\textsuperscript{39} Section 501 declares that union officers are fiduciaries and authorizes members to sue officers in the federal courts for breach of fiduciary duty. By common law in most states, and by statute in others, union officers, of course, were already fiduciaries under state law and subject to suit as such in state courts. But state law on the point was amorphous and varied.\textsuperscript{40} Like section 301, section 501 set out no substantive principles for the federal courts to follow, or on which to build. Nevertheless, there was no doubt that Congress thought it was doing more than eliminating the diversity requirement in breach of fiduciary duty cases, a course which would have brought article III into play. By declaring union officers fiduciaries, the section imposed upon them a new \textit{federal} duty, and thereby gave union members a new \textit{substantive} right.\textsuperscript{41}

To the assertion of the three Justices in \textit{Westinghouse}, that section 301 must be only procedural because Congress could not have intended to leave the federal courts entirely at large to fashion a new

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Bakeries, Inc. v. Local 50, American Bakery \& Confectionery Workers, 370 U.S. 254 (1962), where the Court stated: "In passing \S\ 301, Congress was interested in the enforcement of collective bargaining contracts since it would promote a higher degree of responsibility upon the parties to such agreements, and will thereby promote industrial peace . . . ." Id. at 263.
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\textsuperscript{41} Because it was substantive, the new right was prospective not retroactive. Highway Truck Drivers v. Cohen, 182 F. Supp. 608, 612 (E.D. Pa.), aff'd, 284 F.2d 162 (3d Cir. 1960), cert. denied, 365 U.S. 833 (1961). Nor did it detract from the substantive character of section 501 that Congress declared that its enactment should not supersede any duties of union officers as fiduciaries under state law. Section 603(a) of the Labor-Management Reporting and Disclosure Act of 1959, 73 Stat. 540, 29 U.S.C. \S\ 523(a) (Supp. IV, 1963), provides as follows:

Except as explicitly provided to the contrary, nothing in this chapter shall reduce or limit the responsibilities of any labor organization or any officer, agent, shop steward, or other representative of a labor organization, or of any trust in which a labor organization is interested, under any other Federal law or under the laws of any State, and, except as explicitly provided to the contrary, nothing in this chapter shall take away any right or bar any remedy to which members of a labor organization are entitled under such other Federal law or law of any State.
body of substantive collective bargaining contract law, the majority in *Lincoln Mills* replied that Congress did not leave the federal courts entirely at large:

The Labor Management Relations Act expressly furnishes some substantive law. It points out what the parties may or may not do in certain situations. Other problems will lie in the penumbra of express statutory mandates. Some will lack express statutory sanction but will be solved by looking at the policy of the legislation and fashioning a remedy that will effectuate that policy. The range of judicial inventiveness will be determined by the nature of the problem. 42

In retrospect, a better answer appears to have been available, an answer perhaps lurking even in Mr. Justice Frankfurter's opinion in *Westinghouse*:

[F]ederal law is, in certain respects, in the background of any action on a collective bargaining agreement affecting commerce: § 301 vests rights and liabilities, which under state law are distributed among the union members, in a legal "entity" recognized by federal law for purposes of actions on collective bargaining agreements in the federal courts . . . . 43

Federal labor law does much more than "furnish some substantive law"; federal law is not merely "in the background" of a collective bargaining contract affecting interstate commerce. Such a contract has "the imprimatur of the federal law upon it . . . ." 44 It is "the product of the exercise of federally sanctioned collective bargaining rights." 45 What makes a collective agreement under the Railway Labor Act and under the National Labor Relations Act a "product" of federal law are the statutory provisions for exclusive representation by the agent selected by a majority 46 and compulsory collective bargaining which produces the agreement. 47 By April 1963, the Court had observed that a contract made pursuant to the Railway Labor Act, like a section 301 contract, "is a federal contract." 48

Rights having their genesis in federal contracts are "so dominated by the sweep of federal statutes that" they "must be deemed governed by fed-

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42 353 U.S. at 457.
43 348 U.S. at 451.
44 Railway Employees Dep't v. Hanson, 351 U.S. 225, 232 (1956).
eral law having its source in those statutes, rather than by local law.\textsuperscript{49} Since collective bargaining agreements are "federal contracts" they are perforce "governed and enforceable by federal law, in the federal courts."\textsuperscript{50}

In this focus there was never room for argument that section 301 was "procedural" in the sense that it merely opened an avenue for enforcement in the federal courts of contract rights created by state law. All section 301 did was express the consequence of the contract—producing provisions of the national act. Section 301 was necessary only because those consequences had neither been envisioned nor explored in the normally "elucidating process" of labor law litigation. Section 301 was neither substantive nor procedural; it was declaration, not innovation.

In hindsight, the materials for concluding that collective agreements are governed by federal, not state, law and are therefore clearly within federal question jurisdiction, were on hand well before enactment of section 301. It was settled, for example, that states could not treat individual interests as superior to interests represented by the exclusive representative, or individual contracts as superior to collective agreements.\textsuperscript{51} States could not relieve employers of the duty to bargain collectively.\textsuperscript{52}

It was generally understood that Congress had intended the collective bargaining contracts it encouraged the parties to make to be legally binding and judicially enforceable.\textsuperscript{53} Sympathetic appraisal of the statutory scheme could hardly have avoided the conclusion that "protection of employee rights already secured by contract" in judicial proceedings was within the power and responsibility of the exclusive representative.\textsuperscript{54} As Mr. Justice Frankfurter stated in \textit{Westinghouse}:

As a practical matter, the employees expect their union not just to secure a collective agreement but more particularly to procure for the individual employees the benefits promised. If the union can secure only the promise and is impotent to procure for the individual employees the promised benefits, then it is bound to lose their support.

\textsuperscript{52} Hill v. Florida, 325 U.S. 538 (1945); Eppinger & Russell Co., 56 N.L.R.B. 1259 (1944).
\textsuperscript{53} Hughes Tool Co., 56 N.L.R.B. 981 (1944), enforced, 147 F.2d 69 (5th Cir. 1945);
\textsuperscript{54} Carroll's Transfer Co., 56 N.L.R.B. 935 (1944).
\textsuperscript{54} Conley v. Gibson, 355 U.S. 41, 46 (1957).
... There is in fact a strong group interest in procuring for the employee the benefit promised as well as the promise in the collective agreement.  

If the purpose of the NLRA was to enable the exclusive representative to protect the group interest in obtaining benefits from the employer, "it would be self defeating to limit the scope of the power of [the bargaining agent] to less than is necessary to accomplish this congressional aim."  

Our purpose, however, is not to re-examine the premises of the substantive-procedural debates as such; it is to demonstrate that the substantive law on which section 301 is grounded is the supersedure of the individual's interest in terms and conditions of employment by the right of the exclusive bargaining agent to act in the collective interest. If that is the substantive law of section 301, there is no room for resort to common law third party beneficiary analogies to determine the extent to which federal substantive law recognizes individual interests in collective agreements.

3. MISCONCEPTION OF THE FUNCTION OF IMPARTIAL ARBITRATION OR ADJUDICATION

The inference from section 301 decisions that individuals have a right running against the bargaining agent and the employer to impartial arbitration or judicial decision of their claims of contract violation is independently erroneous. It assumes that there is relevance to the allocation of authority between individual and collective bargaining agent in Congress' policy of promoting arbitration as the means of settling disputes over contract interpretation and application. But the only disputes to which that policy relates are those between the contracting parties; disputes between members of the unit and the bargaining agent are obviously not included. Indeed, that policy becomes relevant in the 301 context only to demonstrate that section 301 should not be deemed to embrace the common law's antipathy to arbitration. The explanation properly is that in labor relations, arbitration is a substitute not only for litigation but for strikes, and that Congress' preference for peaceful

55 348 U.S. at 457, 458.
solutions makes the common law policy an irrelevancy. If the employer’s agreement to arbitrate is the *quid pro quo* for the union’s agreement not to strike, obviously the one must be as enforceable as the other. This rationale, plainly, has nothing whatever to do with disputes over contract interpretation or enforcement between an individual and his statutory agent. Disaffected individuals rarely, if ever, strike against their bargaining agent.

Congress’ preference for resolution of contract disputes by impartial adjudication to resolution by strike action does not even remotely imply that it preferred a decision by outsiders to resolution of disputes over interpretation by the contracting parties themselves. Congress favored voluntary arbitration as a supplement to, not a substitute for, collective bargaining. It was intent upon strengthening, not weakening, the hands of the contracting parties to settle contract disputes. It left the means and manner of reaching agreement to the contracting parties. Thus, federal policy excludes the courts from disputes which the parties have even arguably agreed to submit to final and binding arbitration. If courts cannot substitute for arbitrators when the contracting parties do not agree, a fortiori, neither arbitrators nor courts can substitute for the contracting parties when they *do* agree. What Congress’ policy seeks to promote is settlement of contract disputes within the contracting parties’ own “system of industrial self government.”

To sum up, collective bargaining is a continuous process which entails supersedure of the individual by a collective representative. Congress enacted section 301 to enhance that process by guaranteeing enforcement against defaulters of the commitments the bargaining process produces. To treat that section as empowering individuals or groups within the unit to defeat the authority of the contracting representative to make, interpret, perform or change an agreement is to say that Congress destroyed collective bargaining under the guise of strengthening it. Such duplicitousness is not to be attributed to Congress. Accordingly, as the Sixth Circuit stated in *Hildreth v. Union News Co.*, exercise of authority by the bargaining agent “to agree with the employer” about the meaning or application of a contract in relation to individual rights cannot “be treated as a breach of the collective bargaining agreement.”

If disposition of an individual claim by agreement of the exclusive

59 315 F.2d 548 (6th Cir. 1963).
60 Id. at 551.
representative with the employer is not a breach of the collective agreement, a suit predicated upon such disposition cannot be within section 301, for that section comprehends only breach of collective agreements.61

**Allocation of Authority as Between Individual and the Exclusive Representative**

1. **The Statutory Distinction Between Collective Bargaining and Grievances**

While section 301 itself has nothing to say about division of authority between the exclusive representative and its constituents, it does inevitably focus attention on those provisions of the act which do. To hold, as *Smith* does, that an employee may *sometimes* sue is to invite inquiry as to when he may not sue, and when, if at all, disagreement between the individual and the representative is controlling.

We may start, once again, with Mr. Justice Frankfurter's opinion in *Westinghouse*:

To hold that the union may sue, it is not necessary to hold that the employee may not sue in any forum, and vice versa. At least when the union and the employee are in agreement, there is no reason why either or both should not be permitted to sue. Such is the situation under § 9(a) of the National Labor Relations Act with respect to the adjustment of grievances without suit. When the employee and the union are in disagreement, the question is not which may sue, but rather the extent to which the one may conclude the other.62

On analysis, section 9(a) is more than analogy. It answers the question directly. Initially, section 9(a) provided that the representative designated by the majority "shall be the exclusive representative of all employees . . . for the purposes of collective bargaining," but that individuals should have the right "to present grievances to their employer."63 Thus, section 9(a) distinguished between collective bargaining and grievance adjustment. These areas were necessarily mutually exclusive, for in one the individual was allowed a voice; in the other he was not. The duty to recognize the exclusive agent imports the "negative duty to treat with no other."64 The problem was to define the line of separation. Demarcation was complicated by the fact that

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62 348 U.S. at 459.
64 Medo Photo Supply Corp. v. NLRB, 321 U.S. 678, 684 (1944), citing NLRB v. Jones & Laughlin Steel Corp., 301 U.S. 1, 44 (1937).
“grievance,” even in collective bargaining parlance, is not a term of art. It is used in a wide variety of senses and contexts to include complaints, major and minor, which may or may not arise out of or have anything to do with interpretation or application of a contract. Accordingly, interpretation had to begin with a definition of collective bargaining, the other side of the equation. Once the scope of collective bargaining was established, “grievances” would be what was left.

That is what the Fifth Circuit did in Hughes Tool Co. v. NLRB.65

The opinion is worth quoting at length:

Taking the quoted provisions [sections 2(4), 2(5) and 9(a)] together, it is plain that collective bargaining in respect to rates of pay, wages, hours of employment and other conditions of employment for everyone in the unit, is distinguished from “grievances,” which are usually the claims of individuals or small groups that their rights under the collective bargain have not been respected. These claims may involve no question of the meaning and scope of the bargain, but only some question of fact or conduct peculiar to the employee, not affecting the unit. They may, however, raise a question of the meaning of the contract, or present a situation not covered by the contract touching which an agreement ought to be made. In the latter cases it is plain that the representative ought to participate, for bargaining, rather than the mere decision of a case according to the contract, is involved. Attention to grievances is therefore mentioned in Section 2(5) as part of the business of the representative, but Section 9(a) does not give him the exclusive right to handle them unless they really involve a bargaining for the unit, or an interpretation of the bargain. On the contrary, it expressly gives each employee or group of employees the right to present their own grievances to the employer. The purpose is to preserve in each employee as a right this direct approach to the employer to secure full consideration of his case.66

This dichotomy between the area in which the authority of the exclusive representative is exclusive and the area in which it is not was adopted and sharpened by the Supreme Court of the United States in Elgin, J. & E. Ry. v. Burley.67 The Court explicitly distinguished prospective adjustments from retroactive ones, holding that insofar as “grievances” entail adjustments looking to the future, the bargaining agent has exclusive authority, by virtue of its statutory status, to dispose of them in the collective interest, whereas, if the grievance involves only the vindication of “accrued monetary claims”68 it is within the province of the individual. Thus, the Court distinguished between

65 147 F.2d 69 (5th Cir. 1945).
66 Id. at 72-73. (Emphasis added.)
67 325 U.S. 711 (1945), aff’d on rehearing, 327 U.S. 661 (1946).
68 Id. at 712; cf. id. at 756 (dissenting opinion).
collective bargaining and grievances, as those terms are used in section 9(a), on the ground that collective bargaining looks "to the acquisition of rights for the future, not to assertion of rights claimed to have vested in the past," and:

To settle for the future alone, without reference to or effect upon the past, is in fact to bargain collectively, that is, to make a collective agreement. That authority is conferred independently of the power to deal with grievances, as part of the power to contract "concerning rates of pay, rules, or working conditions." It includes the power to make a new agreement settling for the future a dispute concerning the coverage or meaning of a pre-existing collective agreement. For the collective bargaining power is not exhausted by being once exercised; it covers changing the terms of an existing agreement as well as making one in the first place.

But it does not cover changing them with retroactive effects upon accrued rights or claims. For it is precisely the difference between making settlements effective only for the future and making them effective retroactively to conclude rights claimed as having already accrued which marks the statutory boundary between collective bargaining and the settlement of grievances.

When Congress amended the NLRA in 1947, it codified this definition of collective bargaining and approved the Burley line of demarcation in section 8(d), section 203 and the amendment to the section 9(a) proviso.

Section 8(d) defines the duty to bargain collectively to include the duty to negotiate with a view to reaching agreement about, inter alia, "any question arising . . . under" a collective agreement. Section 203(d) declares in part that, "Final adjustment by a method agreed upon by the parties is declared to be the desirable method for settlement of grievance disputes arising over the application or interpretation of an existing collective-bargaining agreement."

The 9(a) proviso was amended to read as follows:

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.

The legislative history shows that the amendment was designed to

69 Id. at 723.
70 Id. at 739.
“accord with” Burley.74 In adding authority to adjust “without the intervention of the bargaining representative” to the pre-existing authority of individuals and groups to “present” grievances, Congress must have contemplated “grievances” in the Burley sense; i.e., fully accrued and vested monetary claims. To include future claims would attribute to Congress an intent to reduce the authority of the exclusive representative over what Congress considered the subject matter of collective bargaining.75

Taken together, the 1947 amendments prove that Congress intended no such thing. Thus, the “parties” referred to in section 203, who are encouraged to make final adjustments of “grievance disputes arising over the interpretation or application of an existing collective bargaining agreement” are the contracting parties, the employer and the exclusive bargaining agent, not the affected employees. Section 8(d), moreover, compels the bargaining agent and the employer to attempt to resolve between themselves controversies over interpretation and application. Thus, section 8(d) goes even further than the usual rule that “parties to a contract may agree as to its meaning.”76

Moreover, the provision in section 9(a) that the individual may make no adjustment of a grievance “inconsistent with the terms of a collective-bargaining contract or agreement then in effect” is an absolute bar against outsiders’ awards to individuals based upon an interpretation or application of the contract inconsistent with that to which both contracting parties agree.

It is no obstacle to the effectuation of these plain statutory provisions that they leave contracting parties at liberty during the contract term, under guise of interpretation, to deprive individuals of rights which the contract creates. Since the contracting parties are at liberty to do exactly this by outright amendment of the contract at any time, there can be no solid objection to their accomplishing the same thing by interpretation. Section 8(d) guarantees each contracting party against compulsion “to discuss or agree to any modification of the terms and conditions contained in a contract . . . if such modification is to become

74 1 Legislative History of the Labor Management Relations Act 781 (1948) (remarks of Representative Owens).
effective before said terms and conditions can be reopened under the provisions of the contract . . . ." Enactment reversed the rule that the duty required bargaining over modification.77 But the new provision clearly assumes that the contracting parties are entirely at liberty to modify voluntarily, for it would be pointless to protect against compulsion if there were no power to make effective changes by agreement. If employee interests in existing benefits, terms and conditions were a bar, contracting parties would be powerless to bargain for modifications.

It follows that by defining the area of "grievances" excepted from the statutory representative's exclusive authority over "collective bargaining" by the proviso to section 9(a), Burley establishes the scope of individual claims cognizable under section 301 "when the employer and union are in disagreement."78

2. POLICY OBJECTIONS TO THE Burley RULE

This conclusion comes under attack from two quarters, one on the ground that the Burley rule gives the individual too much authority and thereby unduly upsets stability in collective bargaining; the other on the ground that Burley gives the individual too little authority and subjects him unduly to arbitrary action by his bargaining agent and employer. The leading spokesman of the first school, Solicitor General, then Professor, Cox, would use policy considerations to justify reading the 9(a) proviso to mean only "that the employer's duty to bargain exclusively with the representative designated by a majority of the employees is not violated if he chooses to receive grievances from individuals."79 That reading, we submit, is foreclosed by Hughes Tool, Burley, and the legislative history of the amendment to section 9(a). The employer's power to receive grievances from individuals is not the subject of section 9(a) but is only a corollary of the subject right of the individual to present them. There is no more reason to believe that Congress intended to make the right of the individual to present grievances contingent upon the consent of the employer than upon the consent of the bargaining agent.

78 Association of Westinghouse Salaried Employees v. Westinghouse Elec. Corp., 348 U.S. 437, 459 (1955); cf. Allied Oil Workers Union v. Ethyl Corp., 301 F.2d 104 (5th Cir. 1962). Attempts to limit Burley to the railway field are barred both by Burley's reliance upon Hughes Tool and by Congress' acceptance of Burley in re-enacting and amending § 9(a).
The office to which Cox would reduce the proviso—empowering the employer to receive grievances from individuals—is performed by a different proviso. The proviso to section 8(a)(2) explicitly permits employers to "confer" with employees even during working time, and even allows the employer to pay for working time so spent. The Cox position reduces the 9(a) proviso to a meaningless superfluity.

Moreover, Cox appears to acknowledge the force of the considerations which underlie Burley when he suggests that waiver or compromise by the representative of an individual claim to a sum plainly earned and due would be a breach of duty of fair representation:

Where the sum is plainly due, the collective bargaining representative should have no power to waive or compromise the claim of one group of employees in return for a concession supposed to benefit a larger number. Such dickering in vested rights is simply taking money from one group to give it to another. Even a legislature has no power thus to redistribute the wealth.81

If distinction is to be drawn in any event between the scope of the union's authority over vested rights and other individual claims there would appear to be no advantage from the standpoint of stability of bargaining relationships over Burley in a rule which sweeps vested rights into the area of the bargaining agent's statutory authority but subjects the agent to a more rigid standard of judicial scrutiny in its handling of them.

On the other hand, there is just as little basis for the attack from other quarters that the Burley rule does not give the individual enough. Thus, to say that individuals should have control over their own wrongful discharge cases because of the importance of their interest in keeping their jobs is simply to reject the premise of collective bargaining when it becomes important. The Supreme Court met and rejected this proposition squarely when it held that seniority rights affecting "promotions, transfers, layoffs and similar matters" are not vested against the bargaining agent, but are rather a "part of the process of collective bargaining," subject to change by the bargaining agent and the employer jointly at any time, despite objections of individuals adversely affected.82 "The complete satisfaction of all who are represented is hardly to be expected."83 Were it otherwise the province of collective bargaining would be narrow indeed.

81 Cox, supra note 79, at 633.
Seniority rights provided for in a collective agreement may be modified or eliminated by agreement of the union and the employer so long as they act in good faith, and this change may be affected without the consent—indeed against the wishes—of the individual employees.84

3. IMPLICATIONS OF INDIVIDUAL AUTHORITY OVER GRIEVANCES

Although Burley establishes an area of individual predominance where the individual and the exclusive representative disagree, it by no means follows that even in that area the exclusive representative has no role. The section 9(a) proviso itself prohibits any grievance adjustment inconsistent with the terms of the applicable collective bargaining agreement, and it enables the representative to police that prohibition by guaranteeing its presence "at [the] adjustment." As Mr. Justice Frankfurter predicted in Westinghouse, therefore, it now becomes "necessary to work out a federal code governing the interrelationship between the employee's rights and whatever rights were found to exist in the union."85

We start, of course, with the second Burley decision86 which, as noted in Westinghouse, made it plain that the individual could not only voluntarily delegate his power over grievances to the collective bargaining agent, but, if he were a union member, could have that power taken from him by authorized action of the union pursuant to its own rules and regulations. There will remain, however, a body of cases, those of non-members and others, who for one reason or another will not have delegated to the representative power to handle their grievances. These will create some problems.

Chief among these is the question mooted in Lincoln Mills:

Whether there are situations in which individual employees may bring suit in an appropriate state or federal court to enforce grievance rights under employment contracts where the collective bargaining agreement provides for arbitration of those grievances is a question we do not reach in this case. Cf. Assn. of Westinghouse Employees v. Westinghouse Electric Corp., 348 U. S. 437, 460, 464; Moore v. Illinois Central R. Co., 312 U. S. 630; Slocum v. Delaware, L. & W. R. Co., 339 U. S. 239; Transcontinental Air v. Koppal, 345 U. S. 653.87

Citation of the Railway Labor Act cases in this context seems highly significant, for they suggest that the answer turns on the distinction,
implicit in Burley, between remedies which affect future relationships within the bargaining unit and those, like money judgments, which do not. Thus, the cases hold that an employee who is willing to accept his discharge as final and sue for money damages only can take his case to court, but that one who seeks reinstatement cannot. The rationale is that an award of money damages for breach of contract by improper discharge "does not involve questions of future relationships between the [employer] and its other employees,"88 whereas an award of reinstatement obviously does. To the extent that reinstatement involves future relations within the bargaining unit, to recognize a justiciable cause of action in the employee would trench upon the collective bargaining province of the representative.

The Railway Labor Act cases further suggest that even if the employee seeks damages alone, his suit may be barred if the contract contains a grievance procedure terminating in impartial arbitration which is available to the employee for the processing of such grievances. Under that act, the rule developed that exhaustion was a matter of state law. But the scope of pre-emption under section 301, reflecting, as it does, the need "for a single body of federal law,"89 to govern all phases of collective bargaining contract enforcement, may well result in judicial fashioning of a uniform federal exhaustion rule. It is suggested that the rule should be that resort to a grievance procedure is required if, but only if, that procedure permits the employee to carry his grievance through to final and binding impartial arbitration. Perhaps this is one of the implications of the cryptic observation in General Drivers Union v. Riss & Co.,90 that if it should turn out that the grievance procedure which had produced the award in the case on which the individuals were suing was not final and binding, and if the individuals should then "seek to pursue the action as a § 301 suit for breach of contract, there may have to be considered questions unresolved by our prior decisions."91

Another question, also presently unresolved, relates to the kind of contract claims an individual has standing to enforce. This is the area the Supreme Court apparently reserved in Smith when it pretermitted "the question of federal law of whether petitioner, under this contract, has standing to sue for breach of non-discrimination clause [and] the standing of other employees to sue upon other clauses of other

91 Id. at 520.
contracts. Here perhaps the Westinghouse distinction between rights and benefits which are predominantly institutional and those which are predominantly personal may prove usable. There is good reason for allowing the individual standing to enforce a claim in which he has a unique personal interest; there seems little justification for granting individuals standing to enforce institutional claims, except where derivative action is required.

Of course this is not to imply that the Second Circuit erred in holding in Zdanok v. Glidden that seniority rights are vested against the employer and do not automatically terminate upon expiration of the contract term. Indeed, inasmuch as section 8(d) specifically provides that neither of the contracting parties may, without notice to and negotiation with the other, unilaterally modify or fail to continue “in full force and effect . . . all the terms of the existing contract” it establishes that seniority rights which may be terminated or modified with the consent of the bargaining agent, may not be terminated or modified without such consent. By the same token, while seniority rights can be considered vested against the employer both during and after expiration of the contract term, they may never be considered vested against the bargaining agent, even during the term of the contract.

THE ROLE OF THE DUTY OF FAIR REPRESENTATION

1. THE STANDARD

The avowed motive of those who would transform section 301 and the 9(a) proviso into a bulwark of individual rights against the bargaining agent is their feeling that the duty of fair representation does not go far enough; that the burden of proving violation is too heavy for the individual to bear. The short answer is that if the exclusive representative is effectively to represent its constituency in dealing with the employer, it must be authorized to resolve conflicts of interest within the unit. To ask of it more than honesty of purpose in this endeavor, avoidance of arbitrary or invidious discrimination, is to hobble and

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92 371 U.S. at 201 n.9.
93 288 F.2d 99 (2d Cir. 1961), aff’d without consideration of this issue, 370 U.S. 530 (1962).
94 Compare Industrial Union of Marine & Shipbuilding Workers v. NLRB, 320 F.2d 615 (3d Cir. 1963), where a “unilateral elimination of accrued seniority rights” after expiration of a collective bargaining contract was held to be a violation of § 8(a)(5).
incapacitate its effectuation of the collective interest, and, by indirection, award priority to individual interests. The Supreme Court stated clearly in *Huffman*:

> [S]tatutory obligation to represent all members of an appropriate unit requires [the bargaining agent] to make an honest effort to serve the interest of all of those members, without hostility to any. . . [But negotiators must have] discretion to make such concessions and accept such advantages as, in the light of all relevant considerations, they believe will best serve the interest of the parties represented . . . Inevitably differences arise in the manner and degree to which the terms of any negotiated agreement affect individual employees and classes of employees. The mere existence of such differences does not make them invalid. The complete satisfaction of all who are represented is hardly to be expected. A wide range of reasonableness must be allowed a statutory bargaining representative in serving the unit it represents, subject always to complete good faith and honesty of purpose in the exercise of its discretion. . . .

The National Labor Relations Act, as amended, gives a bargaining representative not only wide responsibility but authority to meet that responsibility.96

The source of the duty of fair representation—the political analogy—also confines the limitation. Just as legislatures would be intolerably hamstrung by a rule which found denial of equal protection in more than invidious discrimination, so would exclusive bargaining agents. Consequently, insofar as it is dealing with anything other than “vested rights” in the *Burley* sense; *i.e.*, “accrued monetary claims,” the obligation of the bargaining agent is only not to discriminate unfairly.97

The NLRB's decision in *Miranda Fuel Co.*,98 a case noted principally for its landmark holding that the duty of fair representation is enforceable under section 8(b)(1)(A),99 illustrates the danger of failure to apply in this context the *Burley* distinction between rights which are vested only against the employer and those which are vested against the bargaining agent as well.

*Miranda* held that the bargaining agent had violated its duty of fair representation by inducing the employer to reduce the seniority standing of an employee pursuant to an interpretation of the contract which the Board considered erroneous. The Board was obviously influenced by the fact that the disaffected employee, Lopuch, “had no reason to antici-

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pate any change in his rights under the contract or to believe that, if the contract changed, it would be applied retroactively to deprive him of his seniority standing."\textsuperscript{100} This has been translated to mean that "the duty of fair representation requires that the union honor, not alter, the employee's seniority rights."\textsuperscript{101}

But unless seniority is "vested" against the bargaining agent and, of course, under Burley, Campbell, and Huffman it is not, no employee is entitled to anticipate that his seniority rights will not be reduced by agreement between the bargaining agent and the employer during the life of the contract. And since the change did not deprive Lopuch of money earned by work he had performed, but only of prospective work opportunities which he anticipated, it is quite permissible for the bargaining agent to make a change retroactive. As the Third Circuit recently stated: "[Burley] simply holds that a bargaining representative can compromise accrued monetary claims of individual employees only if the employees have authorized it to do so."\textsuperscript{102}

It is here that the pro-individual approach parts company with Burley and, in our opinion, breaks down. It argues:

\begin{quote}
[T]he employee has no standing to participate in thrashing out the interpretation of an existing employment standard to the extent that it purports to settle the future scope of a disputed existing right. Insofar as it operates prospectively, the interpretation of a standard, no less than its formulation, is within the exclusive province of the representative, for the interpretative process is a policy-making function which calls for the imaginative and informed choice of available alternatives in construing an agreement. Whether the result is termed an interpretation or a change of the agreement, its essence is to imbue it with a new meaning to which the employees are bound in the future.\textsuperscript{103}
\end{quote}

There is nothing in Burley which disables the bargaining agent from interpreting and applying the contract to past events, or which gives employees standing to participate in resolving a question of interpretation or application unless an accrued monetary claim is involved. To draw the line between collective bargaining and grievances solely in terms of past or future events and to overlook the distinction between vested and inchoate rights and between money judgments and remedies operating prospectively is to remove from collective bargaining everything but its

\textsuperscript{100} 140 N.L.R.B. at 190.
\textsuperscript{101} Blumrosen, supra note 95, at 1512.
\textsuperscript{102} Industrial Union of Marine & Shipbuilding Workers v. NLRB, 320 F.2d 615, 619 (3d Cir. 1965).
\textsuperscript{103} Dunau, Employee Participation in the Grievance Aspect of Collective Bargaining, 50 Colum. L. Rev. 730, 748, 755 (1950). (Emphasis added.)
negotiation phase, denying to the union both administrative and judicial functions. Certainly that is irreconcilable with the concept that statutory collective bargaining "absorb[s] and give[s] statutory approval to the philosophy of bargaining as worked out in the Labor movement in the United States."104

The predicate of the Miranda majority is as follows: "The sacrifice of Lopuch to placate the other drivers does not, in our opinion, comport with the requirement for fair dealing."106 But that statement confuses the scope of the bargaining agent’s function with the standard by which its performance is to be judged. Thus, unless rights vested against the bargaining agent were involved, it was the agent’s function, indeed its duty, to resolve the conflict of interest between Lopuch and the other drivers. The problem is no different than a bargaining agent faces at any time in deciding whether to support the demands of one group of constituents over another in controversies over seniority rules, wages, or any other matter in which interests of members of the unit are in conflict. The agent virtually always must sacrifice the interests of one group to those of another. The question is on what basis may or must the choice be made? The union in Miranda faced alternatives: if it interpreted the contract one way it was open to accusation of sacrificing Lopuch to placate the other drivers; but if it interpreted the contract the other way it was open to accusation of favoring Lopuch over others.

To say in such cases that the union’s compliance with the duty of fair representation turns on whether the Board or a court agrees with the union’s interpretation of the contract is to transfer the function of interpretation from the contracting parties to the Board or the courts. It is simply impossible to square that result with Congress’ unequivocal policy of having the contracting parties, wherever they can reach agreement, have the final interpretative word themselves.

Of course, this does not mean that the duty of fair representation lacks substantial application to the union’s contract interpretation and application function. "The bargaining representative can no more unfairly discriminate in carrying out these functions than it can in negotiating a collective agreement."108 Nor is the duty limited to discrimination based

106 140 N.L.R.B. at 190.  
upon union activity, race, or religion.\textsuperscript{107} It comprehends, rather, discrimination on any irrelevant or invidious ground. All that is prohibited, however, in administration as in negotiation, is discrimination amounting to "arbitrariness of the bad faith kind,"\textsuperscript{108} discrimination reflecting "factual malice,"\textsuperscript{109} such as an intent to discriminate hostilely against a portion of the union's membership.\textsuperscript{110}

Just as a case of discrimination for union activity or race or religion must rest on allegation and proof that one of these factors was the reason for the discrimination, so must similar proof as to the reason be required in any other case of allegedly forbidden discrimination. It is a complete perversion to say, as the Board majority does in \textit{Miranda}, that if "discrimination" is shown the burden shifts to the union to justify and show a reasonable basis for it. That is a conception of due process and equal protection which the Supreme Court rejected as impossibly restrictive in the early days of the New Deal. Its use as the standard of judging fairness is no more tolerable in the field of industrial than in the field of political self-government.

2. THE CONSEQUENCES OF VIOLATION

Where a union does violate its duty of fair representation in processing a claim of contract violation, as when it does so in initial contract negotiation, the resulting agreement with the employer is to be set aside.\textsuperscript{111} But it is vital both for analytical and for jurisdictional purposes to keep clearly in mind that setting aside the agreement in such cases is not an incident of contract rights protected and comprehended by section 301. For section 301, as we have seen, provides a remedy only for violation of a collective agreement, and while "unfair" settlement of a grievance like "unfair" amendment of a contract, may deprive the individual of a contract benefit, the only valid complaint is against the union's breach of its statutory obligation to represent him fairly, not against deprivation of his contract right. The employer, against whom the contract right runs, is brought in only because it is necessary to reach him to rectify the union's misconduct. The "duty the Act imposes is one of fair representation and it is imposed upon the union. The em-

\textsuperscript{107} See Cox, The Duty of Fair Representation, 2 Vill. L. Rev. 151 (1957).
\textsuperscript{108} Cunningham v. Erie R.R., 266 F.2d 411, 417 (2d Cir. 1959).
\textsuperscript{109} Ibid.
\textsuperscript{110} Hardcastle v. Western Greyhound Lines, 303 F.2d 182, 185 (9th Cir.), cert. denied, 371 U.S. 920 (1962).
\textsuperscript{111} Cases cited note 106 supra.
ployer is merely prohibited from aiding the union in breaching its duty." 112

The individual’s contract right against the employer remains subject to defeasance in the proper performance of the union’s duty of fair representation.

It follows that tribunals charged with enforcing the duty of fair representation must refrain from substituting for the honest judgment of the contracting parties their own notions of how the contract should be interpreted and enforced, and how grievance proceedings should be conducted. *Brotherhood of R.R. Trainmen v. Howard* 113 indicates that the Supreme Court is sensitive to this problem.

**POTENTIALS FOR EFFECTUATION OF THE POLICY CONGRESS ENACTED SECTION 301 TO PROMOTE**

The sequence and posture in which section 301 issues were presented to the Supreme Court have tended somewhat to obscure and delay the task of innovation plainly necessary to accomplish the objective Congress sought by its enactment. The extraneous procedural-substantive controversy is not alone responsible. Argument over whether section 301 divests the Board of jurisdiction where unfair labor practices are also a breach of contract or withholds jurisdiction from the courts where a breach of contract is also an unfair labor practice, also played a part.

From an historical standpoint, that controversy should never have arisen. There was never any inconsistency or incompatibility between judicial enforcement of contractual obligations federal law encouraged the parties to undertake and Board enforcement of unfair labor practice obligations imposed by the law itself. In enacting section 301 Congress must have intended to provide more, not less, redress to the victims of dual violations.

The Board early recognized that contracts made pursuant to the act were enforceable at law but that it was the province of the courts, not the Board, to enforce them. At the same time, it recognized that violation of a contract could be of such a character, or reflect such hostility to collective bargaining, as to amount to a denial of recognition or rejection of the process of collective bargaining itself. In such cases, the Board stepped in to remedy the unfair labor practice, recognizing the duplication, pro tanto, of the court’s function.

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113 343 U.S. 768 (1952).
In its classic decision in *Carroll's Transfer Co.*, the Board held that unilateral disregard of unequivocal contract stipulations constituted unlawful refusal to bargain because it "evidenced a wilful and deliberate contempt for the whole plan of collective bargaining and discredited the duly chosen bargaining representative in the eyes of the employees." Explaining its policy, the Board said:

[W]e do not embark upon a course of policing and enforcing trade agreements. If, after a full exchange of views and a sincere effort to compose differences, the parties to a trade agreement are left at an impasse concerning its interpretation, application or modification, the matter is outside our hands. If such a dispute involves questions of interpretation or application, it presumably can be solved by the courts, under the applicable principles of the law of contracts. But, particularly in the light of Section 10(a) of the Act, the execution of a trade agreement does not necessarily remove our jurisdiction, even when the questions thereafter raised concern solely its interpretation and application. By signing a trade agreement an employer does not purchase immunity from the requirements of good faith and honest negotiation which are basic to Section 8(5) of the Act. It is inevitable that, in the enforcement of the public right to have the channels of interstate commerce freed from obstructions resulting from unfair labor practices, private rights may incidentally be protected or enforced.

Far from displacing the "authority of the Board to deal with an unfair labor practice which also violates a collective bargaining contract," section 301 indicates Congress' intention to provide more effective remedies in such cases as an additional deterrent to that kind of violation.

The policy underlying section 301 in this respect parallels that underlying section 303, which allows suits for damages against conduct characterized as an unfair labor practice in section 8(b)(4). It parallels also Congress' preservation of state court power to enjoin and award damages against violence and mass picketing in labor disputes despite the Board's concurrent unfair labor practice jurisdiction under section 8(b)(1)(A). The precedents established in those cases for simultaneous proceedings before separate tribunals on separate causes of action arising out of the same transaction or series of transactions would

114 56 N.L.R.B. 935 (1944).
115 Id. at 939.
116 Ibid.
therefore seem to be applicable to breach of contract unfair labor practices as well.

The process of infusing substantive labor law principles into the collective bargaining contract, exemplified in *Mastro Plastics Corp. v. NLRB*,¹²¹ and *Lucas Flour* has begun to produce results designed to effectuate both prompt and efficient enforcement of contract obligations and respect for substantive labor law obligations. Thus, in *Local 78, Retail Clerks Ass'n v. Lion Dry Goods, Inc.*¹²² it was held that an employer charged with breach of a strike settlement agreement is not entitled to challenge the representative status of the contracting union because, if he could, "litigation [under section 301] would be much hindered."¹²³

The lower courts have recognized that whether a contract is violated will frequently depend on whether the alleged breach is an unfair labor practice,¹²⁴ just as the Board recognized in other cases that whether the conduct complained of is an unfair labor practice may depend on whether the contract was violated.¹²⁵ For example, in cases of subcontracting, plant removal, etc., under the *Town & Country¹²⁶* rule, unilateral action by the employer, even if motivated exclusively by valid economic considerations, if taken without notice to the union is per se an unfair labor practice.¹²⁷ It might well be held under section 301 that such action during a contract term violates the contract, even though the contract does not prohibit economically motivated subcontracting or plant removal.


¹²¹ 350 U.S. 270 (1956). Whether a contract waived the employees' right to strike is a question of interpretation of the particular contract. "Like other contracts, it must be read . . . in the light of the law relating to it when made." Id. at 279.

¹²² 369 U.S. 17 (1962).

¹²³ Id. at 29; see Lewis v. Benedict Coal Corp., 361 U.S. 459 (1960), holding that an employer charged with breach of a contract obligation to the union is not entitled to set off a contract obligation owed by the union to him.

¹²⁴ United Steelworkers v. New Park Mining Co., 273 F.2d 352, 356-57 (10th Cir. 1959); Local 1912, Int'l Ass'n of Machinists, 270 F.2d 496, 498-99 (10th Cir. 1959).


On the other hand, the courts have read implied prohibitions against subcontracting and plant removal during the contract term into collective bargaining agreements, reasoning that otherwise an employer would be free unilaterally to defeat his obligations under the contract. Unilateral nullification is deemed to violate the implied "covenant of good faith and fair dealings . . . which must inhere in every collective bargaining contract if it is to serve its institutional purposes." Exploration of the interrelationship between this covenant of good faith and fair dealing, derived from common law concepts, and the duty to bargain collectively in good faith in the administration of collective agreements, derived from section 8(a)(5), can be expected to produce new developments significant in both fields.

The courts have already indicated willingness to go much further in awarding relief under section 301 where the breach is also an unfair labor practice than where it is not. Thus, punitive damages and attorneys' fees may be awarded in the former, but not in the latter. Such awards will tend to effectuate the policy of deterring unfair labor practices, as well as serving their traditional function of deterring contract breaches which also violate positive law. Judge Staley had this to say in a runaway shop case:

The achievement of industrial stability has for many years been of major concern to the Congress of the United States. It has expressly declared that our national labor policy favors unionization and the execution and observance of collective bargaining agreements between employers and employees as a means of realizing that end. 29 U.S.C. § 151. Congress demonstrated the importance of faithful performance of those agreements when it enacted § 301(a). The Act's legislative history also shows the persistent concern of officials in both the executive and legislative branches of government for the availability of effective remedies to an aggrieved party when a breach occurs. S. Report No. 105, 80th Cong., 1st Sess., 1947; 92 Cong. Rec. pp. 4265, 4410, 80th Cong., 1st Sess., 1947. That history goes on to indicate, S. Report No. 105, supra, p. 30, that § 301(a) is to be read in conjunction with § 8 of the Act . . . . As we indicated earlier, the company's breach of

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128 Cases cited note 124 supra.
129 Ibid.
130 Ibid.
131 Industrial Union v. American Dredging Co., 49 L.R.R.M. 3014 (E.D. Pa. 1962): "[S]ome distinction in the rule of damages should be made when the discharge or refusal to reinstate involves an unfair labor practice."
the runaway shop provision of the contract had its genesis in the secret, written agreement, executed between John and Michael Goldenberg in 1954. This called for termination of operations at the Philadelphia plant at the earliest possible date. In the ensuing years, the company systematically and deviously carried out its plan of removal. At the same time, it renewed on several occasions, between 1954 and 1957, its agreement with the union. Such conduct on the part of defendants is not only a willful breach of its collective bargaining contract, but also constitutes a flagrant violation of duties imposed by the Labor Management Relations Act, 1947, 29 U.S.C.A. § 141 et seq. It is difficult to conceive of conduct calculated to destroy more effectively the national labor policy. Such violation of defendants' duties supplies a sufficient legal basis for the imposition of punitive damages, and the award of such damages here was without doubt proper.\textsuperscript{134}

That the Board and a court may, each for their own purposes, answer differently the question whether particular conduct is an unfair labor practice is not one of the “serious problems [which] arise from both the courts and the Board having jurisdiction over acts which amount to an unfair labor practice . . . .”\textsuperscript{135} The \textit{Deena Artware} cases\textsuperscript{136} show that the parties are expected to live with such incongruities; if a particular divergence is unusually serious or legally significant the Supreme Court can straighten it out on certiorari.

What may give rise to “serious problems” is the Board’s policy, referred to by the Supreme Court in \textit{Smith}, not “to exercise its jurisdiction to deal with unfair labor practices in circumstances where, in its judgment, federal labor policy would best be served by leaving the parties to other processes of the law.”\textsuperscript{137} The Board’s rationale is that abstention effectuates the policy of section 301 and section 203 inasmuch as it encourages and enforces legally permissible agreements to submit controversies involving unfair labor practices and representation questions to tribunals selected by the parties themselves. The government has recently told the Supreme Court that the Board usually makes an exception “only where the arbitration proceedings were not fair, the arbitrator did not consider the issue before the Board, or the result reached was repugnant to the purposes and policies of the Act.”\textsuperscript{138}

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\textsuperscript{134} Local 127, United Shoe Workers v. Brooks Shoe Mfg. Co., 298 F.2d 277, 280-83 (3d Cir. 1962).
\textsuperscript{136} Deena Artware, Inc. v. NLRB, 198 F.2d 645 (6th Cir. 1952), cert. denied, 345 U.S. 906 (1953); United Brick & Clay Workers v. Deena Artware Co., 198 F.2d 637 (6th Cir. 1952).
\textsuperscript{137} 371 U.S. at 198 n.6.
\end{flushleft}
It is at least doubtful, however, whether either section 301 or section 203 can properly be read as encouraging contracting parties to agree to oust the Board of its jurisdiction.139 Certainly, it does not follow from the fact that Congress encouraged the parties to add contract rights to statutory rights that it intended to encourage substitution as opposed to supplementation of private remedies for public ones in the vindication of statutory rights. Dowd Box and Lucas Flour surely look in the opposite direction.

On the other hand, there is no gainsaying the desirability of economizing the Board's time and effort by removing its burden in cases which have been or will be fully and fairly decided in accordance with the act by tribunals of the parties' own choice. Perhaps in view of the competing interests involved, the burden of proof should be placed on the pleader of what amounts to estoppel to show that the question adjudicated by the arbitrator was exactly the same question being presented to the Board; that the arbitration proceeding was conducted under the exact rules the Board would apply and that the result is entirely compatible with federal law and policy. If estoppel is pleaded because of a promise to arbitrate, on an appropriate showing the Board might well stay its proceedings pending conclusion of the arbitration, so that it could review the arbitration under that standard.

**Epilogue**

After this article was set in galley, the Supreme Court on January 6, 1964, decided *Humphrey v. Moore*.140 Rather than rewriting, it was deemed appropriate to add a postscript.

*Moore* focused a typical conflict of interest between two sets of employees represented by the same bargaining agent. Employed by competing employers in the same city, their job security was threatened when


140 84 Sup. Ct. 363 (1964). For what reflection it may cast upon the writer's bias, it may be noted that he was counsel for petitioners in one of the cases consolidated under the title of Humphrey v. Moore.
decline in business left room for only one. Both employers were signatories to a contract negotiated by representatives of a multi-employer, multi-local union, nationwide bargaining unit. The contracting parties treated the situation as governed by section 5 of article 4 of their contract, which provided that when one employer “absorbs the business” of another “the seniority of the employees absorbed or affected thereby shall be determined by mutual agreement,” pursuant to an established grievance procedure. Authority to resolve finally disputes presented through that procedure was delegated by the contracting parties to designated representatives, functioning as a Joint Conference Committee, who were to make their decision “after listening to testimony of both sides.”

After initially taking the position that the projected withdrawal of one of the employers did not entail an “absorption,” the local union, which represented both groups of employees, later concluded that it did, and urged the Joint Conference Committee to dovetail or integrate the seniority lists, thus compelling the surviving employer to absorb the competitor’s employees. Since the latter had greater seniority, dovetailing entailed laying off the survivor’s employees. After hearing the evidence, the committee unanimously decided that an absorption was involved and ordered the lists integrated.

The employees of the surviving employer thereupon brought suit in a Kentucky court to enjoin implementation of the decision, contending that (1) the Committee lacked authority to subordinate their seniority rights to employees of another employer; (2) the union had violated its duty of fair representation by favoring a rival group of constituents at their expense and fraudulently depriving them of a fair hearing. The Kentucky Court of Appeals enjoined implementation of the decision, principally on the ground that the union was barred by the conflict of interest between its constituents from representing both in a dispute over contract rights.141

The Supreme Court unanimously reversed, holding that the union is not only “free to take a position” in such cases but to resolve the dispute finally by agreement with the employer, provided it acts, as it did here, “honestly, in good faith and without hostility or arbitrary discrimination.”142 To hold otherwise, said the Court, “would surely weaken the collective bargaining and grievance processes.”143

But, Mr. Justice White’s opinion indicates that the scope of the union’s

141 356 S.W.2d 241 (Ky. 1962).
142 Id. at 372.
143 Ibid.
power over such individual rights as were here in dispute, and its vulnerability to judicial review in their disposition, turns on whether the union and the employer purport to be acting in accordance with existing terms of their contract, on the one hand, or amending it, on the other. Thus, at the very outset, the opinion confines the issue to "a joint employer-employee committee purporting to settle certain grievances in accordance with the terms of a collective bargaining contract."\footnote{144} Later, the opinion expressly preterms "the problem posed if . . . the parties had acted to amend" the contract and relies squarely on "the fact . . . that they purported to proceed under [it] . . . ."\footnote{145}

The opinion may be read as holding that where contracting parties purport to be interpreting or applying their contract as written, the courts, rather than they, have the final word as to what the contract means. This reading is supported by the fact that the Court examined and approved the committee’s construction of the contract on the merits. And a footnote\footnote{146} states that reconciliation of contract clauses said to be conflicting presented an issue ultimately for the court, not the committee, to decide. On the other hand, a narrower reading may be warranted. For the discussion is addressed to the proposition that the committee exceeded powers conferred upon it by the contracting parties,\footnote{147} not that the contracting parties could not legally have conferred such power upon the committee, or legally have such power exercised themselves. The narrower interpretation may well be intended, for the opinion does not assert that parties to a collective bargaining contract are, or explain why they should be, denied the liberty contracting parties normally enjoy to "agree as to its meaning."\footnote{148}

In any event, it seems quite plain that the Court does not dispute that collective bargaining is a "continuous process" and that section 301 therefore does not confer on individual employees a justiciable interest in preserving against amendment their "rights" under a contract as written. For himself and Mr. Justice Brennan, Mr. Justice Goldberg argues that if such rights are vulnerable to amendment they should be equally vulnerable to interpretation:

Just as under the Huffman decision an amendment is not to be tested by whether it is within the existing contract, so a grievance settlement should not be tested

\footnote{144} Id. at 365.
\footnote{145} Id. at 369 n.7.
\footnote{146} Id. at 370 n.8.
\footnote{147} Id. at 369.
\footnote{148} Edelstein v. Duluth M. & I. Ry., 225 Minn. 508, 521, 31 N.W.2d 465, 472 (1948).
by whether a court could agree with the parties' interpretation. If collective bargaining is to remain a flexible process, the power to amend by agreement and the power to interpret by agreement must be coequal.149

But, if distinction is to be drawn between the power to amend by agreement and the power to interpret by agreement, then, as the majority opinion implies, what the parties purport to be doing becomes controlling. Nothing could be clearer than Congress' intention to leave the formation of substantive terms to the contracting parties themselves.150 Thus, if the parties purport to be amending, the validity of their agreement cannot be tested by a court's interpretation or construction of what they had agreed on before.

Now, if what the parties say they are doing is controlling, they can be trusted to find suitable language to avoid undue judicial interference.151 Just as Burley was met by amendment of union constitutions and bylaws, so Moore will be met by a change in the language of grievance dispositions. Instead of casting the result solely in terms of interpretation or application of the contract, the parties will reach their decision also by amending the contract and announce that the contract is simultaneously amended in accordance with the result. Like the Rule in Shelley's Case, the effect of Moore will be to add a few words to official documents.

But, it may be argued, this will not suffice, for even if the parties purport to amend, the Court will review their decision to determine whether the union has breached its duty of fair representation. The point would seem to have merit, for the Court does indeed hold that alleged breach of the duty of fair representation, depriving individuals of rights claimed under a collective agreement, also states a case under section 301.152 The reasoning seems to be that individual rights created by collective agreements can lawfully be divested only in consequence of fair representation, and, therefore, a contention that divestiture is a product of unfair representation states a claim of unlawful divestiture, or breach of contract, cognizable under section 301.

Whether or not this reasoning is sound, and it is effectively criticized in Mr. Justice Goldberg's concurring opinion,153 it plainly will not sup-

149 84 Sup. Ct. at 374-75 (concurring opinion).
152 84 Sup. Ct. at 369 n.7.
153 Id. at 375-76 (concurring opinion).
port a conclusion that decisions cast as amendments will be subjected to the same sort of judicial scrutiny, or held to the same standards, as decisions purporting to be interpretations. The opinion makes it quite clear that the question of fair representation is entirely different from the question of proper or permissible interpretation; enforcement of the duty of fair representation does not at all entail substitution of the court’s views of what the contract means for the agreed view of the parties.

In determining whether a union performed or violated its duty of fair representation, the Court asks only whether it “took its position honestly, in good faith and without hostility or arbitrary discrimination.”154 The same question can as rightfully be asked whenever a union negotiates a new agreement, or amends an expired one, as when it amends during the contract term. Whether the question is asked under section 301, as it now can be when there is a contract in effect, or in a Steele type suit, as it must be where there is no contract in effect, would seem to make little difference. The current existence of an agreement would be important only if the Court would then apply a different standard to solution of the fair representation question. There is no evidence that it will.

It does appear, however, that where a contract is in effect, the Court may demand strict conformity with whatever procedure, whether for interpretation or for amendment, or both, the parties have by contract prescribed for themselves. Since the parties are free by agreement to amend any such prescribed procedures at will, such judicial restraint seems difficult to justify.

The majority is obviously anxious to provide additional protection for individuals against arbitrary action by their bargaining agent. But the opinion does not satisfactorily explain why those who subscribe to it consider the protection available under Huffman inadequate. As Mr. Justice Goldberg demonstrates, a union-employer agreement resulting from breach of the union’s duty of fair representation is in any event vulnerable under Huffman;155 it was not necessary to read section 301 as authorizing constituents to sue their bargaining agent to accomplish that result. If the significance of Moore is that employees may henceforth hold unions and employers strictly to such rituals as they may have by contract prescribed for themselves, voluminous litigation may be en-gendered having no perceptible value to the collective bargaining process.

154 Id. at 372.
155 Id. at 375-76 (concurring opinion).
or to the interests of the employees who are its beneficiaries. As Mr. Justice Goldberg puts it:

Of course, we must protect the rights of the individual. It must not be forgotten, however, that many individual rights, such as the seniority rights involved in this case, in fact arise from the concerted exercise of the right to bargain collectively. Consequently, the understandable desire to protect the individual should not emasculate the right to bargain by placing undue restraints upon the contracting parties. Similarly, in safeguarding the individual against the misconduct of the bargaining agent, we must recognize that the employer's interests are inevitably involved whenever the labor contract is set aside in order to vindicate the individual's right against the union. The employer's interest should not be lightly denied where there are other remedies available to insure that a union will respect the rights of its constituents. Nor should trial-type hearing standards or conceptions of vested contractual rights be applied so as to hinder the employer and the union in their joint endeavor to adapt the collective bargaining relationship to the exigencies of economic life.156

156 Id. at 376-77 (concurring opinion).
RECENT PROBLEMS IN THE CREATION OF
FEDERAL LAW UNDER SECTION 301

ROBERT H. KLEEB*

INTRODUCTION

Application of a body of federal common law would inevitably lead to one of the following incongruities: (1) conflict in federal and state court interpretations of collective bargaining agreements; (2) displacement of state law by federal law in state courts, not only in actions between unions and employers but in all actions regarding collective bargaining agreements; or (3) exclusion of state court jurisdiction over these matters. It would also be necessary to work out a federal code governing the inter-relationship between the employee's rights and whatever rights were found to exist in the union.1

These words of Mr. Justice Frankfurter in Association of Westinghouse Salaried Employees v. Westinghouse Elec. Corp.2 are of great interest in light of the fact that, even though the Supreme Court later overruled3 the holding of the case, his predictions have proven to be quite valid. Section 301 of the Labor Management Relations Act4 was given a substantive role by the Court in Textile Workers Union v. Lincoln Mills.5 And succeeding cases such as the arbitration trilogy,6 Charles Dowd Box Co. v. Courtney7 and Local 174, Teamsters Union v. Lucas Flour Co.8 have added further substance to the new federal law of collective bargaining agreements. In the latter decisions, the Court was cognizant of Justice Frankfurter's second prediction in Westing-


2 Ibid.
5 353 U.S. 448 (1957).
8 369 U.S. 95 (1962).
More recently, in Smith v. Evening News Ass'n,10 the Court initiated recognition of Justice Frankfurter's third prediction,11 since it began to "work out a federal code governing the interrelationship between the employee's rights and whatever rights [are] found to exist in the union."12

BASIS OF STATE LAW

Before examining closely the developing federal law on this subject, it is appropriate to review briefly the general rule among the states which is in the process of being supplanted or at least transformed into federal law.13 State law with respect to the standing of individual employees to sue their employer for alleged violations of a collective bargaining agreement relied initially upon the terms of each particular contract.14 With the growth of contractual grievance procedures, the state courts tended to dismiss employee suits for violations of contracts if the employee failed to exhaust these internal grievance procedures which were generally construed to be exclusive, initial remedies.15 If the employee used the grievance procedure, but failed to receive satisfaction, the state courts then forced the employee to show that he had been frustrated by union nonfeasance or malefeasance which was variously described as arbitrary, capricious, or discriminatory.16 In applying such a test, the state courts usually gave a union wide latitude to compromise

9 "(2) displacement of state law by federal law in state courts, not only in actions between unions and employers but in all actions regarding collective bargaining agreements . . . ." 348 U.S. at 455.
11 "(3) exclusion of state court jurisdiction over these matters." 348 U.S. at 455.
12 Ibid.
13 The general subject of individual employee rights under collective bargaining agreements has been well chronicled. This article will not discuss in detail the historical development of the case law but will emphasize a criticism of recent developments. The following will summarize the author's understanding of state law: Cox, Rights Under a Labor Agreement, 69 Harv. L. Rev. 601 (1956); Dunau, Employee Participation in the Grievance Aspect of Collective Bargaining, 50 Colum. L. Rev. 731 (1950); Hanslowe, Individual Rights in Collective Labor Relations, 45 Cornell L.Q. 25 (1959); Howlett, Contract Rights of the Individual Employee as Against the Employer, 8 Lab. L.J. 316 (1957); Comment, Individual Employee Grievances Under the Wagner and Taft-Hartley Acts, 1949 Wis. L. Rev. 154.
a grievance for the over-all good of the bargaining unit.\textsuperscript{17} We may generalize by saying that the union's discretion varied somewhat according to the subject of the grievance. As the matter increased in economic vitality to the individual employee and involved fewer questions of contract interpretation, the courts began to scrutinize with more care the employer's defense that the union had settled the grievance in good faith.

The case of Ostrofsky \textit{v. United Steelworkers}\textsuperscript{18} decided by the United States District Court for the District of Maryland is representative of the state of the law at that time. In Ostrofsky, the union declined to press for arbitration of several discharges and asserted that it did so because it believed the company acted for good cause and because the employees did not fully cooperate with the union in preparing the case. The employees had been discharged as national security risks. Ostrofsky sought damages from both the company and the union, and also asked the court to order the parties to arbitrate the discharged case. Ostrofsky argued that the language of the collective bargaining agreement did not expressly state that the grievance procedure was the sole avenue of relief. The court replied that such a limitation is implicit in the agreement, and an exception will be made only if the union arbitrarily refuses to press the claim. The court noted that the collective bargaining agreement limited the arbitration procedure to union initiative and denied Ostrofsky's plea for arbitration in the absence of a showing "that the union had violated its duty of fair representation."\textsuperscript{19}

Courts have frequently held that the power to compel arbitration was strictly a creature of the collective bargaining agreement.\textsuperscript{20} If the contract gave the right only to the union, the court would dismiss an employee's suit for specific performance.\textsuperscript{21}

\textbf{History of the Federal Law}

In December 1962 the United States Supreme Court decided \textit{Smith v. Evening News Ass'n}\textsuperscript{22} and thereby began to define the federal substantive law with respect to an individual employee's right to enforce a labor agreement in the courts. The \textit{Smith} facts should be clearly stated

\textsuperscript{17} See, e.g., Jennings \textit{v. Jennings}, 91 N.E.2d 899 (Ohio App. 1949).
\textsuperscript{19} Id. at 792.
\textsuperscript{20} See, e.g., Palnau \textit{v. Detroit Edison Co.}, 301 F.2d 702 (6th Cir. 1962).
\textsuperscript{22} 371 U.S. 195 (1962).
because they are extremely important for an understanding of what the Court did and did not say about such employee rights. In *Smith*, the collective bargaining agreement between the company and union A forbade discrimination against covered employees based on union membership. The contract did *not* contain a grievance arbitration procedure. During a strike by company employees who belonged to union B, the company permitted nonunion, white-collar employees to work at full wages although there was little or nothing for them to do. Smith and other members of union A asked the company for the same arrangement but were refused. They then sued the company for breach of the contract's no-discrimination clause under the authority of section 301. The trial court dismissed the suit relying upon the holding of *San Diego Bldg. Trades Council v. Garmon*,23 which held that state courts lacked jurisdiction to entertain suits based on conduct which is also arguably an unfair labor practice. The Supreme Court of Michigan affirmed. The Supreme Court of the United States reversed the dismissal and remanded for further proceedings after deciding three important questions and framing a fourth for future resolution. These four questions are discussed herein in detail. First, the Supreme Court drew an exception to *Garmon* by allowing state and federal courts to hear section 301 suits for alleged breach of contract, even though such conduct is also a violation of Sections 8(a)(5) or 8(b)(3) of the National Labor Relations Act.24 Second, the Court declared that *Westinghouse* was no longer precedent and that section 301 may be invoked to enforce "uniquely personal"25 rights. Third, the Court said that nothing in section 301 restricts all suits under the section to those brought by employers or unions.26 The fourth and unanswered question is most significant. Under the Evening News' collective bargaining agreement or under any other collective bargaining agreement, does the covered employee have standing to sue for a breach of contract? The following quotation from Mr. Justice White's opinion will help to resolve this pertinent question:

The only part of the collective bargaining contract set out in this record is the no-discrimination clause. Respondent does not argue here and we need not consider the question of federal law of whether petitioner, under this contract, has standing to sue for breach of the no-discrimination clause nor do we deal with the standing of other employees to sue upon other clauses in other contracts.27

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25 Id. at 198.
26 Id. at 200.
27 Id. at 201 n.9.
It is my opinion that Mr. Justice White was suggesting the answer to his own reserved question. I think the answer should be that the individual's standing to sue for damages or to invoke arbitration if that is involved, depends upon the particular grievance scheme of each collective bargaining agreement. I think the Justice was inviting draftsmen to obviate private appeals to the courts by creating grievance procedures which offer industrial due process to the individual, but which may also restrict ultimate control over grievances to the authorized representative. I suggest that this answer to the question in Smith is demanded by the hard facts of industrial relations, is consistent with other statutory authority given to unions, and in the framework of other laws is not a deprivation of individual due process. Mr. Justice Black's dissent in Smith clearly shows that he believed that the fourth question has been left unanswered and he appears to be convinced that this question is the central issue of the case. The Court's unwillingness to resolve this question leaves Mr. Justice Black perplexed. The language of his dissent appears to hold that under section 301 an employee is free to bring his own suit in his own way.

The question of the individual's standing to sue has since been litigated in several states, as well as in several federal courts. Because of the divergent results of the courts in this area, it is more than probable that the Supreme Court will have to answer the question explicitly.

**Federal and State Court Solutions to the Grievance Procedure Problems**

The United States Court of Appeals for the Second Circuit and the New York state courts have committed themselves to the answer that if a collective bargaining agreement provides for arbitration of the subject matter of a grievance, but restricts its use to union initiative, the individual must still go to the union first for vindication of his rights. The courts will not entertain a suit for damages or for specific performance of an arbitration clause if the contract provides for exclusive internal remedies. The Second Circuit left open the precise formula

30 Ibid.
32 Belk v. Allied Aviation Serv. Co., 315 F.2d 513 (2d Cir. 1963); Black-Clawson Co. v. International Ass'n of Machinists, 313 F.2d 179 (2d Cir. 1963).
for individual remedies in the event a union flatly refuses to process a grievance. With a sense of the history of this problem the court cited numerous cases wherein the traditional state remedies were provided where a union acted arbitrarily, capriciously, or discriminatorily.

Decisions in Minnesota and New Mexico follow the New York rule which requires both an examination of the contract to determine limitations on individual suits and a hearing of such suits only in the event of gross union malfeasance.

In my opinion, the most disturbing answers to the question have come from New Jersey and Michigan. The case of Donnelly v. United Fruit Co. in New Jersey involved a union's refusal to press for arbitration of an alleged wrongful discharge. The employee sued both employer and union for damages and specific performance of the arbitration clause. The trial court had dismissed the suit because: (1) a state common law precedent forbade a union member’s suit against his union; (2) a union had discretion to compromise even meritorious claims in the interest of the unit's common good; (3) there was insufficient evidence that the union acted arbitrarily; (4) the collective bargaining agreement did not give the employee the right to compel arbitration. The Supreme Court of New Jersey reversed and remanded, thereby rejecting the old New Jersey prohibition on membership suits against unions. The court then proceeded to overrule the argument based on contract language by stating that the federal statute, i.e., section 9(a), guarantees the individual the right to press his grievance through arbitration without compromise by the union. The New Jersey court announced the rule that the employee must first ask the union to press his claim, but if the union refuses to bring suit for any reason, the individual may process his own grievance directly with the employer. Such action would be according to the contractually specified steps with the union present to prevent results inconsistent with the collective bargaining agreement even to the point of compelling arbitration via a section 301 suit. This procedure adheres to the final proviso in section 9(a), but fails to go as far as Mr. Justice Black would go,

33 Ibid.
namely, permitting an employee to "prosecute his own lawsuit in his own way."38 Under Donnelly, the union has at least the chance to control the prosecution of the arbitration case, if it is willing to press, even against its better judgment, for arbitration. The New Jersey court said it assumed

that in the great majority of grievances the union fulfills its traditional role of guardian of the interests of its members by processing their claims. It is probable, also, that with section 9(a)-rights of individual employees thus implemented, there will be even fewer instances of union abstinence.39

This statement, it is submitted, is one of the few correct propositions announced in Donnelly. By this holding the union will be practically forced into pressing every claim to arbitration.

I feel that one of the mistakes of the court in Donnelly is its curious proposition that the rule it proposes will not burden the collective bargaining process because, as an historical fact, the grievances are adjusted in the preliminary stages of the grievance procedure. The court appears to ignore the fact that this phenomenon has occurred under the case law which permitted unions to make binding good faith settlements. With respect to arbitration cases presented personally by employees, the New Jersey court suggests that the arbitrator's power to assess costs to an employee who presses a frivolous or patently erroneous claim may restrict the growth of nuisance arbitration and promote settlements. I fear that in the majority of cases this will afford little protection. The Donnelly cost rule would assess the individual only when he appeared pro se, but it is evident that the natural result of the case's central holding will be that the union will feel compelled to bring all cases to arbitration.

The recent decisions of Michigan courts in this area are even more disturbing. In Ries v. Evening News Ass'n,40 an employee attempted to use section 301 as the basis for his damage action in the state courts against his employer for alleged failure to recall in seniority order after a layoff. From the outset of his grievance, the employee used private counsel to present his case to the employer. The employer refused to honor the employee's demand for arbitration. After the employee filed suit, the union initiated an arbitration proceeding on the subject matter of the grievance, but the employee refused to participate to avoid prejudice to his own suit. The employee carefully gave the union represent-

38 371 U.S. at 205 (dissenting opinion).
39 190 A.2d at 841.
40 122 N.W.2d 663 (Mich. 1963).
ative an opportunity to be present at all times when he pressed his grievance claim upon the employer. The employer moved to dismiss on two grounds: (1) the employee failed to exhaust the contractual grievance procedure by not proceeding through the union; and (2) the suit failed to state a cause of action. The trial court dismissed in reliance on the first defense, namely, failure to exhaust contractual remedies. The Supreme Court of Michigan split four to four on the disposition of the case. Four justices, led by Justice Souris, stated that there had been inadequate evidence and argument on the question of whether the employer should have recalled strictly in seniority order. The contract provided that the employer was entitled to consider other factors, such as ability, when recalling employees. Therefore, the suit should have been dismissed for the reason raised by the defendant employer, i.e., failure to state a cause of action. Justice Souris affirmed the dismissal but allowed the employee thirty days in which to amend his complaint and start again. The trial court was instructed to honor any union request to intervene either as a party or as amicus curiae. Justice Dethmers, speaking for the other half of the court, reviewed the collective bargaining agreement which said: "In the event any complaint . . . shall arise, the Union, at the request of the employee involved, may report in writing the grievance to the . . . [employer]."41 Justice Dethmers concluded on the basis of this language that the contract did not compel processing of all employee claims through the grievance procedure. Moreover, even if the contract had been drafted to limit all processing of grievances to union initiative and to exclude the employee from taking individual action, such a contract clause would be illegal under section 9(a) and the rule announced by the United States Supreme Court in Elgin, J. & E. Ry. v. Burley.42 Because the Evening News Association contract did not explicitly prohibit a private employee suit, Justice Dethmers found that the employee could avail himself of Michigan's third party beneficiary statute.43 Thus, under combination of a permissive collective bargaining agreement, section 9(a) and the state third party beneficiary statute, the employee should be free to present his own grievance even to the point of demanding arbitration and suing the employer for damages in the event arbitration is refused. Justice Dethmers' opinion strongly endorsed Mr. Justice Black's remarks in the Smith dissent, where the Justice declared that Congress, in

41 Id. at 664.
42 325 U.S. 711 (1945), aff'd on rehearing, 327 U.S. 661 (1946).
43 122 N.W.2d at 665.
enacting section 301, did not intend to interfere with the right of individuals to bring their own suits in their own way.

I believe that Justice Dethmers’ invocation of the state third party beneficiary statute was a mechanical action which was both inappropriate and harmful in the context of modern industrial relations and the federal law which regulates those relations. The common law concept of third party beneficiary is difficult enough to rationalize with the realities of collective bargaining, without automatically incorporating a general third party beneficiary statute.

The same day that the Michigan court delivered its split opinion in the Ries case it also decided Pennington v. Whiting Tubular Prods. In Pennington, forty-nine employees sued their union, their former employer, and two new employers for damages. The two new employers were sued on the theory that they were successors and that the plaintiffs had not been properly afforded their contractual right to transfer to the new plant sites. It is not clear from the decision whether the contract contained an arbitration clause, but we do know that the plaintiffs’ union filed a grievance describing exactly the subject matter of the law suit, and later abandoned the grievance claim half-way through the contractually provided procedure. The employers argued on appeal that the union abandonment of the grievance precluded the employees from suing because these employees, through their representative, the union, had failed to exhaust the contractual remedies. The Michigan court replied: “We do not think the argument well founded. Under the decision above cited [Smith] the conclusion would seem to follow that the action of the union in abandoning the grievance claim was not binding on the plaintiffs.” The Pennington decision does not cite section 9(a) as the basis for the above-quoted view, but rests instead on the rationale of Smith. But if the contract in Pennington contained an arbitration clause or any unused grievance steps, then it is an extension of the Smith case to say that union abandonment of a grievance does not preclude individual suit. In Smith, the Court said there was no grievance arbitration procedure. Moreover, Mr. Justice White expressly reserved judgment on the question whether individual standing to sue could be created or eliminated by contract.

The decisions from Michigan and New Jersey, which guarantee individuals the right to pursue fully their grievances without union compromise, appear to rely on the combined authority of section 301, section 9(a) and Burley. It appears that the New Jersey and Michigan decisions will

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45 Id. at 696.
produce instability in industrial relations because unions will no longer have authority to compromise unmeritorious or impolitic grievances. The intermediate grievance procedures are likely to be less effective in reducing claims than before because unsophisticated employees will most likely press for satisfaction in the face of reason and precedent. This can be especially troublesome if, amid union politics, an insurgent leader or aspirant encourages individuals to pursue unfounded grievances. If the union refuses to handle the individual cases, the possibility of arbitrators and/or courts interpreting the collective bargaining agreement in various ways increases greatly, even though the union would be permitted to attend and participate in the proceedings in some vague, amicus status in order to argue against propositions inconsistent with the contract. When we consider the fact that section 301 has been made a part of a rather carefully planned judicial scheme for promoting industrial stability and the private resolution of grievances, we are struck by the incongruity of the Michigan and New Jersey theories concerning the section. We can assume that many contracts provide for exclusive union arbitration of unsettled grievances and therefore imagine a great many situations under the Michigan rule where the Supreme Court's rules, as announced in the arbitration trilogy,\(^\text{46}\) will be nullified or minimized by allowing the employee to try the merits of his grievance in court. Does the Michigan court suggest that all steps of a grievance procedure be available to both the representative and the employee, regardless of the contract language?

**INTERPRETATION OF SECTION 9(a)**

Turning to section 9(a)\(^\text{47}\) itself, I am not persuaded that the language compels the result suggested by the Michigan court, i.e., that the


Sec. 9(a). Representatives designated or selected for the purposes of collective bargaining by the majority of the employees in a unit appropriate for such purposes, shall be the exclusive representatives of all the employees in such a unit for the purposes of collective bargaining in respect to rates of pay, wages, hours of employment, or other conditions of employment; 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. (Italicized language added in 1947.)
right to adjust grievances with the employer includes the right to press and manage individual civil suits for such adjustment. The statute does not say that the employees have a judicially enforceable right to settle grievances, and it does not contain procedures for prosecuting an individual's charge that his employer has refused to talk to him. Nor has the NLRB supported such a doctrine absent a showing of discrimination based on exercise of section 7 rights. Moreover, the statute does not suggest the theory that employees may compel their employer to arbitrate a grievance. The Supreme Court of Michigan implies that the right to present grievances to their employer and to have such grievances adjusted probably includes the right to compel arbitration if the contract contains an arbitration procedure.\(^48\) I submit that this implication is wishful thinking, and support for this theory cannot be found in federal or state statutes, nor in case law.

**REVIEW OF LEGISLATIVE HISTORY OF 9(a)**

To have an understanding of the development of the law in this area it is important to look at the legislative history of section 9(a), both as it was originally written in 1935 and as it was amended in 1947. It is my recollection, supported by a review of the legislative history, that section 9(a) in 1935 was written in the first place to help define the authority of the collective bargaining representative and that the proviso: "that any individual employee or group of employees shall have the right at any time to present grievances to . . . their employer," was inserted in response to management requests for statutory protection against unfair labor practice charges in the likely event that they would continue to have grievance discussions with individuals or groups who had not chosen to join the authorized representative.\(^49\) You will have to forgive my cynicism, which is that of an NLRB Regional Attorney from 1935 to 1943, but I frankly do not believe that the proviso was drafted with predominant concern for so-called *individual rights*.

Furthermore, it does not appear upon review of the legislative history that Congress intended by section 9(a) to create a judicially enforceable right to press grievances *all the way* without union intervention or compromise. The 1935 references to *individual rights* appear to have been lip service to disguise the hope of friends of business that preservation of some consultation between the employer and individual employee would lead to elimination of collective bargaining itself.


\(^{49}\) *1 Legislative History of the Labor Management Relations Act* 780 (1948).
Upon review of the congressional hearings on the Taft-Hartley Act\textsuperscript{50} there is little evidence that Congress intended by amended section 9(a) to deny all bargaining representatives the power to compromise grievances. The emphasis in the debates appears to have revolved around the need to overrule NLRB decisions which had tolerated employee presentation of grievances, but had found 8(a)(5) violations if the employer consented to settlement.\textsuperscript{51} It is important that the legislative history be read with the realization that at the time of the hearings binding arbitration of grievances was less common. I believe the language of section 9(a), both in the 1935 and 1947 versions, was written to permit the employer and employee to confer without fear of or actually committing an 8(a)(5) violation. It is unrealistic to say that the legislators consciously intended to grant to the employee the power to compel arbitration. The legislative intent of section 9(a) was to permit and protect the employer who chose to settle grievances with an individual. It is reading too much into the debate to say Congress intended compulsory settlement of grievances under a contract whose language did not so provide.

Proponents of the \textit{Donnelly} and \textit{Ries} interpretation of section 9(a) often cite the exchange between Representatives Owens and Hartley during debate over Representative Lanham's proposal to strike from section 9(a) all provisions for individual employee-employer conferences and settlement:

Owens: Is it not a fact that under this provision we have gone in accord with the decisions of the Supreme Court of the United States which hold that where employees have a grievance, for instance, in connection with the recovery of a certain amount of money claimed due from an employer, they can go to him and complain about it and settle it without having a bargaining agent? We have not in this Section 9(a) of the bill said anything about wages, terms, or conditions of employment as stated by the gentleman from Georgia [Lanham] but we have specifically said it does not include the making of any settlement inconsistent with the terms of the collective bargaining agreement then ineffect, that is at the time of the settlement.

Hartley: The gentleman from Illinois [Owens] is absolutely correct in that statement.\textsuperscript{52}


\textsuperscript{52} 93 Cong. Rec. 3625 (1947).
The Lanham amendment was immediately defeated. It is argued that Owens was referring to the Burley decisions and that section 9(a) thus is a codification of the Railway Labor Act\textsuperscript{58} ruling that a bargaining representative may not legally compromise a grievance for a certain sum of money owed under the contract. Let me reserve comment on the Burley decisions for a moment; but before turning to other legislative history, I should merely say that the rule(s) of the Burley decisions were so vague and self-contradictory at the time of the 1947 debate that they provide very little content to Representative Owen's remark.

In an exchange between Representatives Brehm and Lanham which occurred slightly earlier in the debate on Lanham's amendment, Representative Lanham criticized the individual grievance provision (as it now stands) stating that it would help undermine the exclusive representative. Representative Brehm asked:

Could that not be taken care of in the collective bargaining agreement? In other words, the agency that was making the bargaining agreement would say that that could not be done, and then that groups could not do that. That could be put in the collective bargaining agreement.\textsuperscript{54}

Representative Lanham replied: "Of course it could, but if the employer did not agree, the employees would be without a remedy."\textsuperscript{55} In reading Representative Lanham's words fairly, I think we should interpret employees as meaning the majority who support the representative of the union, and who would be without a remedy against their employer dealing directly with individual employees.

Representative Hartley rose immediately to criticize the Lanham amendment itself, but he did not refute the view held by both Representatives Brehm and Lanham that under section 9(a) as written the employer and the union could draft the agreement so that the union would exercise ultimate authority over pressing and settling grievances.

In light of the fact that today employers are more concerned with the stable authority of a union which can legally compromise grievances, it is twisting history to say that Congress intended to forbid such contractual arrangements. It is important to remember that the debate on section 9(a) took place between management-oriented persons intent on saving management from 8(a)(5) violations and union-oriented persons fighting to maximize collective bargaining. It is anomalous to

\textsuperscript{54} 93 Cong. Rec. 3624 (1947).
\textsuperscript{55} Ibid.
interpret Representative Hartley's words as a directive to management that it must settle grievances with individuals or suffer possible suit or arbitration for failure to do so. If anything, the day's debate on the Lanham amendment shows that vocal representatives of both camps, Brehm for management and Lanham for unions, tolerated the then rarer phenomenon of contracts which gave the representative ultimate control over grievances.

The Place of the Burley Decisions in the Development of Grievance Suits by Individual Employees

I said earlier that the recent Michigan and New Jersey decisions drew upon the Burley decisions for precedent. And as previously stated, Representative Owens cited Burley with approval as support for section 9(a). When the Supreme Court finally answers the question of under what circumstances an employee does have standing to sue under section 301, the state courts' interpretation of the Burley decisions will be neither controlling nor persuasive. In Burley, employees who were members of an operating brotherhood alleged that they were entitled to cash penalties from the employer for instances of improper discharge. The contract clearly granted the penalties if the discharge was not properly conducted, but there was a serious question of contract interpretation as to whether the discharge provision applied to this particular category of employees at all. The employees' union had filed grievances covering the claim, but had compromised them with the employer in a larger settlement agreement which was part of a general resolution of outstanding questions between this union and this employer. Later, the individual plaintiffs refiled their claims, and these claims were processed through the statutorily provided Board of Adjustment.56 The Board decided that the union-employer settlement was res judicata and dismissed the claims. The Seventh Circuit reversed the district court's affirmation of the Board.57 Justice Rutledge wrote for a five-man majority of the Supreme Court which held that, although the authority of the union was broad for the purposes of negotiating agreements, the freedom of the individual was preserved in great measure by the scheme of the Railway Labor Act for the purposes of pressing and settling individual grievances. Justice Rutledge believed that the literal language of the Railway Labor Act and the entire scheme of that act prevented the union

57 Burley v. Elgin, J. & E. Ry., 140 F.2d 488 (7th Cir. 1944).
compromise of individual claims for money. Accordingly, the Supreme Court remanded for trial factual issues which could have resulted in a federal court hearing on the merits of the employees’ claims.

The holding of Burley I was extremely unpopular with railroad employers as well as brotherhoods, and within six months the Supreme Court heard reargument. Burley II reaffirmed Burley I, but in doing so left it vague and weak. Justice Rutledge’s opinion in Burley II centered on an agency problem, namely, whether the individual had authorized the brotherhood to compromise his grievance. In Burley I, he had found there was no such authority either: (1) in the contract because the statutory right to grieve would not be compromised by contract; (2) in the original filing of grievances through low-level brotherhood officials; (3) in the brotherhood constitution or regulations which were not clear and explicit on the point; or (4) in the fact that the employees authorized the brotherhood to submit and argue the claims before the Adjustment Board. The Burley II decision retreats to a re-examination of the facts of each case for evidence that the employee authorized settlement. The Court further stated in Burley II that it would look to custom in the industry when making its determinations. The Court said in view of the presumption that the brotherhood acts fairly in presenting and adjusting grievances, the unsatisfied grievant carries the burden of showing that it was wrong. Finally, the Court inferred that if the employee remains silent, although aware that the brotherhood is compromising his claim, the employee has acquiesced and will be foreclosed from upsetting the settlement.

Mr. Justice Frankfurter’s dissent in Burley I is a soundly reasoned, frontal assault upon the view that individual grievances cannot be compromised by the representative. I commend it to you with the prediction that it will influence the final outcome of the question at hand. In Burley II, Justice Frankfurter describes the havoc which Burley I caused in railroad labor relations in the following words:

The machinery set in motion by the Act was stopped by the opinion. Immediately after the Court’s decision of last Term, the two divisions of the Adjustment Board dealing with 94% of the cases under normal circumstances completely shut down. And when they were reopened, they functioned at only a fraction of their normal activity.

Finally, Mr. Justice Frankfurter states, quite correctly, that Mr. Justice Rutledge has restated the rule for upsetting a compromised grievance in

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59 Id. at 674 (dissenting opinion).
the form of an almost irrefutable presumption that the brotherhoods act fairly. Indeed, it appears that the majority for which Justice Rutledge writes in *Burley II* approached the traditional state law rule respecting employee suits to overturn compromised grievances.

**Conclusion**

Frankly, I do not believe that we should conclude that the *Burley* decisions settle the matter. In the first place, if *Burley* were the law of the case, I think Mr. Justice White would have invoked it in *Smith* rather than leaving the question of individual employee standing to sue open. Second, *Burley* was decided under a statute drafted quite strongly in favor of individual rights. Third, *Burley* was decided by a five-man majority over the vigorous dissent of Mr. Justice Frankfurter, who was supported by Chief Justice Stone as well as Justices Roberts and Jackson. In my opinion, Mr. Justice Frankfurter’s dissent persuasively argues that grievance settlement and contract negotiation are interrelated aspects of union responsibility and authority which cannot be divided by the courts without destroying the statutory scheme for the private creation and maintenance of labor contracts. Fourth, we should remember that the *Burley* decisions were decided at a time when individual employees and the public lacked the extensive statutory curbs on abuse of power by union representatives. Traditional state court relief was available in extreme cases of arbitrary union action, but individual grievants did not have the benefit of Sections 8(b)(1)(a) and 8(b)(2) of the NLRA,°° nor were unions under the strictures imposed by the Labor-Management Reporting and Disclosure Act of 1959.°¹

Finally, the *Burley* decisions have been further weakened by the


. . . There is hereby established a Board, to be known as the “National Railroad Adjustment Board,” the members of which shall be selected within thirty days after [enactment], and it is provided—. . . parties may be heard either in person, by counsel, or by other representatives, as they may respectively elect, and the several divisions of the Adjustment Board shall give due notice of all hearings to the employee or employees and the carrier or carriers involved in any disputes submitted to them . . . .


. . . Employees shall have the right to organize and bargain collectively through representatives of their own choosing . . . Provided, That nothing in this Act shall be construed to prohibit a carrier from permitting an employee, individually, or local representatives of employees from conferring with management during working hours without loss of time, or to prohibit a carrier from furnishing free transportation to its employees while engaged in the business of a labor organization . . . .

initiative of brotherhoods and unions in drafting their constitutions to require members to authorize the union to compromise grievances. If the individual's rights may be so freely compromised by majority rule inside the union, what is so shocking about achieving the same result through the collective bargaining agreement? I venture to say that the individual employee at a plant level has greater political opportunity to influence or protest contract negotiations than he does the processes of his union's national constitutional convention.

In closing, I suggest that courts and commentators today would do well to consider the classic analysis of this subject written by Archibald Cox in 1959. Permit me to paraphrase Cox's principles governing three contract situations:

1. If a contract explicitly gives the right to grieve and arbitrate exclusively to the union, the court should respect that decision.
2. Absent manifest contrary intent, the court should interpret an ambiguous grievance and arbitration procedure as being strictly enforceable by the union and the company.
3. If there is no grievance machinery at all, let the union sue on matters which run to the union and let the employees sue on uniquely personal rights arising from individual contracts with the employer.

It is evident that under the principle governing the third situation, courts will face hairline choices of who has the primary interest, union or employee? Indeed, it can be said that adjudication of almost any employee grievance has an impact on the contract and its application to the bargaining relationship in the future. There is an obvious advantage to confining the difficult choice to the relatively uncommon third situation. Others may try to erect standards for differentiating between that which is primarily for the union and that which is primarily for the employee. I submit that the litigation process of doing so will continually upset stable collective bargaining relationships. Others may seek to enhance individual employees' rights by this unsettling process. Instead, I find agreement with Solicitor General Cox's statement:

[T]he interests of the individual will be better protected on the whole by first according legal recognition to the group interest in contract administration and then strengthening the representative's awareness of its moral and legal obligations

63 Id. at 619.
to represent all employees fairly than by excluding the union in favor of an individual cause of action.\textsuperscript{64}

In the interest of stability and true employee rights we should urge the courts in this formative period of law under section 301 to reject the aberrations of the \textit{Donnelly}, \textit{Ries} and \textit{Pennington} decisions, in favor of exclusive union power over ultimate stages in grievance procedures to be exercised as a trust.

\textsuperscript{64} Id. at 657.
JURISDICTIONAL DISPUTES IN THE
CONSTRUCTION INDUSTRY
SINCE CBS

MARTIN F. O'DONOGHUE*

INTRODUCTION

In January 1961, the Supreme Court issued its decision in NLRB v. Radio & Television Broadcast Eng'rs (CBS), 1 which reversed, finally and absolutely, the policy followed by the National Labor Relations Board since the passage of Taft-Hartley 2 in handling jurisdictional disputes. CBS established that the Board must make affirmative work assignment determinations in section 10(k) proceedings. 3 Prior to CBS, the Board tenaciously followed the position taken in its earlier decisions 4

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3 364 U.S. at 579, 586. Section 10(k) of the National Labor Relations Act [hereinafter cited as NLRA] provides:

Whenever it is charged that any person has engaged in an unfair labor practice within the meaning of paragraph (4)(D) of section 8(b), the Board is empowered and directed to hear and determine the dispute out of which such unfair labor practice shall have arisen, unless, within ten days after notice that such charge has been filed, 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. Upon compliance by the parties to the dispute with the decision of the Board or upon such voluntary adjustment of the dispute, such charge shall be dismissed.


Section 8(b)(4)(D) of the NLRA provides:

It shall be an unfair labor practice for a labor organization or its agents . . . (i) to engage in, or to induce or encourage any individual employed by any person engaged in commerce or in an industry affecting commerce to engage in, a strike or a refusal in the course of his employment to use, manufacture, process, transport, or otherwise handle or work on any goods, articles, materials, or commodities or to perform any services; or (ii) to threaten, coerce, or restrain any person engaged in commerce or in an industry affecting commerce, where in either case an object thereof is . . . (D) forcing or requiring 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:

4 International Longshoremen's Union, 82 N.L.R.B. 650 (1949) (Juneau Spruce Corp.); Lodge 68, Int'l Ass'n of Machinists, 81 N.L.R.B. 1108 (1949) (Moore Dry Dock Co.).

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that it would not make affirmative work assignment determinations in section 10(k) proceedings, but would only determine whether the striking union or group was entitled to have the work assigned to it by means of either a Board order or certification or a collective bargaining agreement.\(^5\) Absent a Board certification or a provision in a collective bargaining agreement, the employer's assignment was not disturbed, although the Board was careful to point out that its "decision" was not to be construed to mean that it was awarding the work to the employees to whom the employer made his assignment.\(^6\)

Although several circuit courts\(^7\) refused to enforce section 10(c)\(^8\) cease and desist orders rendered in section 8(b)(4)(D) unfair labor practice proceedings after a union refused to comply with the Board's earlier section 10(k) determination, the Board was unpersuaded that its interpretation of section 10(k) was erroneous.\(^9\) The Board was not without sound arguments to support its position,\(^10\) and in CBS it presented many legal and practical problems\(^11\) which would be encountered

\(^5\) Local 675, Int'l Union of Operating Eng'rs, 116 N.L.R.B. 27, 38 n.10 (1956) (Port Everglades Terminal Co.).


\(^7\) NLRB v. Radio & Television Broadcast Eng'rs, 272 F.2d 713 (2d Cir. 1959), aff'd, 364 U.S. 573 (1961); NLRB v. United Bhd. of Carpenters, 261 F.2d 166 (7th Cir. 1958); NLRB v. United Ass'n of Journeymen & Apprentices of the Plumbing Indus., 242 F.2d 722 (3d Cir. 1957). Only one circuit agreed with the Board's interpretation of § 10(k). NLRB v. Local 450, Int'l Union of Operating Eng'rs, 275 F.2d 408 (5th Cir. 1960).


\(^9\) Local 173, Wood, Wire & Metal Lathers' Union, 121 N.L.R.B. 1094, 1107-08 (1958) (Newark & Essex Plastering Co.).

\(^10\) Id. at 1108-13. The Board contended that congressional intent in enacting §§ 8(b)(4)(D) and 10(k) would not be realized by the Board's determination of affirmative work assignments, because such determination: (1) would infringe on the employer's right to select his employees and make work assignments; (2) would be discriminatory in violation of § 8(a)(3) in cases where the union had no representation rights; and (3) would encourage jurisdictional strikes in order for the union to take advantage of a § 10(k) proceeding. The Board indicated that its position had thus far achieved satisfactory results.

\(^11\) 364 U.S. at 582-85. The Court answered the Board's contentions, note 10 supra, as follows: (1) The fact that § 10(k) sets forth no standards to guide the Board in determining jurisdictional disputes and the fact that § 8(b)(4)(D) makes the employer's assignment decisive unless he is violating a Board order or certification does not mean that the Board would infringe any right of the employer by making affirmative work assignments. Experience and common sense should guide the Board; (2) The Court expressed confidence in the Board's ability to settle disputes consistent with the provisions of the act; (3) The
if it were to make affirmative work assignments in jurisdictional disputes. The Supreme Court, however, expressed confidence that the Board in its expertise could, consistent with the purposes of the act, work out the problems.¹²

Since CBS, the Board has made approximately fifty-nine awards and quashed the notice of hearing in eighteen section 10(k) cases.¹³ This article does not purport to cover all the problems confronting the Board in its new role of arbiter, but will be concerned mainly with an evaluation of criteria used by the Board in making its awards in the construction industry. The criteria used by the Board in 10(k) cases since CBS will be compared with the criteria used by the National Joint Board for the Settlement of Jurisdictional Disputes in the Construction Industry. In addition, the article will treat the private settlement exception in 10(k) and the interrelationship between sections 8(b)(4)(B) and 8(b)(4)(D).¹⁴

BACKGROUND

Jurisdictional disputes, broadly speaking, can be of two types: some result from conflicting claims of two unions to the representation of the same employee group; while others arise from conflicting claims of two employee groups over the same work assignment.¹⁵ Congress, in debating

Court said that whether jurisdictional strikes would be encouraged or not, it is a policy determination implicitly settled by Congress when it enacted § 10(k). In answer to the Board’s further contention that its construction of § 10(k) has now become a part of the act since it has been consistently adhered to, the Court said that, while this would generally be true, not so in this situation since it is an administrative construction which has constantly been rejected by courts of appeals, and also because a regulation of the Board which was in effect from 1947-1958 could reasonably be interpreted as inconsistent with the Board’s position.

¹² Id. at 583-84.
¹³ Figures obtained from the statistical office of the NLRB for decisions rendered through December 31, 1963.
¹⁴ Since the scope of this article is limited, there are naturally many problems involving jurisdictional disputes which will not be covered here, such as the effect of a 10(k) award on charges under §§ 8(a)(3) and 8(b)(2) and the harmonious interpretation of § 8(b)(4)(D) and § 303. Many of these problems are discussed in the Supreme Court’s opinion in CBS, and in Farmer & Powers, The Role of the National Labor Relations Board in Resolving Jurisdictional Disputes, 46 Va. L. Rev. 660 (1960). For a comprehensive insight into the practical aspects of jurisdictional disputes, see Dunlop, Jurisdictional Disputes, N.Y.U. Second Annual Conference on Labor 477 (1949); Note, The NLRB as Arbiter of Work Assignment Disputes Under 10(k), 50 Georgetown L.J. 121 (1960).
the proposed section 10(k), referred to both types, but it is clear that its basic concern was with the work assignment dispute. These disputes, termed "indefensible" by President Truman, caused costly and wasteful jurisdictional strikes which resulted in the enactment by Congress in 1947 of sections 8(b)(4)(D) and 10(k).

Although there was considerable debate in Congress as to the best means of dealing with jurisdictional strikes, and several proposals were presented, including one granting the employer the right to seek a private injunction, there was no dispute as to the need for some form of regulation. In fact, the minority report of the Senate Labor and Public Welfare Committee, while criticizing other sections of S. 1126, approved the proposed section 10(k). Particularly appealing to the minority was the provision encouraging quarreling unions to settle their jurisdictional disputes privately before the government intervened to settle the dispute for them.

Jurisdictional disputes have been a thorn in the side of labor since the beginning of this century, and prior to 1947 many methods were devised within the labor movement for private settlement. Beginning with the formation in 1897 of the National Building Trades Council, the forerunner to the present Building Trades Department of the AFL-CIO, attempts were made by the building trades unions to settle jurisdictional disputes. During World War I, the National Board for Jurisdictional

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18 93 Cong. Rec. 136 (1947) (address of President Truman).
19 2 Legislative History 1058 (remarks of Senator Ellender).
21 1 Legislative History 463, 480.
22 Id. at 480-81.
23 Dunlop, supra note 14, at 494 (1949); Haber & Levinson, Labor Relations and Productivity in the Building Trades 234 (1960); Rains, Jurisdictional-Dispute Settlements in the Building Trades, 8 Lab. L.J. 385 (1957).
24 Strand, Jurisdictional Disputes in Construction: The Causes, The Joint Board, and the NLRB 61 (1960). Later attempts included the Structural Building Trades Alliance formed in 1904 but, like its predecessor, this also failed because of internal weakness, lack of enforcement powers and pressure for the formation of a building trades department within the AFL. The Building Trades Department was formed in 1908, but its efforts to settle jurisdictional disputes were less than successful for generally the same reasons which destroyed the prior plan. Id. at 62-63.
Awards was established. This was the first national joint body composed of representatives of construction unions and employer groups.\textsuperscript{25} Although this Board eventually failed, it rendered many decisions settling long-standing controversies in its seven years of existence.\textsuperscript{26} Several other methods were later tried, including a referee system in the 1930's,\textsuperscript{27} but none was as effective as the present National Joint Board for the Settlement of Jurisdictional Disputes which was initiated in 1949.\textsuperscript{28} From this short summary, it is apparent why the 1947 Congress felt that labor had not succeeded in abating the jurisdictional warfare between its unions, and that the injurious effects such disputes had upon employers and the public demanded relief.\textsuperscript{29}

To remedy this situation, Congress attempted to establish a workable procedure for settling jurisdictional disputes, or at least confining the effects of such a dispute to the parties involved. Sections 10(k) and 8(b)(4)(D) were dovetailed to require a determination under the former when a charge was filed under the latter, unless the parties had agreed on a settlement or method of settlement of the underlying dispute.\textsuperscript{30} Despite the clear language of section 10(k), providing that the Board is "empowered and directed to hear and determine the dispute out of which such unfair labor practice shall have arisen," the Board, as pointed out earlier, did not interpret its function as requiring an affirmative award in section 10(k) proceedings.\textsuperscript{31}

The Board members were not in complete agreement as to what section 10(k) required, and, in fact, there were some very strong dissenters, particularly Member Murdock, who insisted that 10(k) was

\begin{itemize}
  \item \textsuperscript{25} Id. at 64. A few joint groups were established to settle jurisdictional disputes locally. The joint board in New York City has operated successfully for over fifty years. See also Rains, supra note 23, at 388.
  \item \textsuperscript{26} Strand, op. cit. supra note 24, at 65.
  \item \textsuperscript{27} Id. at 67, 68. See also Dunlop, supra note 14, at 494-95.
  \item \textsuperscript{28} Plan for settling Jurisdictional Disputes Nationally and Locally (1958) [hereinafter cited as Green Book].
  \item \textsuperscript{29} 2 Legislative History 1012 (remarks of Senator Taft); 1 Legislative History 583 (remarks of Representative Landis).
  \item \textsuperscript{30} The Board does not automatically hold a § 10(k) hearing when an 8(b)(4)(D) charge is filed, but does so only if it finds reasonable cause to believe a violation of § 8(b)(4)(D) has been committed. International Union of Operating Eng'rs, 137 N.L.R.B. 1746 (1962) (E. C. Ernst, Inc.); Local 9, Int'l Bhd. of Elec. Workers, 128 N.L.R.B. 899 (1960) (G. A. Rafel & Co.); Local 562, United Ass'n of Journeymen & Apprentices of the Plumbing Indus., 124 N.L.R.B. 1125 (1959) (General Refrigeration Serv. Co.).
  \item \textsuperscript{31} NLRB v. United Ass'n of Journeymen & Apprentices of the Plumbing Indus., 242 F.2d 722, 724 (3d Cir. 1957).
\end{itemize}
useless unless the Board made affirmative assignments as, he argued, Congress intended.\(^2\)

While the Board refused to accept the role Congress intended for it in section 10(k), it was fully aware of the role of 10(k) in the statutory scheme and expressed it with lucidity in *Local 595, Int'l Ass'n of Iron Workers (Bechtel Corp.)*:

> [When] an 8(b)(4)(D) charge [is filed], Section 10(k) interposes an intermediate formal step between the completion of investigation of the charge and the issuance of a complaint based thereon. It provides for a hearing and a declaratory ruling by the Board on the question of legal entitlement to force or require the work assignments involved in the underlying dispute, which is designed to facilitate settlement of the dispute and to obviate the need for further proceedings. If the 10(k) procedure has failed to produce a settlement or acceptance by the parties of the Board's determination of the underlying dispute, then the further proceedings—the issuance of a complaint based on the charge followed by the traditional procedure for determination and redress of all unfair labor practices—are spelled out in Section 10(b), not 10(k).\(^3\)

After enactment of Taft-Hartley, the building trades unions, in conjunction with employer groups, set up the original National Joint Board for the Settlement of Jurisdictional Disputes in an attempt to establish effective machinery for the private settlement of such disputes.\(^4\) This move followed the encouragement of Congress, as expressed in section 10(k)\(^5\) and the thinking and approval of the Board\(^6\) itself which, from the beginning, was reluctant to enter this labyrinth of Crete.\(^7\)

\(^2\) International Longshoremen's Union, 82 N.L.R.B. 650, 660 (1949) (Juneau Spruce Corp.) (dissenting opinion); Lodge 68, Int'l Ass'n of Machinists, 81 N.L.R.B. 1108, 1120 (1949) (Moore Dry Dock Co.) (dissenting opinion).

\(^3\) 112 N.L.R.B. 812, 814 (1955).

\(^4\) Dunlop, supra note 14, at 496.

\(^5\) The Joint Congressional Committee on Labor-Management Relations approved the institution of the Joint Board as an effort to effectuate the legislative intent of stimulating the establishment of voluntary procedures to settle jurisdictional disputes. Report of Joint Comm. on Labor-Management Relations, § 401, 80th Cong., 2d Sess., Part I, at 19 (1948).


\(^7\) We frankly do not want to be plunged into the new field [of jurisdictional disputes] that is strange territory to us, in which we would be compelled to become experts almost overnight, but we will do it if we must. The alternative is for you of the industry to fence us off from the field by a program of this character. [Establishment of Joint Board].

Address by Robert N. Denham, General Counsel, National Labor Relations Board, delivered before the Associated General Contractors, Dallas, Texas, February 11, 1948. Printed in 21
The original Joint Board, more commonly called the Board of Trustees, was created in 1948, but it soon became mired in problems which need not be considered here, and expired after one year.\textsuperscript{38} Soon thereafter, however, in October 1949, the present National Joint Board for the Settlement of Jurisdictional Disputes was established. Though some of the building trades wanted to exclude the employers, fear that they would take disputes to the NLRB if excluded led to the establishment of a joint body similar to its predecessor.\textsuperscript{39} The Joint Board has been functioning as a continuous body, rendering hundreds of job decisions yearly and providing an effective procedure for the settlement of jurisdictional disputes.\textsuperscript{40}

The Joint Board will be considered in more detail later, but this thumbnail sketch brings us up to the Supreme Court's decision in CBS in 1961. That case involved a work assignment dispute between two unions, both of whose members were employed by the Columbia Broadcasting System, over which group was to perform certain remote lighting work for the employer. The employer was neutral.\textsuperscript{41} It did not care which group performed the work and attempted, unsuccessfully, to satisfy both unions. When the technicians struck because the remote lighting was assigned to the stage hands, the employer filed an 8(b)(4)(D) charge against the technicians. The Board, in following its usual procedure, held a 10(k) hearing and found that the striking union was not entitled to have the work assigned to its members under an outstanding Board order or certification or a collective bargaining agreement.\textsuperscript{42} The striking union failed to comply with that decision, and the Board then found a violation of section 8(b)(4)(D).\textsuperscript{43} The Second Circuit refused enforcement,\textsuperscript{44} and the Board sought review in the Supreme Court.

Perhaps it is unfortunate that the Court was presented with this factual situation upon which to decide the meaning of section 10(k) because an employer is not necessarily a neutral party unconcerned with which

L.R.R.M. 44-52, at 51 (1948). See also address by Paul M. Herzog, Chairman of the National Labor Relations Board, before the American Management Association in New York City, October 12, 1947. Printed in 20 L.R.R.M. 97-103 (1947).

\textsuperscript{38} See Strand, op. cit. supra note 24, at 93.

\textsuperscript{39} Id. at 93-94.

\textsuperscript{40} See Note, supra note 14, at 154. See also Strand, op. cit. supra note 24, at 99.

\textsuperscript{41} 364 U.S. at 573.

\textsuperscript{42} 119 N.L.R.B. 594, 597 (1957).

\textsuperscript{43} 121 N.L.R.B. 1207 (1958).

\textsuperscript{44} 272 F.2d 713 (2d Cir. 1959).
group performs the work, nor is it common in the construction industry to have both groups employed by the same employer quarreling over the assignment of work. However, the Board has held the language of the Supreme Court to be broad enough to cover situations beyond the breadth of the facts in CBS. The Court, of course, rejected all the arguments upon which the Board had been relying for the past fourteen years and expressed confidence that the Board could make affirmative 10(k) awards drawing upon the standards used by "arbitrators, employers, joint boards, and others in wrestling with this problem," as well as "experience and common sense."

**Evaluation of Board Criteria**

The Board, in one of the first 10(k) cases decided after CBS, stated that each 10(k) case would have to be decided on its own facts. Listing some factors it would generally consider as relevant, the Board warned that criteria and relative weight would vary from case to case. True to its word, the relative weight accorded by the Board to some criteria has run the full gamut from considerations significant and persuasive in one case to complete disregard in another. While it may be difficult

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47 See International Alliance of Theatrical Stage Employees, 137 N.L.R.B. 738 (1962) (Allied Maintenance Co.). See also United Ass'n of Journeymen & Apprentices of the Plumbing Indus., 144 N.L.R.B. No. 12 (1963) (Matt J. Zaich Constr. Co.).

48 363 U.S. at 583; cf. dissent of Member Murdock in International Longshoremen's Union, 82 N.L.R.B. 650, 660 (1949) (Juneau Spruce Corp.), where, in one of the first 10(k) cases decided by the Board, he suggested that the Board use the same criteria as that indicated by the Supreme Court thirteen years later.

49 International Ass'n of Machinists, 135 N.L.R.B. 1402 (1962) (J. A. Jones Constr. Co.).

50 The Board will consider all relevant factors in determining who is entitled to the work in dispute, e.g., the skills and work involved, certifications by the Board, company and industry practice, agreements between unions and between employers and unions, awards of arbitrators, joint boards, and the AFL-CIO in the same or related cases, the assignment made by the employer, and the efficient operation of the employer's business. This list of factors is not meant to be exclusive, but is by way of illustration.

Id. at 1410-11.

51 Compare Local 964, United Bhd. of Carpenters, 141 N.L.R.B. No. 101 (1963) (Carleton
to predict the criteria to be used and relied on by the Board in a 10(k) case, realistically the end result is a foregone conclusion—the employer's assignment will be affirmed. This has been the result in all but five of the fifty-five cases in which awards have been made by the Board since CBS.53

Of course, this result may be coincidental, but a comparison of the Board's record with that of private bodies established to settle jurisdictional disputes, such as the Joint Board in the construction industry, militates against such a conclusion. A random sampling of three months' decisions of the Joint Board has revealed that out of 113 cases considered, the employers' assignments were affirmed in only eight cases.54 In some cases, the disputes were disposed of by other means,55 but in at least ninety per cent of all cases considered by the Joint Board, the employers' assignments were reversed in whole or in part.

Such wide disparity in the results of these two bodies raises the question as to whether the NLRB is following the Supreme Court's mandate in CBS to utilize the criteria considered by arbitrators, joint boards, unions, experience and common sense.56

The NLRB has used, at various times in 10(k) cases, such criteria


53 In three cases members of the Board dissented from the majority's affirmation of the employer's assignment: Philadelphia Typographical Union, 142 N.L.R.B. No. 1 (1963) (Philadelphia Inquirer) (Members Leedom and Brown); General Teamsters Union, 137 N.L.R.B. 1473 (1962) (Snowhite Baking Co.) (Member Fanning); Local 991, Int'l Longshoremen's Ass'n, 137 N.L.R.B. 750 (1962) (Union Caribde Chem. Co.) (Member Brown).

54 Compiled from a review of the April, August and September 1963 weekly reports of the meetings of the Joint Board.

55 Action may be taken which is not considered a job decision, or a request for more information may be made.

56 364 U.S. at 583.
as collective bargaining agreements, agreements between unions, company practices, the employer's assignment, skills, efficiency, apprenticeship training, decisions of the AFL-CIO, and economy.

While one cannot be overly critical of the criteria used by the Board on the whole, certain factors appear to be given too much weight, either implicitly or explicitly, and other factors are ignored which should be given weight.

On the other hand, the Joint Board's criteria is quite narrow, easily identifiable, and more practical for employers and the unions in the settling of jurisdictional disputes. When a case comes before the Joint Board, it is first determined whether or not the dispute is covered by a decision of record or an agreement of record, or by a national agreement between the disputing trades. A decision of record is a decision rendered by a National Referee, appointed by the Building Trades Department, to settle a dispute between two affiliates, or decisions of the AFL Convention. These decisions are binding upon all affiliates of the Building Trades Department, even though they were not parties to the case giving rise to the decision. These decisions are preserved in what is known as the Green Book. Agreements of record, also in the Green Book, are agreements

57 Local 853, Int'l Union of Operating Eng'rs, 136 N.L.R.B. 993, 998-99 (1962) (Schiavone & Sons, Inc.).
60 Local 825, Int'l Union of Operating Eng'rs, 137 N.L.R.B. 1425, 1434 (1962) (Nichols Elec. Co.).
61 Bricklayers Int'l Union, 144 N.L.R.B. No. 119, at 5 (1963) (Engineered Bldg. Specialties, Inc.).
62 Local 45, Int'l Ass'n of Bridge Workers, 141 N.L.R.B. No. 115, at 5 (1963) (Kaiser-Nelson Steel & Salvage Corp.).
66 The Board refuses to recognize the property right concept of craft unions. See Local 173, Wood, Wire & Metal Lathers' Union, 121 N.L.R.B. 1094 (1958) (Newark & Essex Plastering Co.).
68 Id. at 11.
69 Id. at 4.
70 Note 28 supra.
reached by two affiliates and approved by the Department, but are only binding upon the trades signatory to the agreement. National agreements are similar to agreements of record except that they are not approved by the Department, and have generally been negotiated during the life of the Joint Board by two disputing trades and attested to by the Chairman of the Joint Board.72

If there are no decisions of record or agreements covering the disputed work, the Joint Board makes its decision upon the basis of established trade or area practice.73 Generally, all of its decisions are job decisions, applicable only to the job in question, but the Joint Board is empowered to make national and area decisions.74 This authority is rarely invoked.75

EXCLUSIVE CRAFT JURISDICTION

By recognizing the pre-eminence of chartered trade jurisdiction or craft jurisdiction inherent in the decisions of record and agreements of record, the Joint Board gives effect to the property concept or job ownership concept of each craft.76 The NLRB, however, has rejected this concept, on the theory that it would be incompatible with its quasi-judicial status, since the concept is actually based on union ownership of jurisdiction.77 While certainly the organized trades are the exponents and defenders of the property concept, nevertheless in many nonunion contracting firms in the building and construction industry, the property concept is followed and craft lines basically maintained.78 The reason for the Board’s failure to utilize this property concept or job ownership or exclusive jurisdiction concept is actually a failure to appreciate fully the unique characteristics of the construction industry.79

72 Id. at 2. See also Strand, op. cit. supra note 24, at 100.
73 Procedural Rules 11.
74 Procedural Rules 14-16.
75 Note, The NLRB as Arbiter of Work Assignment Disputes Under 10(k), 50 Georgetown L.J. 121, 147 (1961).
77 Local 173, Wood, Wire & Metal Lathers’ Union, 121 N.L.R.B. 1094 (1958) (Newark & Essex Plastering Co.).
79 Congress, in the passage of the amendments to the Taft-Hartley Act in 1959, recognized the unique character of the construction industry by including an exemption in § 8(e) for the construction industry and by adding § 8(f) to the act. 73 Stat. 543, 545 (1959), 29 U.S.C. §§ 158(e), (f) (Supp. IV, 1963). Ironically, the Board itself, for many years, refused to take
Many of the agreements and decisions of record, based on their charter trade jurisdiction, antedate the existence of the Labor Board by as much as thirty years. Historical rights, adhered to by all parties through the years, should be entitled to great weight by even "quasi-judicial bodies" especially when their application carries out the congressional intent of eliminating jurisdictional strife. The origin of this concept of exclusive trade jurisdiction was explained by Nathaniel R. Whitney in his book, *Jurisdiction of American Building Trades Unions*, as follows:

Men who had devoted years of time and effort to acquiring a knowledge of a particular trade felt that they had a property right in the trade, and gradually the unions, with increase in membership and growth of power, came to feel that they represented the sum of these individual interests, and that they were entitled to full control of the craft. A corollary of this proposition was the principle that no other association would be permitted in the trade, or in other words, that each union was to have exclusive jurisdiction.

Whitney further explains the concept of job ownership:

A second important reason for insisting that each union keep to its own trade is found in the inheritance of the union to the doctrine of "vested interest." ... Members of a union feel that having devoted years to the acquirement of skill in a certain trade and having spent energy and perhaps money in improving the conditions of work in that trade, they have a certain accumulation or investment in it which justifies them in resisting any attempt made by an outsider to encroach upon it.

Recognizing the fact that suitable labor relations could only be achieved by recognizing the right of one and only one union to have exclusive trade jurisdiction, the AFL, in 1900, amended its constitution to provide that no charter could be granted to a national or international union jurisdiction over the construction industry because of its unusual nature. See Brown & Root, Inc., 51 N.L.R.B. 820 (1943). See also Dunlop, Jurisdictional Disputes, N.Y.U. Second Annual Conference on Labor 477 (1949).

80 See, e.g., Decision of AFL regarding Elevator Constructors' (1904), Green Book 74; Decision of AFL regarding Jurisdiction of Engineers (1907), Green Book 76; Agreement Between Boiler Makers and Iron Workers (1926), Green Book 18.

81 Since CBS, the Board, as stated earlier, has given consideration to a greater or lesser degree to agreements between unions and to decisions of the parent federation, Local 68, Wood, Wire & Metal Lathers Union, 142 N.L.R.B. No. 101 (1963) (Acoustics & Specialties, Inc.), and International Ass'n of Machinists, 135 N.L.R.B. 1402 (1962) (J. A. Jones Constr. Co.), but has rejected the property concept of craft jurisdiction. See Enterprise Ass'n of Steam Pipefitters, 136 N.L.R.B. 1641 (1962) (All-Boro Air Conditioning Corp.).

“without a positive and clear definition of the trade jurisdiction claimed by the applicant, and the charter shall not be granted if the jurisdiction claimed is a trespass on the jurisdiction of existing affiliated unions, without the written consent of such union [sic].” Ignoring the property right or job ownership concept, particularly in the construction industry, can only result in increased jurisdictional warfare.

OTHER CRITERIA

Generally, the NLRB, consistent with the practice of the Joint Board, and its own practice prior to CBS, has given little weight to collective bargaining agreements unless they were clear and unambiguous. In the construction industry, because of overlapping jurisdictional claims, and the fact that many unions incorporate by reference in collective bargaining agreements the jurisdictional claims contained in their constitutions, the Joint Board ignores such self-serving declarations. Any other procedure would thwart its effectiveness.

The Labor Board has generally ignored constitutional claims of the various unions for the same reasons, and properly so, but in International Union of Operating Eng'rs (Frank P. Badolato & Son), it erroneously equated constitutional claims with jurisdictional grants of the AFL. In some cases there is no basis for the former, whereas the latter is an express grant from the AFL over certain types of work.

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84 See Note, 73 Harv. L. Rev. 1150, 1164 (1960); Brief for the Joint Board as Amicus Curiae, in Wood, Wire & Metal Lathers Union, 119 N.L.R.B. 1345 (1958) (Acoustical Contractors Ass'n); Brief for the Joint Board as Amicus Curiae, in Local 9, Wood, Wire & Metal Lathers Union, 113 N.L.R.B. 947 (1955) (A. W. Lee, Inc.).

85 International Longshoremen's Ass'n, 116 N.L.R.B. 1533 (1956) (Abraham Kaplan); Local 675, Int'l Union of Operating Eng'rs, 116 N.L.R.B. 27 (1956) (Port Everglades Terminal Co.).


88 Local 964, United Bhd. of Carpenters, 141 N.L.R.B. No. 101 (1963) (Carleton Bros.); Local 825, Int'l Union of Operating Eng'rs, 139 N.L.R.B. 1426 (1962) (Schwerman Co.).

89 135 N.L.R.B. 1392, 1398 (1962).

90 The AFL-CIO constitution provides that a charter will not be granted to a union if its claimed jurisdiction trespasses upon an affiliate's jurisdiction. AFL-CIO, Const., art. III, § 7 (1961). The substance of the current provision was adopted by the AFL at its
In several cases, the Board has been persuaded by the employer's appeal that one of two disputing crafts could perform the work more efficiently, but it has also rejected such appeals while apparently conceding their validity. While the Board stated in *Local 46, Wood, Wire & Metal Lathers Union (Precrete, Inc.)* that it would not consider wage rates of the two competing trades as the sole factor in determining jurisdictional disputes but would consider that and economy of operation along with other criteria, the comparative wage rate appears to be lurking in the shadows of many of the Board's decisions as a significant, if unexpressed, factor. There are many minor jobs of any skilled craft that can be done by lesser skilled tradesmen at a lower wage rate, such as handling certain material, but a craft does not consist only of men utilizing their ultimate skill at all times. Two highly respected scholars in the field of labor law, in explaining this principle, stated:

Also related to the competence of the workers—in a sense, the converse of it—is the question of the degree of skill required for the task in dispute. In many cases, disputed tasks, like the placing of rods in reinforced concrete, do not require a high degree of skill. Should the task be assigned to the union whose workers are in general less skilled? There is a degree of logical appeal in the suggestion that it should. But we think the appeal is deceptive. Most skilled work involves some operations that can be isolated and performed relatively easily. There appears to be no good reason why the settlement of work assignment disputes should become a factor in determining the extent to which jobs are to be thus broken down. Other criteria having more practical relevance to the

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1900 Louisville Convention. See Report of Proceedings, 1900 Convention, AFL, art. IX, § 11. The effect of this provision is that the constitutional claims of a union are in reality approved when it becomes an affiliate but there is no provision in the constitution of the AFL-CIO requiring approval of amendments to constitutions of affiliates, so that a union, once it becomes affiliated, may broaden its jurisdictional claims with impunity.


92 Local 499, Int'l Bhd. of Elec. Workers, 144 N.L.R.B. No. 80 (1963) (Iowa Power & Light Co.). "The Company asserts that it would be more efficient to have pipefitters perform the interference work . . . [but we find] it is more equitable and logical to use regular maintenance employees for interference work." Id. at 6.


94 See, e.g., Glazers Local 1778, Bhd. of Painters, 137 N.L.R.B. 975 (1962) (Manhattan Constr. Co.); Enterprise Ass'n of Steam Pipefitters, 136 N.L.R.B. 1641 (1962) (All-Boro Air Conditioning Corp.). Utilizing this criterion can only foment jurisdictional disputes. Dunlop, supra note 79, at 485.

95 Dunlop, supra note 79, at 485; Haber & Levinson, Labor Relations and Productivity in the Building Trades 33 (1960).
problem, such as productive efficiencies, will, we think, take account of this element when it is appropriate.96

Professors Hyman and Jaffe recognized that section 10(k) in Taft-Hartley would breed only "bitter resistance and antagonism" if its provisions were utilized to beat down wage scales. It would appear that awarding less skilled work to a craft because, inter alia, it had a lower wage rate is inherently inconsistent with the mandate to settle and determine jurisdictional disputes. Yet the Board continues to use lower wage rates as an independent criteria in adjudication of work disputes. Again, Professors Hyman and Jaffe have this to say concerning the use of lower wages as a basis for awarding work to one craft in a work assignment dispute:

Dangerous ground is reached with the question of to what extent, if at all, the relative rates of pay established in the competing crafts should be considered in awarding the disputed task. Naturally, employers are going to prefer the work to be awarded to the craft having the lower wage scale. Because of this preference, the recognition of wage scales as an independent criterion would be highly likely to encourage unions with lower wage scales to extend their jurisdictional claims. Under the new regime this tendency will not be repressed by the fact, heretofore important, that the higher wage crafts, being the more skilled, were generally the more powerful and less able to resist adverse awards. If the new methods for relieving the public of the burden of jurisdictional disputes are not to breed bitter resistance and antagonism, they had better not become a device for beating down wage scales. And it seems most probable that this possibility can be avoided only by refusing to make relative wage rates an independent criterion in the adjudication of work disputes.97

The Joint Board does not utilize the criteria of efficiency, economy or wage rates, as such, in reaching its determinations,98 but undoubtedly efficiency and economy may many times be inherent in the area practice upon which their decisions may be based.

The NLRB has generally ignored Joint Board determinations involving the same or related work to that involved in the 10(k) cases.99 In fact,

97 Ibid. In a very recent decision, the Board expressly gave extensive weight to the relative wage rates of two trades, pointing out that there was a one dollar difference per hour between the use of laborers to perform cement rubbing work and the use of cement masons to perform the same work. See Cement Masons Local 694, 144 N.L.R.B. No. 122 (1963) (Edgar H. Hughes Co.).
the Board has held that the existence of an overwhelming number of Joint Board decisions in favor of one craft does not really support that craft's claim to the work but indicates only that the dispute has been long standing and widespread.\textsuperscript{100} Regardless of whether the final outcome in the decisions rendered by the Labor Board are fair and equitable on the facts, it is submitted that the Joint Board decisions should be accorded more weight by the Labor Board.\textsuperscript{101} Otherwise, employers and unions will be encouraged to ignore or withdraw from private arbitration bodies, where they may feel their chances of prevailing are slim, to seek the alternative forum of the NLRB.\textsuperscript{102} Such a result conflicts with the congressional intent.\textsuperscript{103} By providing a voluntary adjustment procedure in section 10(k), Congress was trying to encourage parties to a dispute to settle their differences. Moreover, the NLRB itself must encourage private settlement, or the provision is meaningless.\textsuperscript{104}

\textbf{JOINT BOARD PROCEDURE}

Perhaps if the Joint Board's fact-finding processes were more complete, the Labor Board would be in a better position to afford greater weight

\textsuperscript{100} Local 11, United Bhd. of Carpenters, 142 N.L.R.B. No. 22 (1963) (Berti Co.); Local 964, United Bhd. of Carpenters, 141 N.L.R.B. No. 101 (1963) (Carleton Bros.); United Bhd. of Carpenters, 139 N.L.R.B. 591 (1962) (O. R. Karst).

\textsuperscript{101} It must be remembered also that the members of the Joint Board are experts in the construction industry, and for fourteen years have been most successful in settling jurisdictional disputes. See Report of Joint Board 5 (1961); Note, supra note 75, at 153-54 (1961).

\textsuperscript{102} After CBS, but before the Board issued any of its decisions in § 10(k) cases, one commentator optimistically predicted that the entrance of the Labor Board into the field of work arbitrator would strengthen the Joint Board because the contractors would realize "that in both forums they will very likely receive the same decision, inasmuch as the same elements of consideration will probably be employed." Note, supra note 75, at 149. Unfortunately, the decisions of the Board did not vindicate the prediction.

\textsuperscript{103} See 1 Legislative History 615 (remarks of Representative Hartley); 2 Legislative History 1046 (remarks of Senator Murray); Millwrights Local 1102, United Bhd. of Carpenters, 121 N.L.R.B. 101, 106 (1958) (Don Cartage Co.).

\textsuperscript{104} The NLRB does encourage utilization of the Joint Board to the extent that it will not hold a 10(k) hearing if the employers and unions involved in a dispute are all stipulated to the Joint Board. Local 708, Int'l Ass'n of Ironworkers, 137 N.L.R.B. 1753 (1962) (Armco Drainage & Metal Prods. Co.) (Even though the employer did not become stipulated to the Joint Board until ten days after the charge was filed, there was an agreed upon method for settling the dispute); Wood, Wire & Metal Lathers Union, 119 N.L.R.B. 1345 (1958) (Acoustical Contractors Ass'n); Local 9, Wood, Wire & Metal Lathers Union, 113 N.L.R.B. 947 (1955) (A. W. Lee, Inc.); United Bhd. of Carpenters, 96 N.L.R.B. 1045 (1951) (Manhattan Constr. Co.).
to the decisions, but more than likely, extensive fact finding by the Joint Board would create another evil inherent in the Board's 10(k) proceedings—the intolerable delay between the filing of an 8(b)(4)(D) charge and the 10(k) decision. Because of the generally short duration of construction jobs, and the necessity to complete various phases on a schedule, time is of the essence and a critical factor in the settling of work assignment disputes in the construction industry.

The present practice of the NLRB is intolerable and does not meet the construction industry's needs. Since CBS, from the filing of a charge under section 8(b)(4)(D) to a 10(k) decision, the Board processes consume an average of 320 days. That procedure settles nothing. The record of the Joint Board, on the other hand, is enviable. The Joint Board meets in Washington and issues ten to fifteen job decisions each week. There is no backlog of waiting cases. Any dispute ready for decision by Wednesday of each week will be decided that week. Thus, from the time a dispute arises it is possible to have a decision from the Joint Board within a week. All parties are given an opportunity to answer any complaint and also to present their case orally before the Board.

Not only is this procedure prompt, it eliminates costly work stoppages since there may be no strike or picketing during the processing of a case, and the presidents of the unions involved are charged with policing this aspect of the procedure. On the other hand, while the

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106 Figures obtained from the Office of the Executive Secretary of the NLRB in October 1963.
107 One expert on jurisdictional disputes speculated that construction of a "fair size dam" could be finished before the NLRB rendered a typical decision. See Dunlop, supra note 79, at 500. The Board, in United Ass'n of Journeymen & Apprentices of the Plumbing Indus., No. 16-CD-16 (Unreported decision, April 5, 1963) (Tecon Corp.), proved him a prophet. A jurisdictional dispute arose at the beginning of construction of the Eufaula Dam in Oklahoma. After picketing commenced, an 8(b)(4)(D) charge was filed, an extensive hearing held, and eleven months after the briefs were submitted, the Board quashed the notice of hearing after being "administratively advised" that the dam had been completed while the Board was considering the case.
108 The Joint Board averages about 600 job decisions per year. See Table VI, 1962 Report of the Joint Board.
109 See Brief for the Joint Board as Amicus Curiae, in Wood, Wire & Metal Lathers Union, 119 N.L.R.B. 1345 (1958) (Acoustical Contractors Ass'n); Strand, op. cit. supra note 76, at 103.
111 Id. at 8.
NLRB is proceeding under section 10(k), there can be an extended strike and an employer's job shut down. Even a section 10(l)\textsuperscript{112} injunction will not guarantee the return of employees to work.\textsuperscript{113} There is much more likelihood of the employer's job being manned properly when the employees return to work under the private settlement machinery, in which their representatives may participate, than when they are ordered to cease striking by a court in a section 10(l) case.

Another factor which assists the Joint Board in making prompt decisions is that cases are only accepted from employers and international unions.\textsuperscript{114} Local unions may not submit disputes to the Joint Board. This results in an automatic screening process whereby the local submits its dispute to the parent international, which generally is in a better position to settle the case with the opposing union, or to decide if it should be presented to the Joint Board. In addition, and more importantly, the Joint Board demands that the disputes submitted to it be specific and limited solely to the work in dispute.\textsuperscript{115} These two factors result in the Joint Board being able to focus on a clear cut issue which has been filtered through the jurisdictional departments of the disputing unions. Further, the Chairman of the Joint Board, a full time member, actively assists unions to settle disputes that are being processed through the Joint Board before decision.\textsuperscript{116}

The loose application of standards by the NLRB, on the other hand, can result in confused issues being presented in 10(k) cases, compounded by claims which may have no direct relationship to the work in dispute. No doubt this is partially to blame for the delays in the NLRB procedure.\textsuperscript{117}


\textsuperscript{113} An employer's remedy for damages under § 303(b) is beyond the scope of this note.

\textsuperscript{114} See Procedural Rules 5.

\textsuperscript{115} Id. at 10.

\textsuperscript{116} See 1960 Report of the Joint Board 5; Strand, op. cit. supra note 76, at 100.

\textsuperscript{117} Normally, the Board's 10(k) decisions are limited to the particular controversy giving rise to the proceeding, but, in an apparent effort to eliminate future jurisdictional disputes involving work assignments once considered, the Board occasionally has extended its decisions beyond the \textquoteleft particular controversy\textquoteright and held them applicable to all similar future disputes in a particular geographical area involving certain employers. United Ass'n of Journeymen & Apprentices of the Plumbing Indus., 144 N.L.R.B. No. 12 (1963) (Matt J. Zaich Constr. Co.); International Union of Operating Eng'rs, 135 N.L.R.B. 1392 (1962) (Frank P. Badolato & Son). There appears to be no statutory basis for the Board's assumption of this authority especially in view of the language of § 10(k) which provides that the

WHO IS A "PARTY" TO THE DISPUTE

The Labor Board narrowly interprets the exception to section 10(k) which provides, in effect, that the Board will not hold a 10(k) hearing if the parties voluntarily settle their dispute, or if they have agreed upon a method for private adjustment. It has refused to quash the notice of a 10(k) hearing when it is claimed the dispute is within the jurisdiction of the Joint Board, on the ground that one party, generally the employer, is not stipulated to the Joint Board.118 The Labor Board, since Local 9, Wood, Wire & Metal Lathers Union (A. W. Lee, Inc.),119 recognizes, however, that affiliates of the Building Trades Department are bound by Joint Board determinations through the constitution of the Department.120 The Board, in effect, defines the phrase "the parties to the dispute" in section 10(k) to mean that all parties, including the employer, must have agreed to the settlement or the method for adjusting the dispute.

It is suggested that Congress did not intend a tri-partite agreement (that is, the employer and both unions) to be necessary before the exception to section 10(k) came into play; and therefore, a voluntary agreement for settling a dispute between two unions or an agreed upon method by the disputing unions should be sufficient for the Board to quash the notice of hearing.121 Certainly, the literal meaning of section 10(k) does not require the employer to be a party to a settlement of a jurisdictional dispute;122 and the legislative history of the act makes

Board is "Only empowered and directed to hear and determine the dispute out of which such unfair practice shall have arisen . . . ."


120 Article X, Const. of Building and Trades Dep't., AFL-CIO (1961).

121 Some commentators have questioned the meaning of the word "parties" in 10(k). "In directing the NLRB to determine the dispute between 'parties' § 10(k) apparently refers to the competing groups of employees as described in § 8(b)(4)(D)." Note, 73 Harv. L. Rev. 1150, 1157 (1960); Farmer and Powers have discussed the possibility of interpreting § 10(k) as argued in the text but rejected the theory on the basis that the Board lacked the "statutory authority to put this kind of pressure on an employer to accept private settlement procedures." The Role of the National Labor Relations Board in Resolving Jurisdictional Disputes, 46 Va. L. Rev. 660, 672 (1960).

122 It has been assumed by the courts, however, that the word "parties" in § 10(k) in-
no mention whatsoever of employers' participation in private settlements under section 10(k). Congress was attempting to protect employers from the fall-out of inter-union quarrels over work jurisdiction by section 8(b)(4)(D), but the exception to section 10(k) was to provide a means and encouragement for unions to settle their disputes themselves.

The Supreme Court in CBS apparently did not interpret the exception to section 10(k) to require employer participation in private settlement of jurisdictional disputes. The Court stated: "Section 10(k) offers strong inducements to quarrelling unions to settle their differences by directing dismissal of unfair labor practice charges upon voluntary adjustment of jurisdictional disputes." The Court also cited a House committee report that legislation was necessary "to protect employers from being the helpless victims of quarrels that do not concern them at all." It is reasonable to assume, then, that Congress did not intend employers to be parties to a settlement of a dispute that did not concern them.

Congress, in section 8(b)(4)(D), did not recognize an absolute right of employers to assign work as they saw fit. On the contrary, section 8(b)(4)(D) is a limiting provision on the right of a union to force a change in a work assignment. The intent of Congress was clearly to protect employers from unjustified jurisdictional dispute strikes in section 8(b)(4)(D). However, Congress, in section 10(k), in effect, told employers that if the unions were able to agree between themselves to a settlement of their disputes, or if they could provide an effective means for settlement, then the employers would have to abide by those decisions to avoid losing the protection of section 8(b)(4)(D). This does not mean that an employer can be ordered to assign work to a particular employee group as a result of an agreement or decision to which he was not a party, but an employer cannot refuse to honor the

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124 See, e.g., 2 Legislative History 1012 (remarks of Senator Taft), 1157 (remarks of Senator Smith), 950, 1554 (remarks of Senator Morse); 1 Legislative History 615 (remarks of Representative Hartley).
125 See 2 Legislative History 1046 (remarks of Senator Murray).
126 364 U.S. at 577.
127 Id. at 581, citing H.R. Rep. No. 245, 80th Cong., 1st Sess. (1947); 1 Legislative History 314.
128 See Note, 73 Harv. L. Rev. 1150, 1155 (1960).
agreement made by competing groups of employees and also expect to be protected by section 8(b)(4)(D) from a jurisdictional strike in support of that agreement.

It is obvious that such an interpretation of section 10(k) would immensely strengthen private settlement bodies such as the Joint Board since all Building Trades Unions are bound by its decisions. Whether or not employers were bound would be irrelevant since the Joint Board could still make decisions involving two craft unions.128

The NLRB has approached this problem from a different angle which, if broadened, would have the same result. In several cases since CBS, either the employee group or the union which originally was assigned the work, agreed after the filing of the 8(b)(4)(D) charge against the striking group, that it would relinquish any claim to the work in dispute, or that it was bound by an inter-union agreement granting the disputed work to the striking group.129 In such cases, the NLRB quashed the notice of hearing, and found that there was no jurisdictional dispute since there was an absence of two employee groups claiming the work. An extension of this principle to a situation where, prior to the dispute, the parties agreed upon a method of settlement could have the same effect as the approach just discussed.

**Interrelation of Sections 8(b)(4)(B) and 8(b)(4)(D)**

Another problem which has become intensified as a result of CBS concerns the interrelation of sections 8(b)(4)(B) and 8(b)(4)(D), namely, whether they are mutually exclusive sections of the act, or at least

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128 The procedure of the Joint Board would have to be changed to adopt this proposal since it requires the employer to be stipulated as well as the unions. See Procedural Rules. Of course, this proposal would still allow employers to participate in the decisional making process if they wished. See Farmer & Powers, supra note 121, at 672.

129 Millwrights & Mach. Erectors, 140 N.L.R.B. 79 (1962) (Port Huron Sulphite & Paper Co.); cf. Local 68, Wood, Wire & Metal Lathers Union, 142 N.L.R.B. No. 101 (1963) (Acoustics & Specialties, Inc.). The cases discussed are distinguishable from those in which the Board has quashed the notice of hearing because it found only a dispute between the employer and one union over collateral issues with members of the other union not claiming the work at all. See Wood, Wire & Metal Lathers Union, 139 N.L.R.B. 598 (1962) (Acoustics & Specialties, Inc.); Highway Truckdrivers, 134 N.L.R.B. 1320 (1961) (Safeway Stores, Inc.); Local 562, United Ass'n of Journeymen & Apprentices of the Plumbing Indus., 124 N.L.R.B. 1125 (1959) (General Refrigeration Serv. Co.). It has been urged, however, that the situation in the latter cases should also be considered a jurisdictional dispute cognizable under § 10(k). McGuinn, Jurisdictional Disputes and the NLRB, N.Y.U. Fifteenth Annual Conference on Labor 103, 119 (1962).
whether a case, which is a true jurisdictional dispute, should be processed by the Board as a secondary boycott case as well.

The Board has at least been consistent in holding, both prior\footnote{130} and subsequent\footnote{131} to CBS, that these sections of the act are not mutually exclusive. Therefore, a union may be found to have violated both on the same facts. Further, a charge under section 8(b)(4)(D) may be dismissed because of an agreed upon method of settlement; yet a union may be found in violation of section 8(b)(4)(B) on the same conduct.\footnote{132}

The Seventh Circuit, in \textit{NLRB v. United Bhd. of Carpenters},\footnote{133} rejected the Board's theory and refused to enforce a cease and desist order under sections 8(b)(4)(A) (pre-1959) and 8(b)(4)(D) based on the same conduct. The District of Columbia Circuit, however, recently affirmed the Board's position in \textit{Local 5, United Ass'n of Journeymen & Apprentices of the Plumbing Indus. v. NLRB.}\footnote{134} Member Fanning has been the constant dissenter from the Board's position. In \textit{Local 48, Sheet Metal Workers Ass'n (Acousti Eng'r, Inc.)},\footnote{135} and more particularly in \textit{Local 5, United Ass'n of Journeymen & Apprentices of the Plumbing Indus. (Arthur Venneri Co.)},\footnote{136} he pointed out that the utilization of both sections in a jurisdictional dispute, particularly in the construction industry, is incompatible with the unique statutory scheme devised by Congress for dealing with such problems.\footnote{137} It appears that Member

\begin{itemize}
\item \textit{United Bhd. of Carpenters, 119 N.L.R.B. 1444 (1958) (Wendnagel & Co.); Local 169, United Bhd. of Carpenters, 119 N.L.R.B. 726 (1957) (W. H. Condo); Local 562, United Ass'n of Journeymen & Apprentices of the Plumbing Indus., 107 N.L.R.B. 542 (1953) (Northwest Heating Co.).}
\item \textit{Local 5, United Ass'n of Journeymen & Apprentices of the Plumbing Indus., 137 N.L.R.B. 828 (1962) (Arthur Venneri Co.), enforced, 321 F.2d 366 (D.C. Cir.), cert. denied, 84 Sup. Ct. 266 (1963).}
\item \textit{Local 252, Wood, Wire & Metal Lathers' Union, 120 N.L.R.B. 871 (1958) (James I. Barnes Constr. Co.).}
\item \textit{261 F.2d 166 (7th Cir. 1958). The Third Circuit recently rejected this theory also in NLRB v. Local 825, Int'l Union of Operating Eng'rs, 55 L.R.R.M. 2112 (3d Cir. 1964). There, in one of the first § 10(k) cases to reach the courts of appeals since CBS the court held the union's conduct violative of § 8(b)(4)(D), but in a companion case the court refused to reaffirm the Board's decision that the same conduct violated § 8(b)(4)(B).}
\item \textit{321 F.2d 366 (D.C. Cir.), cert. denied, 84 Sup. Ct. 266 (1963).}
\item \textit{120 N.L.R.B. 212, 213 n.1 (1958).}
\item \textit{137 N.L.R.B. 828, 834-36 (1962).}
\item \textit{The position of a former member of the Board that § 8(b)(4)(D) should be reserved for only those situations in which no other remedy is available under § 8(b)(4)(A) (present (B)) would appear to be contrary to the congressional intent and it would render §§ 8(b)(4)(D) and 10(k) meaningless. See Local 562, United Ass'n of Journeymen &}
\end{itemize}
Fanning may have finally cracked the armor of the majority because in *Local 502, Int'l Hod Carriers Union (Ernest Fortunato)*,\(^{138}\) the Board adopted the holding of the trial examiner that "The Act required that all issues pertaining to jurisdictional disputes must first be considered under Sections 8(b)(4)(D) and 10(k) before they could be considered as violative of any other section of the Act."\(^{139}\)

The Board's position is simply that a union may be allowed to conduct primary action in furtherance of a work assignment dispute if it is entitled to the work, but may not conduct secondary activity. As a result, in a case where both 8(b)(4)(B) and 8(b)(4)(D) charges are filed, the Board may enjoin the union from striking on the 8(b)(4)(B) complaint but find in the 10(k) proceeding that it was entitled to the work for which it was striking.\(^{140}\) Since the union had already been enjoined from striking for the work to which it was entitled, the 10(k) decision would be an empty victory.

The problem with the Board's position is that again it is attempting to fit the round construction industry into a square hole. Because of the nature of the industry, many jurisdictional disputes resulting in strikes or picketing literally fit the proscription of section 8(b)(4)(B).\(^{141}\) Jurisdictional disputes in this industry more often than not involve two employers, as well as two groups of employees, represented by different unions.\(^{142}\) A decision as to which craft will perform certain work will therefore result in an increase or decrease in volume of business for the contractors involved. In this situation, an argument can be made that a strike to force a change of assignment is also a secondary boycott, but the mere presence of two employers, whose business relationship may be affected, or indeed severed, should not be sufficient to establish a secondary boycott in this situation.

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Apprentices of the Plumbing Indus., 107 N.L.R.B. 542, 552 (1953) (Northwest Heating Co.) (concurring opinion).

\(^{138}\) 140 N.L.R.B. 694 (1963).

\(^{139}\) Ibid. The Court of Appeals for the District of Columbia Circuit, however, found this language unpersuasive as indicating a change in Board policy. *Local 5, United Ass'n of Journeymen & Apprentices of the Plumbing Indus.*, 321 F.2d 366 (D.C. Cir.), cert. denied, 84 Sup. Ct. 266 (1963).

\(^{140}\) *Local 5, United Ass'n of Plumbing & Pipefitting Indus.*, 137 N.L.R.B. 828, 832 (1962) (Arthur Venneri Co.).


Member Fanning has advocated that in a jurisdictional dispute on a construction job, all contractors who are engaged in performing the type of work in dispute and the general contractor be excluded from the definition of a neutral or secondary employer.\textsuperscript{148} This, of course, would eliminate the 8(b)(4)(B) question, and also carry out the intent of Congress concerning jurisdictional disputes without doing violence to the act, since Congress has in the past statutorily recognized the unique problem of the industry.

If the Board does not adopt Member Fanning's approach for the construction industry, the effectiveness of 8(b)(4)(D), 10(k), and the CBS decision will be dissipated because contractors could avoid having a true work assignment dispute decided by merely filing an 8(b)(4)(B) charge. It could even destroy the certification exception written into section 8(b)(4)(D) when two employers are involved in the dispute. Finally, the voluntary adjustment provision of section 10(k) could be abrogated because even if a union is striking in support of a valid Joint Board award, and the General Counsel dismisses the 8(b)(4)(D) charge, the picketing could still be enjoined by the processing of an 8(b)(4)(B) charge without disturbing the employer's original assignment.\textsuperscript{144} It is obvious that in this situation the strength of the Joint Board and similar bodies can be diluted, since their only real sanctions are the knowledge that the Board will support their awards by dismissing 8(b)(4)(D) charges and allow continued picketing.

Conclusions

The Labor Board has now had about three years' experience in dealing with section 10(k) since CBS was decided by the Supreme Court. It would appear that sufficient time has elapsed for the Board to have become acquainted with most of the underlying problems of jurisdictional disputes in the construction industry. If it is to continue deciding these disputes, the parties are entitled to know the relative weight the Board will accord the criteria already established.\textsuperscript{145} Confidence in the

\textsuperscript{148} Local 5, United Ass'n of Journeymen & Apprentices of the Plumbing Indus., 137 N.L.R.B. 828, 836 n.9 (1962) (Arthur Venneri Co.) (dissenting opinion). The majority of the Board, 137 N.L.R.B. at 832 n.6, questioned whether such a procedure would be contrary to NLRB v. Denver Bldg. & Constr. Trades Council, 341 U.S. 675, 689-90 (1951).

\textsuperscript{144} Local 252, Wood, Wire & Metal Lathers' Union, 120 N.L.R.B. 871 (1958) (James I. Barnes Constr. Co.); see Brief, supra note 141, at 53.

\textsuperscript{145} In International Ass'n of Machinists, 135 N.L.R.B. 1402, 1411 (1962) (J. A. Jones Constr. Co.), one of the first 10(k) decisions rendered after CBS, the Board stated that at
processes of the Board will be weakened if the Board continues its present policy of varying the importance of the criteria, which, from a review of the cases, seem to be for the purpose of arriving at a conclusion compatible with the employer's assignment.

Perhaps the Local 68, Wood, Wire & Metal Lathers Union (Acoustics & Specialties, Inc.) case indicates that the Board is now prepared to set out on an independent course from merely approving the employer's assignment. There, it stated, that "an employer's assignment of the disputed work cannot be in all cases the controlling factor in determining jurisdictional disputes." This is a welcome recognition, and one which hopefully means the NLRB may give more consideration to the criteria used by the Joint Board in deciding jurisdictional disputes.

In Acoustics & Specialties, Inc., the NLRB refused to recognize the agreement between the carpenters and the lathers as an agreed upon method for settling the dispute under section 10(k), but it did hold that this agreement was the controlling factor in deciding the dispute. From this, the exponents of exclusive craft jurisdiction may take hope that their voices are being heard, if ever so faintly.

Of course, if the Board adopts a more liberal construction of "parties" in section 10(k), most of the jurisdictional disputes in the construction industry will be decided exclusively by the Joint Board, thereby relieving the reluctant NLRB of part of its unwanted burden.

The NLRB alone should not be the subject of criticism, however. Better fact-finding procedures by the Joint Board would perhaps naturally result in more support from the NLRB. The Joint Board should also make more effective use of its power to render area-wide and national decisions to avoid a proliferation of job disputes beyond its already heavy burden. This again may result in more weight being accorded to its decisions by the NLRB.

It is submitted that the above, together with a reconsideration of the statutory scheme of section 8(b)(4), would more nearly carry out the duty Congress imposed upon the NLRB in sections 8(b)(4)(D) and 10(k).

that time it could not establish the weight to be given the various criteria; but, the Board went on to explain, "It may be that later, with more experience in concrete cases, a measure of weight can be accorded the earlier decisions."


147 Id. at 9 n.4.
RIGHTS OF INDIVIDUAL UNION MEMBERS UNDER TITLE I AND SECTION 610 OF THE LANDRUM-GRiffin ACT

HERBERT S. THATCHER*

INTRODUCTION

Since the enactment of the Labor-Management Reporting and Disclosure Act of 1959, much has been written by learned commentators respecting the background of the act. Such discussions cannot be improved upon and will not be repeated here. What will be discussed is the body of judicial precedent that has developed during the four-year history of the act, with a particular view toward determining whether the case law sufficiently corresponds to the intent of Congress, manifested by its enactment of the LMRDA. Undoubtedly, by the mere passage of the act, Congress intended that the democratic rights of union members should receive the paramount attention of the courts. At the same time, however, it is clear that certain very basic union interests were to be preserved, and that to some extent at least, the rights of union members were to be tempered with the desire to preserve the meritorious aspects of existing institutions. The latter consideration was explained by Professor Summers in the following terms:

The first point of judicial indecision is whether to intervene in internal union affairs. The traditional doctrine of non-intervention, borrowed from cases involving religious societies and fraternal orders, is a recurrent theme in court opinions. This reluctance to intervene is real. It is born of tradition and feeds on misplaced precedents, but it also gains strength from less articulate, but more relevant, considerations. Autonomy of private groups is an essential element of our pluralist democracy. Intervention in internal affairs reduces that autonomy and creates a spectre of close legal control which would make private groups adjuncts of an all-powerful state. Fearful of this end, the courts intuitively resist involvement. Combined with this is the courts' uncertainty as to their com-

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petence to regulate the complex relationships within the union or their ability
to supervise the union's internal operation.⁸

In attempting to reconcile the respective rights and obligations of unions
and members, which are very often in conflict, the courts have had con-
siderable difficulty, particularly because the statute is drawn in general
terms and is not sufficiently explicated by legislative history. Indeed, the
ambiguities in the act itself inherently warn the courts to avoid overly
facile resolutions of essentially complex problems.⁴ It is with a view
toward clarifying the basic issues involved in some of the more com-
PLICATED problems engendered by the "Bill of Rights" that the following
sectional analysis of Title I is undertaken.

THE SCOPE OF TITLE I

Since Title I undoubtedly addresses itself to the relationship between
labor unions and their members, only rights pertaining to membership are
protected under it. Although this concept has been readily seen by the
courts from the act's inception, it has created difficulties in certain areas.
In an early case,⁶ for example, a union business agent who had been dis-
ZCIIlied by his union sought redress in the court. The court refused to
apply Title I pointing out that

this Title deals with the union-member relationship and in no way supports
jurisdiction of a suit involving the employer (union)-employee (business agent)
relationship, which is the essence of the present suit. Such a case turns more
properly on the common law of employment contracts, or employment "status" as
a property right, matters which are outside the scope of Title I.⁸

The same conclusion was reached where a union committeeman had been
removed from office and as a result had lost his superseniority and, sub-
sequently, his job.⁷ Again, the principle was applied where a union member
was discharged as field representative because of his improper use of a
union automobile, the court pointing out that the act "creates obligations

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³ Summers, The Impact of Landrum-Griffin in State Courts, N.Y.U. Thirteenth Annual
⁴ The legislation contains more than its share of problems for judicial interpretation
because much of the bill was written on the floor of the Senate or House of Repre-
sentatives and because many sections contain calculated ambiguities or political com-
promises essential to secure a majority. Consequently, in resolving them the courts
would be well advised to seek out the underlying rationale without placing great em-
phasis upon close construction of the words.
Cox, supra note 2, at 852.
⁶ Id. at 300.
and duties on the part of a labor organization to its members . . . [and] was never intended to cover the relationship of employer and employee."

A variant to the central question of what relationship is protected by Title I was presented in *Tomko v. Hilbert.* There a union member brought a Title I action against other members who libeled and assaulted him, thereby allegedly interfering with his rights under the act. The court, in affirming a lower court dismissal of the action, pointed out that Title I was intended to protect union members only against the action of the union or its officers or agents, and not against the private misconduct of fellow union members. While the case on its facts seems to have been correctly decided, it is noteworthy that in the future Title I rights may be frustrated by the actions of union members who are “fronting” for union officers or agents in order to permit the latter to escape the proscription of Title I. To this possibility the courts will have to be attuned.

Given the proposition that only members of the union are protected in their membership rights, the question is raised as to what constitutes “membership” within the meaning of Title I. Section 3(o) of the act defines a member as including “any person who has fulfilled the requirements for membership” and who has not withdrawn voluntarily or been expelled or suspended. “Expert opinion seems to consider (this provision)
as doing little to disturb the union's general right to determine membership requirements. In this connection Professor Aaron has raised an interesting question:

Most unions that still bar or otherwise restrict membership of Negroes or other minority groups have eliminated the formal statement of such restrictions from their constitutions, bylaws, and rituals. Would a Negro who meets a labor organization's formal requirements for membership but who is nevertheless denied admission for some other reason, or for no reason, be considered a "member" within the meaning of section 101 (a)(1)? If congressional intent is the sole criterion of interpretations, the answer is negative; but those wishing to test the point may win some judicial support for the opposite point of view.

The proposition was indirectly tested in *Hughes v. Local 11, Int'l Ass'n of Ironworkers*. That case involved an iron worker who was a member of both his international and his home local union. Upon moving to another area he applied for a membership transfer to a sister local. Although plaintiff fulfilled all the intra-union requirements for such a transfer, he was denied a transfer card by the sister local. Plaintiff's Title I action was dismissed by the district court which held that section 3(o) applied only to those who had actually been accepted into membership by the union. The Court of Appeals for the Third Circuit reversed, pointing out that plaintiff had complied with all the requirements of membership in the sister local, that under the international's constitution the granting of such membership was compulsory rather than discretionary, and finally that he was in any event a member of the international union. The court held that fulfillment of all the intra-union requirements for membership satisfied the requirements of section 3(o) even though in the instant case plaintiff had not been formally accepted by the local union. Since the court emphasized plaintiff's compliance with the union's constitutional requirements for membership, it would seem to follow that where a union constitution does not expressly prohibit Negro membership, a Negro who meets all the stated requirements may bring a Title I action as a member against that union, even though the union had turned him away. Although the loophole thus suggested is indeed inviting, it is

12 Rothman, supra note 8, at 1001.
13 Aaron, supra note 2, at 863.
14 287 F.2d 810 (3d Cir. 1961).
15 Id. at 815-16.
16 Id. at 818.
17 Id. at 815.
18 Certainly such an action seems likely where, in addition to meeting the stated membership requirements, plaintiff is at present a member of an international union and is en-
difficult to justify in view of the plain intent of Congress not to interfere with a union's right to choose its members and the intent of southern congressmen, whose votes were essential to passage of the act, not to permit the integration of unions in the south against the wishes of their constituents. Thus, the district court's interpretation of section 3(o), rather than that of the court of appeals, seems more in accord with the legislative intent. The latter decision will probably be limited to its facts, and as such would not be inconsistent with congressional intent, for in this case the iron worker was already a member of the international, met all the requirements of transfer, and would have been transferred as a matter of right under the international's constitution.

In Moynahan v. Pari-Mutuel Employees Guild,19 action was brought under section 101(a) by an individual to whom the union had arbitrarily denied membership. The individual had met all the stated requirements of membership except for the requirement of a two-thirds favorable vote of the current membership. The Court of Appeals for the Ninth Circuit pointed out that unlike Hughes, this requirement "can hardly be characterized as a mere formality or ministerial act."20 The distinguishing factor was that in Hughes the requirements for membership had in fact been met—plaintiff there was a member of the international union—while in Moynahan an important non-ministerial requirement remained to be fulfilled. The Ninth Circuit was convinced "that Congress did not intend section 3(o) to limit the previously recognized rights of unions to choose their members," noting in particular the defeat of the Powell amendment which would have prohibited racial discrimination in selection of union membership.21 "Scholars in the field of labor law," said the court, "while deploring this result, agree that it represents the current state of the law."22 Accordingly, the court refused to apply Title I.

One final case deserves mention because it gave rise to a possible conflict between the LMRDA and the Taft-Hartley Act.23 In Local 636, United Ass'n of Journeymen & Apprentices of the Plumbing Indus. v. NLRB,24 the Court of Appeals for the District of Columbia Circuit re-deavoring to transfer from a northern local to a sister local in the south which practices discrimination.

19 317 F.2d 209 (9th Cir. 1963).
20 Id. at 210.
21 Id. at 210 n.1.
22 Id. at 210.
viewed an NLRB holding that certain employers had violated sections 8(a)(1) and (2) of the NLRA by permitting their supervisors, who were members of the union, to participate in intra-union affairs, thereby interfering with their employees' rights under section 7 of the NLRA. It was pointed out in defense that Title I of the LMRDA gave the supervisors an absolute right to participate actively in union affairs as "members" within the meaning of section 3(o) and that therefore the Board could not find such conduct to be violative of the NLRA. The conflict is plain. Title I guarantees to all members the right to participate in union affairs. The NLRA gives to employees, whether members or nonmembers, the right to be free from employer interference with their collective conduct. As held by the Board, the participation of supervisors exerts the employer's influence into the collective processes. A proper accommodation of the two federal statutes would seem to dictate that the pre-existing NLRA rights be fully protected in the absence of congressional expression to the contrary. The court of appeals seems to have so held in approving this part of the holding of the Board.

**EQUAL RIGHTS**

Section 101(a)(1) of the LMRDA guarantees to union members "equal rights and privileges" in nominating candidates and voting in union elections, in attending union meetings, and in discussing and voting upon union affairs, "subject to reasonable rules and regulations in such organization's constitution and bylaws."25

The rights granted by this section may be illustrated by several decisions rendered thereunder. In one case,26 a union was enjoined from amending its bylaws or conducting a meeting in order to perpetuate in office union officials by such unfair procedures as would, in effect, disenfranchise certain members. Furthermore, section 101(a)(1) was applied in order to ensure that dissident members would be allowed to express themselves at meetings without interference from defendant-union by threats of punishment, invitations to fight, or a lack of order in the meeting room.27

On the other hand, it appears that Title I was not intended to create any new rights, but merely to protect existing ones. In *Ragland v. UMW*,28

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25 According to Professor Cox, "The qualification is the result of the accommodation between the practicalities of union government and the commendable aim of preventing unjust discrimination between union members." Cox, supra note 2, at 833.


union members sought an injunction on the ground that under their charter they were not allowed to vote in the international's elections nor to participate in its meetings. The court denied injunctive relief on the ground that section 101(a)(1) was not intended to change intra-union organizational structures in order to confer on certain members the right to vote "where it has not previously existed."29

In the Hughes case previously discussed, plaintiff alleged that the local unlawfully denied him membership and did not permit him to attend meetings, to take part, or to vote therein. The court, having determined that the plaintiff was a member within the meaning of section 3(o), found that 101(a)(1) applied and remanded the case to the court below for the purpose of determining whether or not the plaintiff had in fact been "deprived of his rights to participate in the affairs of Local 11."

A most interesting case under this section of the act is Cleveland Orchestra Comm. v. Cleveland Fed'n of Musicians,30 for in that case the court was squarely faced with the question whether certain classifications employed by the union relative to the voting rights of members were to be permitted under 101(a)(1). The union represented two types of members: musicians in general, and symphony musicians. The former worked on the basis of a predetermined wage scale which they themselves had voted upon, while the latter worked under a collective bargaining agreement with the symphony orchestra which they were not permitted to ratify. This system, the plaintiffs alleged, amounted to discriminatory treatment and a denial of equal rights. The court implied, however, that Title I of itself granted no independent right to vote on the terms of a collective bargaining agreement31 and that the classification was entirely proper by virtue of the different types of working arrangements involving the two groups of employees.32 It is heartening to note that the Court of Appeals for the Sixth Circuit declined the invitation to interfere with the collective bargaining process and with the union's exercise of discretion in carrying out its duties thereunder.

**Freedom of Speech and Assembly**

Section 101(a)(2) provides that every member shall have the right to meet and assemble freely with other members and to express his views, as well as to express his views at meetings of the labor organization

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29 Id. at 133.
30 303 F.2d 229 (6th Cir. 1962).
31 Id. at 232-33.
32 Id. at 232.
"subject to the organization's established and reasonable rules pertaining to the conduct of meetings." The entire section is subject to a proviso which permits unions to adopt and enforce reasonable rules governing the responsibility of every member toward the union "as an institution" and the responsibility of each member to refrain from conduct which would interfere with the union's performance of its legal or contractual obligations. The section is most difficult to comprehend since it poses for interpretation three ambiguous areas: (1) the portion of the section granting the right; (2) the "subject to" clause; and (3) the proviso.

Here again a brief review of the early cases will be helpful.\(^3^3\) In a 1960 case\(^3^4\) a group of employees brought suit under section 101(a)(2) alleging that the local union to which some of them belonged had interfered with their meeting, the purpose of which was to petition the international for an independent local charter. As it related to union members the action was sustained, the court finding reasonable cause to believe that the action of the local union substantially interfered with the members' rights to meet, assemble and discuss their views. Next, in Allen v. Local 92, Iron Workers,\(^3^5\) a local union was found to have violated the section by calling two dissident members to account because the members had sent a letter to the union's executive board requesting an investigation of alleged financial irregularities. The members' letter constituted an expression of views protected by section 101(a)(2). The section has also been held to apply to the union suspension and expulsion of members for having indicated their intention to run for union office in opposition to the incumbents.\(^3^6\)

The difficulties of interpretation of section 101(a)(2) may best be illustrated in connection with the recent decision in Salzhandler v. Caputo.\(^3^7\) The plaintiff had accused a union officer of conversion of union funds through charging improper convention expenses to the union, and of being "a petty robber" in connection with the refund of two small checks to the widows of certain members for an overpayment of dues. The charges were made both orally at union meetings and in leaflets distributed to the general membership. Pursuant to a specific provision in the union constitution prohibiting libel and slander, the union, follow-

\(^{3^3}\) See generally Rothman, Judicial Interpretation of the "Bill of Rights" for Union Members, 45 Minn. L. Rev. 995 (1961).


\(^{3^5}\) 47 L.R.R.M. 2214 (N.D. Ala. 1960).


ing charges, notice and trial, found Salzhandler guilty of libeling and
slander ing the union official and suspended him for five years. Following
exhaustion of his appellate remedies within the union, Salzhandler brought
an action under 101(a)(2) charging abridgment of his freedom of speech.
The district court dismissed the complaint on the ground that the union’s
decision was warranted under the evidence, and that upon an independent
examination of the record by the court, the charges made by Salzhandler
were in fact and in law libelous. The court concluded that the protection
of Title I does not encompass a libel or slander of a union officer by a
member.

The court of appeals reversed, holding as follows:

So far as union discipline is concerned Salzhandler had a right to speak his
mind and spread his opinions regarding the union officers, regardless of whether
his statements were true or false. It was wholly immaterial to Salzhandler’s cause
of action under the LMRDA whether he spoke truthfully or not, and accordingly
Judge Wham’s views on whether Salzhandler’s statements were true are beside
the point. Here Salzhandler’s charges against Webman related to the handling of
union funds; they concerned the way the union was managed. The Congress has
decided that it is in the public interest that unions be democratically governed
and toward that end that discussion should be free and unrammeled and that
reprisals within the union for the expression of views should be prohibited. It
follows that although libelous statements may be made the basis of civil suit
between those concerned, the union may not subject a member to any dis-
ciplinary action on a finding by its governing board that such statements are
libelous.

The widespread importance of this holding is demonstrated by the fact
that of 152 constitutions of unions affiliated with the AFL-CIO, 125 have
a provision which either expressly or by necessary implication makes it
an offense for a union member to libel, slander or otherwise defame a
union officer, and all but three have general punitive provisions with
regard to libel. It is submitted that the court of appeals was in error as
to the question whether the substantive rights granted in the section

38 Hearing before Judge Wham, opinion from the bench, Salzhandler v. Caputo, Civil
No. 61-2110, S.D.N.Y., May 22, 1962. Judge Wham issued written findings of fact and law
under the same heading on May 5, 1963. One of the findings was that there had been a
libel.
39 316 F.2d at 451.
40 Independent research conducted by the AFL-CIO in connection with a petition for
certiorari filed in the United States Supreme Court by the Painters Union. Caputo v.
Salzhandler, 316 F.2d 445 (2d Cir.), petition for cert. filed, 32 U.S.L. Week 3071 (U.S.
July 17, 1963) (No. 282). Certiorari was denied, however, 32 U.S.L. Week 3211 (U.S. Dec.
encompass the right to libel or slander a union officer. With respect to this issue an examination of the legislative history of Title I—the "Bill of Rights"—is of aid. The original version of section 101 proposed by Senator McClellan provided an absolute right of free expression with no proviso attached. 41 Nevertheless Senator McClellan himself made it clear that he regarded the exercise of these rights to be subject to the same limitations as is the exercise of rights under the first amendment to the United States Constitution. He consistently pressed the analogy between the two bills of rights. 42 At the time these comments were made, it had been firmly established by the Supreme Court that the first amendment to the federal constitution did not protect libel or slander. 43 It would seem questionable, therefore, that the "Bill of Rights" of the LMRDA which was intended to extend constitutional guarantees to the union-member relationship, would bring into that sphere greater rights than those contained in the United States Constitution. 44 In any case, whatever abuses might occur by permitting the union to determine whether certain utterances constituted libel or slander would be eradicated by a trial de novo in the district court, whereby the court itself would review the evidence to determine whether the charges made were in fact in the nature of libel or slander. As a matter of democratic policy it might well be advisable to permit union members to express any views or opinions without putting such member to the burdensome task of deciding beforehand whether his views have ample foundation in fact. But the issue here is whether that policy has been in fact made the federal law and, on the basis of the foregoing, it is safe to assume that it has not been. Moreover, to permit a court to review both the propriety of the disciplinary proceedings involving the charge of libel and the question of whether libel had in fact and in law been committed would seem to give both the disciplined union members and the libeled union officials all the protection necessary.

Furthermore, even if it is assumed that section 101(a)(2) grants to the union member the right to libel an officer, it may be that in so doing the member is violating another obligation owed to the union. The "proviso" is subject to as narrow or as broad an interpretation as one may wish to place upon it. It might be argued, on the one hand, that it aims

41 2 Legislative History of the Labor-Management Reporting and Disclosure Act of 1959, at 1103(1) (1959) [hereinafter cited as Legislative History].
42 Id. at 1104(3), 1105(1), 1294(3).
to protect union conduct against a member who actually attempts to upset some legal obligation of the union or attempts in effect to undermine the very existence of the union. Professor Cox would seem to favor this narrow interpretation, for he states that "dissent in a union, like treason within a nation, must be suppressed if the purpose is to destroy the union, encourage a rival, or bring about the violation of legal or contractual obligations. Section 101(a)(2) contains an exception for these cases." The actions of Salzhandler in this case obviously did not have the effect contemplated by the narrow interpretation. On the other hand, it may be argued that the responsibility of a member toward his union "as an institution" does include a responsibility to refrain from falsely holding up the union officers to public contempt. This was suggested by statements made by Senator Kuchel with respect to his amendment adding the "subject to" and proviso clauses to Senator McClellan's original proposal. Senator Kuchel stated:

[T]he language in the amendment of the able Senator from Arkansas ... was too broad, and ... there are in this land of ours, for example, reasonable laws governing libel and slander. The rule of reason is what we sought to apply. By the language of our amendment ... we attempt to provide for the rule of reason with reasonable restraints on the right of free speech.

The remarks of Senator Kuchel may or may not be ambiguous as found by the Second Circuit. In any event, it seems clear that the proviso as applied to the Salzhandler situation could be interpreted in either direction.

A similar problem arose in Farowitz v. Associated Musicians Union. In that case a union member sought to nullify his expulsion from the union. The expulsion was the result of plaintiff's circulation of a handbill which stated that under applicable court decisions, the local's tax (its dues) was illegal, as allegedly violative of section 302 of the LMRA, and should not be paid. The plaintiff's interpretation of the decisions differed from that of the local union's executive board; in fact, the local's interpretation was undoubtedly correct. However, the union's bylaws provided a reasonable though incorrect basis for the union member's charge. The court found no evidence that the conduct of the union member was intended deliberately to harm the union. Accordingly, the court, relying on Salzhandler, set aside the expulsion and ordered the member's rein-

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45 Cox, supra note 2, at 834-35. (Emphasis added.)
46 2 Legislative History 1231(3). (Emphasis added.)
47 The Salzhandler decision was followed in Stark v. Twin City Carpenters Council, 53 L.R.R.M. 2640 (D. Minn. 1963).
statement. The fact is, however, that the proviso permits a union to discipline a member for failing in his responsibility toward the organization as an institution without regard to any particular intent which may underlie his conduct. It would seem reasonable to suppose that the urging of union members not to pay dues, which does constitute the very life blood of the union's existence and without which the union surely could not operate, falls directly within the proviso. The court in *Farowitz* thought otherwise because

It would seem in the interest of proper and honest management of union affairs to permit members to question the Union's method of obtaining taxes and the interpretation of its own By-Laws, even to the point of urging other members not to pay the tax which the speaker believes is illegal.49

It should be noted, however, that the same worthy objective would be served by a union member's urging of other members to leave the union or set up a rival organization because the incumbents are corrupt, and yet such activity, even by Professor Cox's strict interpretation of the proviso, undoubtedly may be met with discipline by the union under section 101(a)(2).

**Protection of the Right to Sue**

Section 101(a)(4) provides that "No labor organization shall limit the right of any member thereof to institute an action in any court" or administrative proceeding regardless of whether a union is named as defendant or not; "Provided, That any such member may be required to exhaust reasonable hearing procedures (but not to exceed a four-month lapse of time) within such organization" before instituting such proceeding.50

The foregoing provision is perhaps the most ambiguous of all those contained in the act. It is susceptible to three interpretations. (1) The words "may be required" appearing in the proviso could be interpreted to mean that the union may impose the exhaustion requirement upon its members. Under such a construction, section 101(a)(4) could be read as having nothing whatever to do with the common law rules of exhaustion of remedies employed by the courts. The section would mean only that the union may discipline a member for instituting a suit if he has failed to

49 Id. at 2846.

50 The section also contains another proviso which prohibits any interested employer or employee association from even indirectly financing, encouraging or participating in any such action except as a party.
exhaust his internal union remedies. That is, the section would apply only in the situation where a union member brings an action complaining that a union has wrongfully disciplined him because he has previously filed suit. This construction seems most sensible for two reasons. First, since the opening sentence of the section speaks to a union limitation, it seems reasonable to assume that the opening sentence of the proviso similarly speaks to a union requirement. Second, each provision surrounding 101(a)(4) prohibits specified union conduct and affords members a right to protect themselves by court action against such specified conduct. This proviso would seem to have a similar objective.51 (2) The second construction also assumes that the words "may be required" are addressed to a union requirement but adds that the courts are obliged to defer to such requirement so long as the procedures meet the standards of the proviso. Thus, if a union in its constitution or bylaws requires that a member exhaust his internal remedies prior to instituting suit and raises the defense of failure to exhaust remedies in any action brought against the union, the court has no power to reject completely the doctrine of exhaustion of remedies. It must, rather, apply the doctrine if internal procedures exist which may be taken advantage of within a four-month period of time and if such procedures are reasonable.52 (3) The third possible construction would have the proviso mean that the courts may require the exhaustion of remedies regardless of what is stated in the union constitution. Under this interpretation a court may or may not refuse to apply an exhaustion doctrine, depending upon existing law in its jurisdiction. But if it chooses to apply a common law doctrine of exhaustion of remedies, it may not require the exhaustion process if it would exceed a four-month period of time or if the hearing procedures are, in the view of the court, unreasonable. In short, the common law doctrine of exhaustion of remedies remains the same in each jurisdiction except that the restrictions of the proviso in section 101(a)(4) are superimposed thereupon.53

The large majority of cases, including the leading case of Detroy v. American Guild of Variety Artists,54 apparently adopt the third interpre-

51 Cox, supra note 2, at 839-41.
52 It must be recognized that this interpretation cannot be tested until an action is brought against a union in a jurisdiction which purports to reject completely the common law notion of exhaustion of remedies.
53 It is this interpretation which has been adopted by Professor Blumrosen, who has rejected the reasoning employed by Professor Cox. Blumrosen, supra note 44, at 1455-60.
tation stated above.\textsuperscript{55} In this connection, the Court of Appeals for the Second Circuit stated:

It appears clear that the proviso was incorporated in order to preserve the exhaustion doctrine as it had developed and would continue to develop in the courts, lest it otherwise appear to be Congress' intention to have the right to sue secured by 101 abrogate the requirement of prior resort to internal procedures. In addition, the proviso dictated an outside limit beyond which the judiciary cannot extend the requirement of exhaustion—no remedy which would require proceedings exceeding four months in duration may be demanded. We therefore construe the statute to mean that a member of a labor union who attempts to institute proceedings before a court or an administrative agency may be required by that court or agency to exhaust internal remedies of less than four months' duration before invoking outside assistance.\textsuperscript{56}

The court further held, and correctly so, that the federal courts may develop their own principles regarding the exhaustion doctrine utilizing the rules formulated by various state courts as a guide line if desired.\textsuperscript{57} However, in applying its interpretation of the proviso to the case before it, the court seemed to lose sight of the fact that the proviso at the very least stands for the proposition that Congress has sanctioned and encouraged the application of the doctrine of exhaustion of remedies and that "democratic values required that the union be allowed a genuine opportunity to correct its own mistakes."\textsuperscript{58} It has been said that "Democratic processes atrophy when they are not exercised; union members will have no interest in improving their organizations' internal adjustment procedures if they never are required to use them."\textsuperscript{59} "Courts and administrative agencies should not interfere in the internal affairs of labor organizations, if union democracy is our goal, until the organization has had a reasonable opportunity to correct any mistakes of subordinate bodies."\textsuperscript{60} Congress has indeed incorporated these principles into section 101(a)(4). The court in \textit{Detroit}, while recognizing this fact, did not truly apply it.

The court held that plaintiff would not be required to exhaust his internal remedies for several reasons. First, the internal union remedy

\textsuperscript{55} See Rothman, supra note 8, at 1010-14.
\textsuperscript{56} 286 F.2d at 78.
\textsuperscript{57} Ibid.
\textsuperscript{58} Blumrosen, supra note 44, at 1459.
was uncertain. The court reached this conclusion because by its own interpretation of the union constitution, and despite the union's argument to the contrary, the remedies and procedures of the constitution might not apply to plaintiff's case. However, it is the function of the union, not the court, to interpret ambiguous provisions of the union constitution. A union ought to be given the opportunity first to determine for itself whether the complaining union member has a remedy under its constitution. Second, the Detroy court failed to apply the exhaustion doctrine because the internal union remedy had "not been specifically brought to the attention of the disciplined party." While realities may demonstrate that members do not in actuality read their union's constitution, the fact is that unions are required by law to make constitutions available to the members, and it is the members' responsibility and obligation to become familiar with the constitution. It is no excuse, therefore, that the remedial provisions were not specifically brought to the attention of the union member. If the proviso means anything, it seems to mean that the union member is obliged to explore the possibility of remediing the wrong done to him through the union procedures. Certainly to require such an inquiry poses no substantial hardship. Third, the court rejected the exhaustion doctrine because the violation of federal law was in its opinion clear and undisputed. That fact is irrelevant under section 101(a)(4). If indeed it is the purpose of the section to permit a union to correct its own mistakes, it is of no importance whether its mistake was clearly violative of the statute or less so. In fact, if anything, the permission given to the union to put its own house in order is all the more imperative where its violation is clear. And finally, the court rejected the doctrine because the injury to the member was immediate and difficult to compensate by means of a subsequent money award. This seems to be the only reasonable ground upon which the decision may be sustained. In any case, no reason appears why the court could not have granted a temporary injunction and retained jurisdiction of the case pending plaintiff's resort to the internal union machinery.

62 286 F.2d at 81.
63 Ibid.
64 Professor Blumrosen has suggested the use of such an alternative:
[The courts can protect the value of internal union decision, and also protect the member, by granting temporary relief while the member pursues his remedy within the union. With such temporary relief to protect him from immediate harm, the union member should be required to pursue his internal remedy, if such a remedy is clearly available.
Blumrosen, supra note 44, at 1460.
The *Detroy* decision was followed in *Farowitz*. As outlined in the preceding section of this article, *Farowitz* concerned a plaintiff who had been disciplined for opposing the union's collection of dues which he claimed were illegal. The court did not require exhaustion, relying on some of the grounds utilized by the *Detroy* court, even though the intra-union remedy was specifically brought to plaintiff's attention. Said the court: "In view of Salzhandler . . . the violation of Federal law seems clear."\(^6\) Also relied on was the apparent futility of plaintiff's appeal within the union, which would be to the federation that had been litigating for three years the legality of its dues and whose views, therefore, were diametrically opposed to those of the plaintiff. But such reliance was unfortunate, since in every case of union discipline the internal union machinery will cause plaintiff at some point in the appellate procedure to be confronted with persons whose views differ from his with respect to the merits of the dispute. No presumption should attach to the effect that inconsistency of views would necessarily disqualify union officials from rendering fair and impartial decisions on the question of improper discipline; otherwise the exhaustion doctrine could be rejected in every case.\(^6\)

Two other problems have recently been brought to the attention of the courts under section 101(a)(4). In *McCraw v. United Ass'n of Journeymen & Apprentices of the Plumbing Indus*.,\(^6\) the court found that the evidence indicated that plaintiff had indeed exhausted his internal union remedies. The union advanced the contention, however, that the member had not made a good faith presentation of his case to the union and therefore did not give the union a sufficient opportunity to determine the controversy properly. The court quite correctly accepted the proposition that "bad faith use of internal settlement procedures, when shown, may be grounds for denying resort to the courts under the Act,"\(^6\) but that a court is not required "to examine and pass judgment upon the skill or competence with which a member presents his claim to the union."\(^6\) The court found that the plaintiff had exerted sufficient efforts toward the vindication of his rights before the union. Also, in *Harris v. International*...

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\(^6\) 53 L.R.R.M. at 2847.

\(^6\) See Sheridan v. United Bhd. of Carpenters, 47 L.R.R.M. 2624 (D. Del. 1961), where *Detroy* was followed.


\(^6\) Id. at 661.

\(^6\) Ibid.

\(^7\) 53 L.R.R.M. 2909 (3d Cir. 1963).
Rights of Union Members

Longshoremen's Ass'n,70 the Court of Appeals for the Third Circuit correctly held that it is not necessary under the proviso for the union to show that its entire internal procedure can be consummated within the four-month period of time. It is sufficient if there is a reasonable opportunity for the union member to obtain relief within the four months even if some higher step in the procedure cannot be exhausted within that time.71

Safeguards Against Improper Discipline

Section 101(a)(5) provides that "No member of any labor organization may be fined, suspended, expelled, or otherwise disciplined except for nonpayment of dues . . . unless such member has been (A) served with written specific charges; (B) given a reasonable time to prepare a defense; (C) afforded a full and fair hearing." The purpose for the inclusion of this provision is probably two-fold. First, it allows the courts to shed the burden of struggling to find contract, tort or property theories to apply against improper union disciplinary proceedings, and second, it publicizes the availability of remedies for such action.72

The legislative history makes it clear that safeguards incorporated by the section refer to discipline against members for the exercise of their rights as members and not as officers or representatives of the union.73 This distinction has apparently been observed rather carefully in the early decisions under the act. For example, Strauss v. International Bhd. of Teamsters74 held that a plaintiff who had been removed from his position as business agent because a conviction for crime rendered him ineligible under the union constitution did not have a cause of action under the section. On the other hand, it has been held that where the discipline was invoked against an officer, but for the reason that he had exercised his rights as a member, an action might be entertained under the section. Thus, where an officer brought criminal charges against a fellow union member for assault, the union's removal of the officer from his position was held to fall within the proscription of section 101(a)(5).75

There have been in addition several cases dealing with the problem of

72 See Aaron, supra note 59, at 873; Cox, supra note 60, at 838.
73 Rothman, Legislative History of the "Bill of Rights" for Union Members, 45 Minn. L. Rev. 199, 216 (1960).
premature action in the courts under 101(a)(5). In one case the court refused to pass on the question whether the section gives a member about to be disciplined the right to inspect membership lists in order to assure that his union trial jury will be impartially selected. The court held that this issue may not be raised until discipline has actually been imposed. Insofar as policy is concerned, the holding would seem to be unfortunate, but since the section does not give rise to judicial jurisdiction until a member has been actually disciplined the conclusion of the court would seem to have been dictated by the language of the act.

The most difficult problem to arise under the section has been what constitutes "discipline." Dictionary definitions are by no means helpful in this regard, for the word "discipline" must be interpreted in the context of the purpose sought to be accomplished by Title I, by the realization that Title I deals only with the exercise of the rights of members, by the fact that section 101(a)(5) is patterned after the common law and a long line of decisions in both state and federal courts as to what constitutes "union discipline," and by an understanding that the various federal laws in the labor-management field must be accommodated in cases of apparent conflict. With this in mind it is necessary to review at this point a series of more recent cases which have apparently mistreated the intent of Congress.

The Detroy case, previously discussed in connection with exhaustion of remedies, involved a suit under section 101(a)(5) by a union member who performed at a resort hotel. His difficulty arose when the hotel claimed that he had breached the agreement between them. At the request of the union the parties submitted to arbitration and the dispute was decided in favor of the hotel. Upon plaintiff's refusal to abide by the arbitration award, the union placed his name on its "national unfair list" causing plaintiff several lost opportunities for employment. The court held that the union action constituted discipline within the meaning of section 101(a)(5). The court reasoned that the union's enforcement of its member's contract with the hotel redounded to the benefit of the union itself and was therefore "an act of self-protection." Does section 101(a)(5) apply to prevent union conduct directed against any of its members for the sake of self-protection? For example, if a union renegotiates the

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77 In Flaherty v. United Steelworkers, 46 L.R.R.M. 3006 (S.D. Cal. 1960), the same result occurred where union members brought an action in court after their disciplinary hearing but prior to any action taken by the union, despite the fact that plaintiffs alleged bias on the part of the union's trial body.
seniority provisions of a collective bargaining contract to the detriment of some of the employees in the bargaining unit, would such employees have a cause of action against the union on the theory that the union’s conduct was self-protective and thus constituted discipline? Federal law suggests otherwise. What the union did in Detroy was in pursuance of its duty as a collective bargaining agent, a duty which it is required to exercise under the law. The decision of the court frustrates the implementation of that federal duty. The instant decision is for these reasons highly questionable.

A similar misinterpretation took place in King v. Grand Lodge Machinists where union members were discharged from their jobs as grand lodge representatives by an officer of the union who had just won an election to his post over a candidate whom the discharged representatives had supported. The court, in holding that the discharge of the representatives constituted discipline, held that 101(a)(5) is not limited to discipline which restricts the rights of union members, but that rights of employment may equally be involved. This approach, however, would seem to contradict the legislative intent. In any event the court should not have reached the question of employment because undoubtedly the backing of a particular candidate in a union election is the exercise of a membership right and not a right of employment.

The interesting question in the King case is whether the union’s conduct constituted discipline, and its resolution depends upon the reasons underlying the union’s action. The union correctly took the position before the court that the question of which representatives were to be employed lay wholly within the discretionary authority of the international president. The art of patronage is well known in political and administrative life and is equally well known and accepted for the same reasons in union life. The fact is that international officers should not be required to administer the union and otherwise perform their functions through representatives who are known to be opposed to their incumbency. This is purely a question of internal union administration into which the court has unduly intruded. It is highly doubtful that Congress meant to impose the stamp of discipline upon the conduct of the union in the instant case.

Similar considerations were overlooked in Rekant v. Shochtay-Gasos Union. There a union member who had lost his job when his employer

80 53 L.R.R.M. 2574 (3d Cir. 1963).
went out of business went to his union and requested that he be given some work, although he had no "right" to such work. There was evidence of a past practice on the part of the union to make available temporary replacement work to a union member by other members giving up a part of their work to their less fortunate colleague. The executive board of the union granted the member's request and a resolution was adopted to that effect. However, at a general meeting of the union the following week that resolution was discussed and finally several months later rescinded because the union member in question had failed to perform his job duties, had failed to appear at work punctually, and had been complained about bitterly by the employers involved. The court held that the rescinding resolution was not discipline because of its finding that the plaintiff's conduct would have precluded him from obtaining work even if the resolution had remained in effect. The result is correct but the reasoning seems specious. The question again should not be cast in terms of the effect upon the union member, but in terms of the motive behind the union's conduct and whether or not the action was intended to affect the union-member relationship. For example, the court said that "the basic thrust of the union action—prompted as it was by appellee's behavior as a member . . . —looked towards stopping appellee's present behavior and preventing or curtailing its possible repetition."81 On this ground, therefore, the court would have found that the union conduct constituted discipline were it not for the fact that as a result of the union's action the plaintiff lost nothing which he otherwise would have had; but the reasoning is based on the wrong premise. The plaintiff did not badly perform his work as a member of the union but simply as an employee. The union's reaction was not addressed to the plaintiff's failure to fulfill some responsibility expected of him as a member, but was intended to correct a situation which threatened peace between the union and the employers involved. It is upon this rationale that the court was correct in concluding that "The union action before us now certainly was not within the intended scope of [the] legislation."82

In Parks v. International Bhd. of Elec. Workers,83 the international president revoked the charter of a local union because its members had failed to abide by his directive that certain clauses be included in the local's collective bargaining agreement pursuant to the policy of the international union, by which policy the local was bound. The

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81 Id. at 2578.
82 Id. at 2579.
83 314 F.2d 886 (4th Cir. 1963).
court correctly decided that the action of revocation, although taken against the local itself, sufficiently affected the membership so as to consti-
tute discipline against the members.\textsuperscript{84}

Furthermore, it has been generally recognized that in determining what constitutes a "full and fair hearing" the courts may not decide the dis-
pute de novo or second-guess the decision arrived at by the union trial
board. However, "a close reading of the record is justified to insure that
the findings are not without any foundation in the evidence."\textsuperscript{88}

One further point requires comment under this heading. One observer
has suggested the following:

The courts are free to adopt standards of review in these cases which will
encourage the union to develop impartial internal review channels, such as those
found in the UAW's Public Board, and in the Upholsterers' Union. If the courts
were to give more deference to decisions of such tribunals than to decisions
emanating from the usual union appellate process, the development of impartial
review machinery might be promoted. This approach would satisfactorily resolve
the dilemma created by the LMRDA requirement of a "fair hearing," unac-
complicated by a requirement of an impartial tribunal.\textsuperscript{86}

However salutary the suggestion in terms of policy, it is in obvious dis-
agreement with congressional intent and the judicial function. There is
no "dilemma" simply because Congress has not created one. The original
McClellan amendment would have provided an opportunity in internal
union procedures for "final review on a written transcript of the hearing,
by an impartial person or persons."\textsuperscript{87} However, that proposal did not find
its way into the statute. Even more impressive is the fact that the
language of the section obviously does not require that a full and fair
hearing encompass the impartial tribunal suggested above. It would ob-
viously be beyond the power of the courts to legislate by suggestion or
otherwise in this area. Undoubtedly it would be advisable for all unions
to adopt arrangements similar to those employed by the United Auto
Workers for the sake of private and public confidence in its procedures.
But they cannot be required to do so in the absence of specific legislation
to that effect.\textsuperscript{88}

\textsuperscript{84} It was held, however, that § 101(a)(5) had not been violated because, factually, plain-
tiffs had failed to prove their case.

\textsuperscript{85} Vars v. Boilermakers Union, 53 L.R.R.M. 2690 (2d Cir. 1963). Unfortunately, while
utilizing a correct standard of review, the court in Vars did second-guess the union trial
board as to one of the points of proof involved. See also Phillips v. Teamsters Union, 209

\textsuperscript{86} Blumrosen, supra note 44, at 1461-62.

\textsuperscript{87} Aaron, supra note 59, at 873.

DUES, INITIATION FEES AND ASSESSMENTS

Section 101(a)(3) provides that dues and initiation fees shall not be increased and that no assessments shall be levied upon the members unless the local unions doing so follow certain prescribed procedures, and national unions or federations doing so follow other prescribed procedures. Generally speaking, the requirement is majority vote by secret ballot.89

The reason for the incorporation of this provision into Title I is difficult to comprehend. Section 8(b)(5) of the National Labor Relations Act90 makes it an unfair labor practice for a union to require of employees covered by a valid union security agreement any excessive or discriminatory initiation fees. Moreover, there are very few instances in practice in which unions may be said to charge unreasonable initiation fees or dues. It has been justly concluded that

[T]he possible benefits of the statutory provision do not appear sufficient to justify such detailed governmental regulation of this particular union activity. On the other hand, unions and courts may congratulate themselves on having escaped from the nightmare of the McClellan Amendment's provision imposing an absolute maximum on union initiation fees. Besides being administratively unworkable, that provision is an example of gratuitous congressional meddling at its worst.91

The only facet of this provision which may cause difficulty was explained by Professor Cox:

The only serious question raised by this provision concerns the manner of raising the payments due the international union in situations where the member pays all his dues to the local union and the local pays a per capita tax to the international. Since there is no evidence of an intention to affect the ability of unions to raise money or to regulate the allocation of power between local and international unions, section 101(a)(3) should be read as a specification of the forms through which each body should express its will when the union constitution requires its action, without affecting other aspects of the process. An international could therefore raise the per capita tax by any of the statutory methods without the assent of the local union, but the local would decide whether to increase the share of the dues paid to the international or actually raise the dues.92

The leading case is Ranes v. Office Employees.93 There the issue presented was

89 The early cases under the section are collected in Rothman, Judicial Interpretation of the "Bill of Rights" for Union Members, 45 Minn. L. Rev. 995, 1009 (1961).
91 Aaron, supra note 59, at 868-69.
92 Cox, supra note 60, at 835.
93 317 F.2d 915 (7th Cir. 1963).
whether the action of an international union pursuant to section 101(a)(3)(B) of the act increasing the constitutional minimum for dues paid by its members to their respective local union can be enforced by an affiliated local union without first submitting the question of a dues increase to a vote of its members under the provisions of section 101(a)(3)(A). 94

The court answered the question in the affirmative, essentially adopting the interpretation suggested by Professor Cox. In any case, "the allocation of power between local and international unions" should properly be left undisturbed.

PRE-EMPTION

Section 103 of Title I provides that: "Nothing contained in this title shall limit the rights and remedies of any member of a labor organization under any State or Federal law or before any court or other tribunal, or under the constitution and bylaws of any labor organization." Under this provision it is equally patent that Congress did not intend to pre-empt the jurisdiction of the state courts in favor of exclusive federal court jurisdiction, nor did it intend that the jurisdiction of any court be pre-empted by exclusive National Labor Relations Board jurisdiction.

No further word on this subject would be necessary were it not for two decisions which suggest that the exclusive jurisdiction granted to the NLRB by the NLRA95 might in some instances limit the rights guaranteed by Title I. In Beauchamp v. Weeks96 the complaint alleged that the union caused plaintiff's employer to discharge him and that this constituted a violation of section 101(a)(5). The proper holding in the face of such a complaint obviously would have been a simple finding that the union conduct in the case could not be deemed "discipline." However, the court unnecessarily went further and held that the case was pre-empted by NLRB jurisdiction within the meaning of San Diego Bldg. Trades Council v. Garmon.97 It understood the admonition of Garmon to require that 101(a)(5) be "strictly construed," and so construing the statute, and for that reason, the court found that the union conduct did not constitute "disciplinary action." In Barunica v. Hatters Union,98 the Court of Appeals for the Eighth Circuit was faced with a complaint alleging that the union had discriminated against plaintiff by refusing to refer her to

94 Id. at 917.
98 53 L.R.R.M. 3002 (8th Cir. 1963).
employment in violation of section 101(a)(1). The court held that “the facts alleged assert no cause of action with respect to section 101(a) (1).”99 This should have ended the matter. The court went on, however, to find that the case was pre-empted by NLRB jurisdiction, that Congress intended such pre-emption to apply to Title I and that the *Detry* case was distinguishable because there “violation of federal law was regarded as clear and injury immediate and otherwise difficult to compensate.”100 The reasoning of *Beauchamp* and the dictum in *Barunica* cannot be justified.101

**Deprivation of Rights by Violence**

Section 610 makes it criminally unlawful “for any person” by force or violence or threat thereof to restrain, coerce or intimidate “any member of a labor organization for the purpose of interfering with or preventing the exercise of any right to which he is entitled under the provisions of this Act.” It is provided that any person who “willfully” violates the section shall be subject to a fine of not more than 1000 dollars or imprisonment for not more than one year, or both.

Two decisions under this section deserve special comment. In *United States v. Roganovich*,102 several union members were indicted under section 610 in the following circumstances: At a membership meeting of the local a business agent named Parker reported that he had issued work permits to nonmembers because he could not find members willing to work on the job involved. Union member Robbins expressed doubt that members willing to do the work could not be found. At that point another member suggested to Parker that Robbins was calling him a liar. Parker asked Robbins whether that was his intent and Robbins denied it. This, however, immediately resulted in a brawl wherein several union members physically assaulted Robbins for having made the comment. Two of the members involved in the fracas were indicted under section 610 and found guilty by a court sitting without a jury. On appeal the defendants contended that section 610 was co-extensive with section 102 which provides civil remedies for deprivation of rights. The union argued that since section 102 is limited to member suits against unions, section 610 must be similarly limited and cannot apply against *members* who are not officers or agents of the union. It was pointed out by the union that

99 Id. at 3004.
100 Id. at 3005.
102 318 F.2d 167 (7th Cir. 1963).
the purpose of the act was to prohibit unlawful conduct by labor organizations and not by members against other members. The contention was rejected. The court observed that unlike the other sections of the act, section 610 made it unlawful "for any person" to engage in certain conduct. The word "person" as defined in section 3(d) includes "one or more individuals." Therefore, section 610 permits the indictment of individuals as well as labor organizations. This interpretation of the section is undoubtedly supported by the clear language of the act.

The same issue arose in United States v. Doherty, where six union members were indicted by a federal grand jury on seventeen counts charging them with violations of section 610 by virtue of their use of force to exclude certain union members from a meeting. The indicted members were adherents of a Teamsters local in Philadelphia while the charging individuals, also union members, were part of a dissident group called SWEEP. During a union meeting in which members were debating a proposed contract, members of SWEEP refused to obey the parliamentary ruling of the chair and thereupon created a disturbance which caused the breakdown of the meeting. A subsequent meeting was set by the local union. The local union received what the evidence in the case shows to be reliable and substantial information that the members of SWEEP proposed to repeat their performance at this meeting. To meet the threat the Executive Board of the local adopted a resolution that because the individuals intended to disrupt the meeting, the local would prevent their entry into the meeting hall. The resolution, it might be noted, was adopted upon the advice of counsel. Accordingly, when the adherents of SWEEP arrived at the meeting hall they were prevented from entering. A general fight ensued which the evidence shows was started by members of the dissident group. Six indictments were issued against union members who were trying to prevent the entry of the SWEEP group. The defendants were found guilty on ten of seventeen counts and consecutive sentences were imposed.

The case is presently on appeal. The Roganovich issue will probably be decided in the same manner. Another interesting question that is raised in the appeal relates to the "willfully" portion of section 610. In the union's brief to the court of appeals it is suggested that the defendants' conduct in this case could not have been willful because they had no

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104 The members of SWEEP were at this time arranging to transfer their allegiance to the Seafarer's International Union, which they later did.
intention of using force and violence, the record apparently showing that the fight was started by the opposition. The argument is quite reasonable and may prevail.

CONCLUSION

In January of 1963 one observer commented:

With respect to Title I, I would conclude that the apathetic member has not had his condition improved by the extra shot of democracy, but that on the contrary the normal percentage of dissidents and litigious characters that you will find in any organization, have started all kinds of vexatious and harassing litigation, encouraged by the broad language of the statute.105

It must be concluded in the months since that utterance that the situation has not radically changed. The main difficulty has been that the large majority of judges, instead of looking to the underlying purposes of the specific provisions of the act and attempting to evaluate properly the conflicting interests which Congress, perhaps unfortunately, left to the province of the judiciary, have attempted to engrave upon Title I "notions of decency, justice and fair play developed by our English speaking culture and interpreted and defined by the judges."106

A summary of what has been discussed above demonstrates the following: The provisions guaranteeing freedom of speech and assembly have in some instances, as in Salzhandler and Farowitz, extended the rights provided by the simple expedient of regarding the "Bill of Rights" as being absolute in form and coverage. We have in effect seen a return to the McClellan amendment by the judiciary in the face of congressional rejection thereof. The title contains a provision governing dues which while relatively harmless to unions does not in any appreciable way increase or better the individual rights of employees or provide them with any protections they did not previously enjoy. Section 101(a)(4) has been interpreted by a majority of the courts so as to place a restriction on the settled judicial doctrine of exhaustion of remedies where the section was not intended to have any such effect. Through the vehicle of the use of the word "discipline" in section 101(a)(5) some of the courts have been able to intrude into the unions' duty to enforce and support their contracts, as in Detroy, and the right of the unions' officers to hire whatever employees or representatives they may feel they could best

106 Nelson v. Johnson, 212 F. Supp. 233, 279 (D. Minn. 1963). In this decision, the ambiguous principles of Title I were held to apply to Title V as well.
work with in the performance of their functions, as in the *King* case, as well as the unions' power to allocate employment rights in conjunction with employers and to free its labor market of those persons who cannot perform the work, as in *Rekant*.

In light of these various decisions it must be concluded that the hopes of Congress have thus far not been satisfied. In the final analysis union democracy will come about or will be preserved not by the LMRDA but by the ability of unions to recognize their own shortcomings where such exist and their willingness and that of their members to cooperate voluntarily in the effort of reconstruction. Our secret hopes were best expressed by Professor Cox in the following terms:

*In conclusion, we should recognize that the law cannot compel idealism or create the spirit of self-government. It cannot force union members to attend meetings or hold their officers to a strict accounting. Many of the intellectuals who grew up under the New Deal may have allowed a romantic glow which surrounded the unionism of the 1930s to obscure harsher facts, but I cannot believe that they were entirely wrong in sensing a vitality which had something quite different to offer than wealth and power for union officials and more and more monetary benefits for union members. The prestige of labor unions is at a low ebb today partly because of the tremendous propaganda advantages gained by hostile forces as a result of the cynical wrongdoing of a few union leaders. But it is also attributable to their obscuring the basic idealism within the labor movement.*

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107 Cox, supra note 60, at 853-54.
CAN COLLECTIVE BARGAINING SURVIVE THE BOARD?\(^1\)

**JOHN J. ADAMS**\* AND **R. L. COLEMAN**\**

**INTRODUCTION**

Whether collective bargaining—at least as Congress and the Supreme Court have understood the duty to bargain in good faith—can survive the National Labor Relations Board is questionable in the face of recent Board decisions. The question results from the Board’s expansion of the subjects of bargaining to include the core of management’s responsibility, from its censorship of the actual negotiations, and from its adoption of more drastic penalties for violations of the duty to bargain.

The Board is increasingly interjecting the government into collective bargaining through its control of the bargaining subjects and its review of the substantive terms of negotiations.\(^2\) In the process the Board is causing employer representatives to become cynical actors in roles written by the Board for an “ideal world” of management and labor in equal partnership. Its world is far from the realities of the economic forces at issue in collective bargaining. In the process the Board is also stifling management’s initiative.

**THE SUBJECTS OF BARGAINING**

The Board, with the Supreme Court’s approval in *NLRB v. Borg-Warner Corp.*,\(^3\) has divided the subjects of bargaining into three classes: mandatory, permissive, and forbidden.\(^4\) The extent of the employer’s duty

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\(^1\) The title is adapted from Virgil B. Day’s speech, “Can Collective Bargaining Survive Its Friends?,” delivered at the Annual Fall Conference of the Associated Industries of Cleveland in Cleveland, Ohio on October 3, 1963.

\(^2\) The role of the Board in the collective bargaining process is discussed generally in Cox & Dunlop, Regulation of Collective Bargaining by the National Labor Relations Board, 63 Harv. L. Rev. 389 (1950).

\(^3\) 356 U.S. 342 (1958).

\(^4\) The subjects of bargaining are catalogued in detail under the three classifications in McManemin, Subject Matter of Collective Bargaining, 13 Lab. L.J. 985 (1962).
to bargain varies with each class. The employer must decide, at his peril, the class within which a bargaining subject falls, for he may misjudge and place a subject in the wrong classification, and the Board may change the bargaining subject’s classification.

First Class—or Mandatory Subjects of Bargaining. These are the subjects which fall within the statutory phrase “wages, hours, and other terms and conditions of employment,” and which are required subjects of bargaining.

The class is an ever expanding one and now covers a broad range of subjects—almost every conceivable subject of wages, fringe benefits and terms of employment. In fact, there are few union proposals in the past twenty-five years that the Board has not forced into the statutory phrase “wages, hours, and other terms and conditions of employment.”

Second Class—or Permissive Subjects of Bargaining. The Board has devised, and a majority of the Supreme Court have accepted, a second class of bargaining subjects—the permissive subjects. These are the subjects that the parties may bargain about if they are willing. This second class of bargaining subjects includes, apparently, every subject that is neither mandatory nor illegal.

The Board distinguishes mandatory from permissive bargaining subjects on a basis which neither two members of a previous Board nor four members of the Supreme Court could accept and which is without apparent sanction in the statute. The Board reasons that the act requires that the parties bargain to agreement or impasse about wages, hours, and

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6 McManemin, supra note 4, at 988-99 (1962), includes as examples the following in his discussion of the mandatory subjects of collective bargaining: rates of pay; method of payment; wages for union leaders for time spent on union business; price of meals furnished employees; paid coffee break; Christmas and Easter bonus; stock bonus; merit increases; changes required by Fair Labor Standards Act; piecework and incentive wage systems; commissions; hours of work; relief, lunch and wash-up periods; overtime; shift operations; holidays and vacations; group health and accident insurance; pensions; profit sharing; stock purchase plan; sick-leave plan; and separation pay.

7 One of the few examples is contributions to an industry advancement program or promotion fund. Metropolitan Dist. Council of the United Bhd. of Carpenters, 137 N.L.R.B. 1583 (1962) (McCloskey & Co.); Detroit Resilient Floor Decorators, 136 N.L.R.B. 769 (1962), enforced, 317 F.2d 269 (6th Cir. 1963) (Mill Floor Covering, Inc.).


other terms and conditions of employment. But with permissive subjects—such as a pre-strike secret vote or a waiver of the right to bargain during the time a labor contract is in effect—the parties need not bargain. If one party refuses to bargain about one of these legal but only permissive subjects, the other may not “insist” that the subject be included in the contract. If the employer does “insist,” he is guilty of refusing to bargain about the mandatory subjects because he has forced the union to bargain about his second class proposal which it was not required to do.

The distinction is difficult even in its statement. For in the words of dissenting Mr. Justice Harlan, for the minority of four Justices in Borg-Warner:

I am unable to grasp a concept of “bargaining” which enables one to “propose” a particular point, but not to “insist” on it as a condition to agreement. The right to bargain becomes illusory if one is not free to press a proposal in good faith to the point of insistence...

It must not be forgotten that the Act requires bargaining, not agreement... It may be that an employer or union, by adamant insistence in good faith upon a provision which is not a... [mandatory] subject... does in fact require the other party to bargain over it. But this effect is traceable to the economic power of the employer or union in... a given situation... If one thing is clear, it is that the Board was not viewed by Congress as an agency which should exercise its powers to aid a party... which was in an economically disadvantageous position.

Third Class—or Forbidden Subjects of Bargaining. These subjects might be called the Eliot Ness or vestal virgin types, untouchable and beyond reach. Two examples will suffice to illustrate these third class, or forbidden subjects: An employer must not bargain about his duty to

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10 The Supreme Court in Borg-Warner ruled that a “ballot” clause requiring a pre-strike secret vote of the employees (union and nonunion) for acceptance or rejection of the employer's last offer was a permissive subject of bargaining. The Court reasoned that the “ballot” clause dealt only with relations between the employees and their unions, while a “no-strike” clause, for example, and other mandatory subjects regulated the relations between employers and employees. Id. at 349-50.


12 A recent addition to the list of permissive subjects is an employer's proposal requiring the signature of each affected employee before a grievance could be processed. Industrial Union of Marine Workers v. NLRB, 320 F.2d 615 (3d Cir. 1963). The court reasoned that the effect of the grievance-signatory proposal was “to limit the union's representation of the employees and not to condition the employees' employment.” Id. at 618-19.

13 356 U.S. at 352, 358 (1958) (dissenting opinion).
grant exclusive recognition to the union. The union must not request the inclusion of a closed shop provision.

**Recent Cases—The Decision to Subcontract.** Subcontracting is a classic, and recent, example of the Board’s promotion of a permissive subject to the first class of mandatory subjects. In 1961, the Board held in the first *Fibreboard Paper Prods. Corp.* case that the employer’s decision to subcontract was not a mandatory subject of bargaining, unless the decision to subcontract was prompted by anti-union reasons. The effect or impact of the decision upon terms and conditions of employment—such as seniority or severance pay—was recognized as a mandatory subject. But the Board did not believe that an employer was required to bargain over basic management decisions, such as whether and to what extent management should risk or employ its own capital or managerial effort.

In 1962, however, the Board, now differently constituted, promoted the decision to subcontract to the mandatory class of bargaining subjects, by first ruling to that effect in *Town & Country Mfg. Co.*, and then reversing its ruling in *Fibreboard* on reconsideration. From the Board’s standpoint, employers must now bargain about their decision to subcontract, in addition to such decision’s effect or impact upon the employees in terms of wages, hours, and other terms and conditions of employment. For one dissenting Board member, however, the *Town & Country* and *Fibreboard* rulings mean “that short of complete union agreement, any action taken by management must hereafter be taken at its peril,” and

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14 Sherwin-Williams Co., 34 N.L.R.B. 651 (1941), enforced, 130 F.2d 255 (3d Cir. 1942); Simplicity Pattern Co., 102 N.L.R.B. 1283 (1953).

15 American Newspaper Publishers Ass’n v. NLRB, 193 F.2d 782 (7th Cir. 1951).


19 The courts of appeals have split in reviewing the *Town & Country* doctrine, and thus a Supreme Court decision appears likely. The Fifth Circuit upheld the Board in *Town & Country Mfg. Co.* v. NLRB, 316 F.2d 846 (5th Cir. 1963), but grounded its decision in the evidence of the company’s anti-unionism. The Court of Appeals for the District of Columbia in *Fibreboard Paper Prods. Corp.* v. NLRB, 322 F.2d 411 (D.C. Cir. 1963), approved the *Town & Country* doctrine in its broadest application, ruling that the employer’s motivation was immaterial. The Eighth Circuit rejected the doctrine and refused in part to enforce the Board’s order in NLRB v. Adams Dairy, Inc., 322 F.2d 553 (8th Cir. 1963), holding that in the absence of a finding of anti-unionism the company could not be held in violation of the act for failure to bargain about its decision to subcontract. But it was required to bargain about the effects of its decision to subcontract, and its refusal to discuss the impact of the contracting out was an unfair labor practice.

will "serve effectively to retard and stifle sound and necessary management decisions."\textsuperscript{21}

The Board imposes this bargaining duty with no qualifications and no guideposts to aid employers. But obviously the employer must take the initiative in advising the union of the proposed subcontracting, for there must be the possibility of bargaining before the decision becomes accomplished fact. The Board has not distinguished routine "make-or-buy" decisions from major (or minor) departures from past practice. Neither has it distinguished subcontracting work never previously done in the plant from work always performed there. Nor has it distinguished a subcontract which reduced employment levels from one which had no effect at all upon present employment.\textsuperscript{22}

A management decision to close, sell,\textsuperscript{23} merge or relocate has also become a mandatory subject. Here, too, the Board had held, until recently, that the decision to close was a second class subject, unless the decision was the result of anti-unionism. But the Board has held that the decision to go out of business altogether is a mandatory subject of bargaining, and again, without yardsticks or qualifications.\textsuperscript{24}

\textit{Future Board Rulings.} While the writers are advocates and not prophets, the future course of the presently constituted Board is not hard to read. The list of subjects which the Board forces into the category of "wages, hours, and other terms and conditions of employment" will continue to grow. More and more basic management decisions will be given the status of mandatory subjects of bargaining—decisions that must

\textsuperscript{21} Ibid.

\textsuperscript{22} The Board has broadly applied its \textit{Town & Country} doctrine to subcontracting during an economic strike in the case of Hawai`i Meat Co., 139 N.L.R.B. 966 (1962). But the Court of Appeals for the Ninth Circuit denied enforcement, Hawai`i Meat Co. v. NLRB, 321 F.2d 397 (9th Cir. 1963), ruling that the employer's decision to subcontract during an economic strike for the purpose of maintaining operations was not a mandatory subject of bargaining.

\textsuperscript{23} Applying \textit{Town & Country}, NLRB trial examiner George Bott has ruled in United Dairy Co., No. 6-CA-2551 (1963), that an employer's decision to sell two of his plants was a mandatory subject of collective bargaining. Trial examiner Bott found that the employer violated the Taft-Hartley Act by not affording the union a reasonable opportunity to bargain about the decision to sell the plants and further violated the act by refusing to furnish the union with a copy of the sales agreement.

\textsuperscript{24} Star Baby Co., 140 N.L.R.B. 678 (1963). The Board, following \textit{Town & Country}, found that the closing of the business without consulting with the union violated the act. But the Board also found that the employer had violated the act by closing for the purpose of avoiding collective bargaining with the union.
be communicated to the union so that the possibility of bargaining exists before the decisions are executed. It is only a short step—or no step at all—from a decision to subcontract or to close, sell, merge or relocate to such decisions as the following:

1) The decision whether or not to invest in conveyor equipment which will displace stock handlers.

2) The decision whether or not to purchase and install automated machinery which will be operated by only one employee and which will replace several employees and several antiquated machines. (The Board may have already arrived here in the Renton News Record case.25)

3) The decision whether or not to install IBM or data processing equipment that will be operated by one or two white collar workers and will supplant several blue collar stock clerks and factory clericals.

4) The decision whether or not to locate a plant in Canada, Mexico, or Japan, whether the purpose is to produce for sale abroad or for sale in the United States.

From the Town & Country doctrine and its logical extensions, the Board now appears determined to make the union an equal partner in basic management decisions.

The Board has attempted to soften its tortured concept of "wages, hours, and other terms and conditions of employment," and its suffocation of the exercise of managerial responsibility, by rather self-consciously emphasizing in the recent decisions that of course the fact an employer must bargain about his decision does not mean that he must agree.26

Although this does not relieve at all the strangling effect of the Board's rulings on managements' attempts to manage, the employer could still retain control of his business to some degree if he were really free not to agree.

But even though the act says that the duty to bargain does not require agreement or concession, the Board's recent decisions, particularly at the trial examiner level in the hard bargaining cases, leave in doubt whether this apparent statutory right has any practical meaning.

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25 136 N.L.R.B. 1294 (1962). In Renton the Board found two employers in violation of Taft-Hartley for their refusals to bargain about the decision to terminate part of their operations. The two had joined with other employers, who were not parties in this case, in the formation of two corporations, with automated equipment, to perform the type of work previously done by the employees discharged as a result of the partial termination of operations.

THE PROBLEMS OF HARD BARGAINING

The statute,27 its legislative history, and the Board’s pre-1947 encroachments28 in the field of collective bargaining29 are the focus of the Supreme Court’s decision in NLRB v. American Nat’l Ins. Co.:30

The National Labor Relations Act is designed to promote industrial peace by encouraging the making of voluntary agreements governing relations between unions and employers. The Act does not compel any agreement whatsoever between employees and employers. Nor does the Act regulate the substantive terms governing wages, hours and working conditions which are incorporated in an agreement. . . .

. . . .

In 1947, the fear was expressed in Congress that the Board “has gone very far, in the guise of determining whether or not employers had bargained in good faith, in setting itself up as the judge of what concessions an employer must make and of the proposals and counter-proposals that he may or may not make.” . . . As amended in the Senate and passed as the Taft-Hartley Act, the good faith test of bargaining was retained and written into Section 8 (d) of the National Labor Relations Act. That Section contains the express provision that the obligation to bargain collectively does not compel either party to agree to a proposal or require the making of a concession.

Thus it is now apparent from the statute itself that the Act does not encourage a party to engage in fruitless marathon discussions at the expense of frank statement and support of his position. And it is equally clear that the Board may not, either directly or indirectly, compel concessions or otherwise sit in judgment upon the substantive terms of collective bargaining agreements.31

The Supreme Court further cautioned the Board in NLRB v. Insurance Agents’ Union:32

27 As a result of the Board’s pre-1947 encroachments in the field of collective bargaining, Congress in enacting the Taft-Hartley Act added a statutory definition of the duty to bargain in good faith:

[T]o bargain collectively is the performance of the mutual obligation of the employer and the representative of the employees 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, but such obligation does not compel either party to agree to a proposal or require the making of a concession . . . .


29 The duty to bargain in good faith is the subject of recent articles by Cox, The Duty to Bargain in Good Faith, 71 Harv. L. Rev. 1401 (1958), and Fleming, The Obligation To Bargain in Good Faith, 47 Va. L. Rev. 988 (1961).

30 343 U.S. 395 (1952).

31 Id. at 401-02, 404.

The same problems as to whether positions taken at the bargaining table violate the good-faith test continue to arise under the Act as amended. . . . But it remains clear that § 8 (d) was an attempt by Congress to prevent the Board from controlling the settling of the terms of collective bargaining agreements. . . .

Our labor policy is not presently erected on a foundation of government control of the results of negotiations. . . . Nor does it contain a charter for the National Labor Relations Board to act at large in equalizing disparities of bargaining power between employer and union.33

But there is increasing evidence that the Board, particularly at the trial examiner level, is ignoring the statutory restrictions and the Supreme Court's admonitions. The recent report by the trial examiner in the General Elec. case34 is a classic case in point.35 It is the case in which the IUE goaded the Board into attacking "Boulwareism"—so-called—for the third time, although two prior attacks had failed.36

The facts and the 111-page intermediate report of the trial examiner are not subject to brief summary.37 Nor is "Boulwareism," for as in the case of other catch words and phrases "Boulwareism" now suggests one general approach to bargaining and is not descriptive of the GE approach. But certainly one of its features is the premise that there is no point in "fruitless marathon discussions at the expense of frank statement and support"38 of GE's position.

For practical purposes, that is the substance of what GE did in 1960. It frankly stated and supported its position, as it had done in previous negotiations. Before its offer was made, GE had of course informed its

33 Id. at 487, 490.
35 The General Elec. case contrasts with the Board's recent decision in Philip Carey Mfg. Co., 140 N.L.R.B. 1103 (1963). The Board ruled that Philip Carey did not violate the Labor Management Relations Act by substantially adhering to its final offer during the seven negotiating sessions subsequent to its offer and prior to the employees' striking. However, the Board pointed out that the offer was not made until the eleventh session and included a wage increase. The Board emphasized that its decision was limited to the facts in that case and did not constitute a review of the purportedly general technique of bargaining labeled "Boulwareism."
36 The IUE in September 1963 filed another charge attacking "Boulwareism" as a result of the 1963 negotiations.
employees of its approach to bargaining. After making the offer, GE informed its employees of its offer and the reasons for its proposal. GE made clear that the company would not be intimidated, or pressured into a business decision it thought unwise, by a strike or threat of strike.

With this brief background, consider some of the trial examiner's conclusions:

1) No claim was made that GE was seeking to rid itself of the union,\(^39\) nor did GE attempt to displace the union and instead reach agreement with the employees,\(^40\) nor did GE unlawfully communicate with its employees.\(^41\)

2) GE clearly desired to reach agreement,\(^42\) did not enter the negotiation with a closed mind,\(^43\) did not initially present its offer on a take-it-or-leave-it basis,\(^44\) and did not finally formulate and make its offer until after six weeks of negotiations.\(^45\)

Yet the examiner concluded that GE bargained in bad faith from start to finish. And his report makes clear his belief that GE had a duty—regardless of the act and the Supreme Court—to agree to proposals and to yield concessions. It is equally clear that the examiner asserted and exercised the right to pass on the substantive proposals under negotiation and to determine when GE had yielded, and retreated, enough.

A few examples will suffice. The examiner outlined GE's offer item by item, with revealing editorial comment. After noting that GE had proposed a three year contract with a three per cent wage increase in October 1960, a four per cent increase in April 1962, but no cost-of-living escalator, the examiner said: "The Union's proposal had asked for annual productivity increases of 3\(\frac{1}{2}\) percent and for continuance of the escalator clause."\(^46\) Referring to GE's "retraining and reassignment" proposal, he observed: "The Union had not asked for this 'employment security' provision. . . . [GE] in its brief points to this as a 'concession,' but it is quite clear that the transfer did not involve any substantive change."\(^47\) With respect to GE's offer for "income extension aid," the examiner stated: "The 'IEA' was new. . . . The only thing in the Union's proposals resembling it in part

\(^{39}\) Trial Examiner's Report 92 n.121.
\(^{40}\) Id. at 94.
\(^{41}\) Ibid.
\(^{42}\) Id. at 85.
\(^{43}\) Id. at 26.
\(^{44}\) Id. at 7.
\(^{45}\) Id. at 26 and n.23.
\(^{46}\) Id. at 29 n.27.
\(^{47}\) Id. at 30 n.28.
was the Union’s demand for separation pay. . . . The Union’s SUB demand involved a different concept.”

The examiner dismissed GE’s proposal for an “emergency aid plan” with the comment: “This proposal was neither requested by the IUE nor desired by it on the condition stated.”

In reference to GE’s proposed “pension plan improvements,” the examiner said:

The Company’s proposal contained some six improvements in the Pension Plan. Three involved changes which did not reflect any proposal made by the Union, one involved a change substantially as proposed by the Union, and two reflected in part union-proposed changes. The proposal in effect rejected other changes the Union had proposed.

His comments regarding “insurance plan improvements” were in the same vein:

Here, too, the Company’s proposal contained some six improvements. At least two concerned items not raised by the Union. Only one was precisely in the terms proposed by the Union, amount of benefits aside. The Union’s basic proposals were rejected.

Even with “non-economic matters”—proposed contract changes—the examiner was critical. He found that the company’s proposal for four changes in the contract included two that differed from the union’s requests and two that “had not been specifically requested by the union at all.”

In the examiner’s opinion, the four proposed changes “were all of a relatively minor nature as compared to many other more basic requests for contract changes which the Union had requested and which were rejected.”

The trial examiner’s censorship of the negotiations is also apparent from his statements that “if any genuine bargaining were to occur, it had to begin at the time [GE’s] . . . offer was made”; that “When [GE] formally presented its offer on August 30, it was responsive to the Union’s demands only in small part.” And that “minimum, good faith bargaining required [GE] . . . to explore with the union possible alternative courses

48 Id. at 30 n.29.
49 Id. at 30 n.30.
50 Id. at 30 n.31.
51 Id. at 30-31 n.32.
52 Id. at 31 n.33.
53 Ibid.
54 Id. at 90.
55 Ibid.
or compromise solutions that might lead to a mutually satisfactory accord.\textsuperscript{56}

The Board's willingness to expand the employer's duty to bargain and then censor his bargaining\textsuperscript{57} is evident in other recent decisions. In \textit{Radiator Specialty Co.},\textsuperscript{58} decided in June 1963, the Board found that the totality of the employer's conduct demonstrated a refusal to bargain. Although unnecessary to the Board's decision, the Board nevertheless reviewed at some length the employer's positions on various union proposals, and found that the employer's positions on the major issues evidenced an unwillingness to do more than go through a form of negotiations. In \textit{H. K. Porter Co.},\textsuperscript{59} the trial examiner found the company guilty of a refusal to bargain for its insistence upon a no-strike clause, without making the concession of an arbitration clause.

\textit{The Future of Collective Bargaining}. The Board's recent decisions present several serious questions for the future of collective bargaining: What has become of the Supreme Court's view that an employer (or union) need \textit{not} "engage in fruitless marathon discussions at the expense of frank statement and support" of his position? What has become of the statutory right in good faith to withhold agreement and to decline concessions? What real assurance is there in the Board's statements that although an employer \textit{must} bargain about his \textit{decision} to subcontract, for example, he need not of course agree with the union or make concessions?

Concretely, how can an employer—in the world of business reality—make a \textit{decision} to subcontract or to move or close or sell his plant, and then bargain with the union, without running into the requirement, which the \textit{General Elec.}, \textit{H. K. Porter} and other cases establish or fairly

\textsuperscript{56} Id. at 91.

\textsuperscript{57} The Board has recently persuaded some of the courts that its role should include censorship of negotiations. In NLRB v. Fitzgerald Mills Corp., 313 F.2d 260 (2d Cir. 1963), cert. denied, 84 Sup. Ct. 47 (1963), a divided Court of Appeals for the Second Circuit found there was substantial evidence, including the employer's uncompromising bargaining attitude, to sustain the Board's finding of refusal to bargain in good faith. The majority, however, refused to view the employer's counterproposal for a contract as evidence of bad faith bargaining for, in their opinion, the contract "did provide the basis for future negotiations." Id. at 265. In a dissent, Judge Leonard Moore was critical of the Board for exercising the function of determining "the proper resolution of differences arising during the course of negotiations." Id. at 271 (dissenting opinion).

\textsuperscript{58} 143 N.L.R.B. No. 42 (1963).

imply, that he must nevertheless be ready to modify or reverse his decision, and make concessions or propose alternative solutions, to prove his open-mindedness?

The real problem here—leaving to one side the view that the basic management decisions should not be bargained at all—is that the anti-GE, anti-Boulware approach of the trial examiner in that case, and the growing trend toward censorship of the substantive bargaining, places the employer—and collective bargaining—on the horns of a dilemma.

1) The employer can make his decision, frankly state and support his position, try for quick union approval, and, failing that, bargain to an impasse and then carry out the decision, accepting the delay and loss of managerial efficiency and decisiveness. He acts at his peril, of course, and the penalties for erring can be ruinously expensive as the Darlington Mfg. Co. case60 illustrates.

2) He can make the union a co-partner in his management. Surely he will satisfy the Board and its trial examiners if he follows this course, which leaves only his board of directors, his stockholders, and his conscience to do the criticizing and penalizing.

3) He can become a cynic. If he has a position or has made a decision, he should keep that to himself and meet, confer, discuss, justify, consider, persuade, explore—and then, having engaged in these senseless antics, go ahead and do what he originally intended.

CONCLUSION

This is the dilemma and the threat to collective bargaining which exists today, and why collective bargaining—at least as Congress and the Supreme Court have understood the duty to bargain in good faith—may not survive the Board's intrusions. The third—or cynical—alternative

60 139 N.L.R.B. 241 (1962), enforcement denied on other grounds, 54 L.R.R.M. 2499 (4th Cir. 1963). The Board ruled that Darlington and its affiliated corporations were liable for back pay for Darlington's approximately 500 former employees. The liability for back pay ran from the time of the employees' discharge as a result of the closing of the Darlington plant until their obtaining substantially equivalent employment. The Board ordered the affiliated corporations, in the event Darlington did not resume operations, to offer jobs to Darlington's former employees, with recognition of the employees' seniority and other rights, to the extent that jobs were available at their plants within the area states. If jobs were not available, the affiliated corporations were required to place the employees on preferential hiring lists. They were also required to pay travel and moving costs for the employees (and their families) who accepted employment at the area plants. For discussions of the Board's requiring back pay from discharge until obtaining substantially equivalent work, see Notes, 111 U. Pa. L. Rev. 672 (1963), and 49 Va. L. Rev. 616 (1963).
should have no place in collective bargaining. But the Board and its trial examiners are naive if they fail to realize that the course they are following discourages candor, fosters pointless haggling, prevents sharp agreements and disagreements, and strangles effective managerial action. In the process, they will cripple or destroy the very collective bargaining process they attempt to protect.

The first alternative is the only reasonable one today. The Board should restore collective bargaining as Congress envisioned: the right to be frank, vigorous and prompt in adopting, stating and supporting a position, and the right to allow the economic consequences that result from the strengths and weaknesses of management and labor, without the risks that one has not waited enough, discussed enough, conceded or retreated enough, or not placed a bargaining subject in its right classification.
THE EVOLVING DUTY TO BARGAIN

Benjamin C. Sigal*

Introduction

The National Labor Relations Act granted to a labor organization representing a bargaining unit majority the right to recognition by the employer as exclusive representative for the purposes of collective bargaining "in respect to rates of pay, wages, hours of employment, or other conditions of employment."1 Corresponding to this right, it imposed a duty upon employers to bargain which, by its nature was as broad as the right to recognition.

In the intervening years since enactment of the NLRA, questions of the scope and nature of the bargaining obligation have repeatedly arisen as unions have brought new problems to the bargaining table, and employers and unions have acquired sophistication in bargaining techniques through twenty-five years of experience under the law. Thus, for example, the pressure generated by widespread subcontracting and plant relocation, in a context of persistent and substantial unemployment, has made them frequently crucial issues in collective bargaining. Resistance by employers to bargain with respect to these matters has posed the question whether the scope of the bargaining obligation includes them, and indeed, more generally, whether it covers those subject matters which the evolution of our industrial society has made of growing concern to employees in their relations to their employers.

Evolution has affected also the manner in which unions and employers attempt to meet their bargaining obligations. While the traditional and more obvious forms of resistance to collective bargaining have been outlawed, and have fallen into disrepute, although not disuse,2 new approaches have been developed which, it is contended, satisfy the letter of the law while preserving to one party or the other almost complete independence of action with regard to the terms of the collective "bargain."

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Bargaining Guidelines

It is this author's view that the statutory sources of the bargaining obligation contain the necessary guidelines to assure that all factors materially bearing on the employment relationship must be subject to collective bargaining between unions and employers, no matter what form they take. Further, evasion of the purposes of collective bargaining will not be permitted by giving sanction to techniques which substitute the forms of bargaining for its substance.

The findings and policies of the act disclose that Congress protected the right to self-organization, and encouraged the practice of collective bargaining, in order to eliminate obstructions to commerce and to eliminate the inequality of bargaining power which prevented "the stabilization of competitive wage rates and working conditions within and between industries." Congress carefully refrained from defining the area of bargaining more specifically than to provide that the obligation to bargain was coextensive with the area of recognition—namely, relating to wages, hours, and other terms and conditions of employment. The philosophy of collective bargaining as worked out in the labor movement in the United States was absorbed, and given statutory approval, by the NLRA. That philosophy traditionally envisaged collective bargaining with respect to all matters affecting conditions of employment. The Board, supported by the courts, gradually spelled out subjects that fell within the area of mandatory bargaining. When the Board held, for example, that employers were required to bargain on insurance, pensions, employee stock purchase plans and company housing, the same hue and cry about the invasion of "management prerogatives" and the threat to our free enterprise system was heard in the land as we hear today in relation to Board decisions on subcontracting and other matters.

In NLRB v. Borg-Warner Corp., the Supreme Court had occasion to indicate the line that separates the area of required bargaining from other

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subjects that may be broached by the parties for agreement. The Court noted that section 8(a)(5), which makes it an unfair labor practice for an employer "to refuse to bargain collectively with the representatives of his employees," read together with section 8(d), which states, in part, that to bargain collectively includes the obligation to meet and confer in good faith "with respect to wages, hours, and other terms and conditions of employment," established the obligation of the parties "to bargain with each other in good faith with respect to 'wages, hours and other terms and conditions of employment . . . .'" The Court concluded that "the duty is limited to those subjects, and within that area neither party is legally obligated to yield." The Court indicated that the distinguishing characteristic of a mandatory subject is that it deals with relations between employees and employers.

The fact that a party bargains in good faith on a mandatory subject does not give it a license "to refuse to enter into agreements on the ground that they do not include some proposal which is not a mandatory subject of bargaining." Consequently, refusal to bargain on a "mandatory" subject is a violation of the act; insistence on bargaining on a "permissive" subject, as a condition of agreement, is also a violation of the act. It is ironic that criticism has been leveled at this dichotomy by some champions of management prerogatives on the ground that parties may unknowingly insist on bargaining on permissive subjects, and later discover they are guilty of refusing to bargain because they want to bargain! The logical terminus of this criticism, if it is to be taken seriously, is that the parties should be able to bargain on any subject to an impasse.

The Supreme Court had occasion to identify a mandatory subject of bargaining in Order of R.R. Telegraphers v. Chicago & N. W. Ry. The case arose on a railroad’s request for an injunction, and the Court was obliged to determine whether a union demand for a contract provision barring the railroad from abolishing jobs without the union’s consent was lawful under the Railway Labor Act and the Interstate Commerce Act.

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8 Id. at 349.
9 Id. at 348-49. Applying that definition to the facts in the case, the Court held that a local uncertified union was not required to bargain on employer demands that (1) the local’s international be excluded from recognition although it was in fact the certified representative; and (2) that the union could not strike without a secret vote of the employees in the unit. The employer was held to have refused to bargain by insisting on these clauses as a condition precedent to accepting any collective bargaining agreement.
and whether it involved a labor dispute under the Norris-LaGuardia Act.\textsuperscript{13} The latter defines a labor dispute, in part, as a "controversy concerning terms or conditions of employment."\textsuperscript{14} The Court found that the union's demand did relate to a condition of employment, and rejected the court of appeals' conclusion that the union's effort to negotiate about the job security of its members represented an attempt "to usurp legitimate managerial prerogatives in the exercise of business judgment with respect to the most economical and efficient conduct of its operations."\textsuperscript{15}

About one month after that decision, the Supreme Court, in \textit{United Steelworkers v. Warrior & Gulf Nav. Co.},\textsuperscript{16} dealt the \textit{coup de grace} to the "management prerogative" litany insofar as it was applied to interpretation of contracts. The agreement between the parties in that case excluded arbitration of "matters which are strictly a function of management." Nothing was said about subcontracting in the agreement, and there was a general provision for arbitration of differences. The Court held that a grievance over subcontracting was arbitrable. The Court disposed of the management function cliche in the following manner:

Collective bargaining agreements regulate or restrict the exercise of management functions; they do not oust management from performance of them. Management hires and fires, pays and promotes, supervises and plans. All these are part of its function, and absent a collective bargaining agreement, it may exercise freely except as limited by public law and by the willingness of employees to work under the particular, unilaterally imposed conditions. . . .

Accordingly, "strictly a function of management" must be interpreted as referring only to that over which the contract gives management complete control and unfettered discretion.\textsuperscript{17}

\textbf{Development of the Board's Views}

With an occasional exception, the Board has taken, even before the Supreme Court's decision in \textit{Borg-Warner} the approach approved by the Court in that case. As long ago as 1946, the Board adopted a trial examiner's conclusion which rejected a contention that a management prerogative clause in a contract relieved the employer of his duty to bargain on the issue of subcontracting.\textsuperscript{18}

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\textsuperscript{14} § 13(c), 47 Stat. 73 (1932), 29 U.S.C. § 113(c) (1958).
\textsuperscript{15} 362 U.S. at 336.
\textsuperscript{16} 363 U.S. 574 (1960).
\textsuperscript{17} Id. at 583-84.
\textsuperscript{18} See Local 24, Teamsters Union v. Oliver, 358 U.S. 283 (1959); Shamrock Dairy, Inc.,
However, the Board faltered in its first consideration of the situation presented in *Fibreboard Paper Prods. Corp.* A majority of the Board rejected the contention that a decision to terminate all the jobs in the bargaining unit related to conditions of employment, and as such would come within the scope of the bargaining obligation. The opinion seemed to suggest that conditions of employment arise out of the continuation of the employment relationship, but that the continuation itself is not a condition of employment. Prior decisions were distinguished on the ground that they involved only partial elimination of bargaining unit jobs, and that the respective unions would continue to be the representative of employees in what remained of their bargaining units. Apparently, the first *Fibreboard* majority felt that the only concern and interest of the union would be the impact of the subcontracting on the employees remaining in the unit. The cited cases, however, did not make a distinction between partial and total elimination of the unit, and did not limit the interest of the bargaining agent as construed by the Board.

Subsequently, after a reappraisal which should not have been agonizing, the Board reversed its position, first in *Town & Country Mfg. Co.*, and then in the second *Fibreboard* decision, which set aside the first. The Board now distinguishes clearly between the right to subcontract, which is not challenged, and the duty to bargain on the decision to subcontract, which the Board holds to be mandatory.


20 Cases cited note 18 supra.

21 136 N.L.R.B. 1022 (1962), enforced on other grounds, 316 F.2d 846 (5th Cir. 1963).


23 See, e.g., Weingarten Food Center, Inc., 140 N.L.R.B. 1001 (1963) (complaint dismissed on a procedural ground, but two members indicated that second *Fibreboard* rationale is applicable to a decision to go out of business); Hawaii Meat Co., 139 N.L.R.B. 966 (1962), enforcement denied, 321 F.2d 397 (9th Cir. 1963) (Board held that bargaining was required on subcontracting during an economic strike, but court of appeals avoided issue by declaring the case to be controlled by NLRB v. Mackay Radio & Tel. Co., 304 U.S. 333 (1938), which held that an employer is justified, in attempting to keep his plant in operation, in hiring new employees as replacements for economic strikers); Motoresearch Co., 138 N.L.R.B. 1490 (1962) (no violation where union was aware that subcontracting was going on, but did not raise issue during eighteen bargaining sessions over a six-month period); Adams Dairy, Inc., 137 N.L.R.B. 815 (1962), enforcement denied, 322 F.2d 553 (8th Cir. 1963) (enforcement denied in part because of lack of finding of unlawful motivation); Renton News Record, 136 N.L.R.B. 1294.
Meanwhile, the Board has recently found certain proposed bargaining subjects to be "permissive" rather than mandatory, where the subject is "related to security for the contracting party . . . rather than relating to a benefit or security for the employees.\textsuperscript{24} These include requests for performance bonds\textsuperscript{25} and for employer contributions to industry promotion funds.\textsuperscript{26}

It is contended that if subcontracting and other matters relating to continuity of employment opportunity are bargainable, numerous difficulties will be created for management in the conduct of business affairs. It is argued that management would be required to bargain over many routine decisions, and that such bargaining would obstruct day-to-day operations. It is argued, on the other hand, that many of these problems are extremely complex. These criticisms not only miss the mark, but underrate the efficacy of the bargaining process as a means of working out solutions and achieving stability in day-to-day relations with employees. The question is not whether bargaining over these matters would be obstructive to management, but whether the failure to bargain with respect to them would lead to labor disputes tending to obstruct commerce. Congress made these matters bargainable because it found that the failure to bargain with respect to wages, hours, and other terms and conditions of employment would obstruct commerce. Moreover, the relative difficulty of the subject matter is not a valid criterion for determining the obligation to bargain. Indeed, the more complex a problem, the greater may be the need to secure employee understanding of, and participation in, the employer's decision. To say that there should be no bargaining on a subject because it will create problems for management overlooks the probability that greater problems may arise because of lack of communication. Management has the opportunity, through bar-

\textsuperscript{24} Arlington Asphalt Co., 136 N.L.R.B. 742 (1962), enforced, 318 F.2d 550 (4th Cir. 1963).
\textsuperscript{25} Local 164, Bhd. of Painters, 126 N.L.R.B. 997 (1960), enforced, 293 F.2d 133 (D.C. Cir.), cert. denied, 368 U.S. 824 (1961) (A. D. Cheatham Painting Co.).
\textsuperscript{26} Metropolitan Dist. Council of the United Bhd. of Carpenters, 137 N.L.R.B. 1583 (1962) (McCloskey & Co.); Detroit Resilient Floor Decorators, 136 N.L.R.B. 769 (1962), enforced, 317 F.2d 269 (6th Cir. 1963) (Mill Floor Covering, Inc.).
gaining, to set up procedures and means for dealing with these aspects of its employee relations in order to normalize them in day-to-day relations, just as it establishes wages, seniority provisions, hours, and all the other aspects of employment relations. The kinds of problems which arise out of automation, technological change and unemployment will undoubtedly lead to new types of proposals and problems at the bargaining table, but they are neither insoluble nor insurmountable. Moreover, they should remove, rather than cause, obstruction when bargaining solutions are worked out. In sum, whether or not bargaining over specific subjects is mandatory is to be determined by reference to the purposes of the act, and not by resort to concepts of management convenience or management rights.

Hard Bargaining

If the bargaining process itself is not effective in producing the kind of negotiation and exchange between the parties which is likely to lead to the solution of problems and to the reaching of understandings, little is achieved by determining what is bargainable. The employer who develops his program for a collective bargaining agreement without the participation of the union in the decision making, and stands on his right to refuse to find a common ground of agreement may, perhaps, be complying with the letter of the law, but he is not bargaining in any realistic sense. The full effectuation of the bargaining obligation requires understanding and acceptance of the processes of collective bargaining. The philosophy of collective bargaining from which the NLRA was born envisaged the bargaining process as one in which wages, hours, and other terms and conditions of employment were arrived at through joint participation of the employer and the exclusive representative of the employees, rather than through employer fiat.\(^27\) It was a concept developed under predecessor acts, such as the Railway Labor Act,\(^28\) the Norris-LaGuardia Act,\(^29\) and the National Industrial Recovery Act.\(^30\) The philosophy was expressed by the National Labor Board in 1934 as follows: "While the law does not

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30 Ch. 90, 48 Stat. 196 (1933).
compel the parties to reach agreement, it does contemplate that both parties will approach negotiations with an open mind and will make a reasonable effort to reach a common ground of agreement.33

Furthermore, the fact that Congress intended from the outset that a union chosen by the majority of employees would be the exclusive representative of all employees in the unit, not just of its members, necessarily indicated that the union would serve in more than just an agency capacity. It was also clear that the representative chosen for the purposes of collective bargaining would serve in a professional capacity as an expert.34 Just as the shareholders of a corporation have their experts on one side of the collective bargaining table, the employees are entitled to have their experts on the other side. This view of the union as representative and expert precludes a view that the union is a competing party with the employer for the allegiance of the employees.

While Congress in 1947 was concerned that the good faith bargaining requirement had been utilized to compel employer concessions in bargaining, it made no fundamental change in the bargaining obligation other than to specify that concessions are not required, and to add formal requirements which it hoped would help preserve industrial peace. It left the basic content of the obligation unchanged. The amendments did not change the nature or functions of the bargaining agent. It did not convert the bargaining agent into a mere sounding board. This view was affirmed by the Supreme Court in NLRB v. American Nat'l Ins. Co.,35 where the Court stated: "The Act does not encourage a party to engage in fruitless marathon discussions at the expense of frank statement and support of his position."36 The Court stated further: "Performance of the duty to bargain requires more than a willingness to enter upon a sterile discussion of union-management differences."37 Finally, the Court noted in the context of its discussion of the limiting provision of section 8(d), that the word "concession" was substituted for the word "counter-proposal" as originally proposed, because the Chairman of the NLRB suggested that the statutory definition of collective bargaining should conform to the

33 343 U.S. 395 (1952).
34 Id. at 404.
35 Id. at 402.
meaning of good faith bargaining as understood at the passage of the NLRA.\textsuperscript{36}

Subsequently, in \textit{NLRB v. Insurance Agents Union},\textsuperscript{37} Mr. Justice Brennan reaffirmed the philosophical content and continuation of the original concept of the bargaining obligation:

Collective bargaining, then, is not simply an occasion for purely formal meetings between management and labor, while each maintains an attitude of "take it or leave it"; it presupposes a desire to reach ultimate agreement, to enter into a collective bargaining contract. . . . This was the sort of recognition Congress, in the Wagner Act, wanted extended to labor unions; recognition as the bargaining agent of the employees in a process that looked to the ordering of the parties' industrial relationship through the formation of a contract.\textsuperscript{38}

This definition, of course, necessarily leads into the conference room.\textsuperscript{39} Only by examining the conduct of the parties at and away from the bargaining table can a determination of "good faith" bargaining be made. Despite the fact that the employer may be willing to sign an agreement, the failure to produce information necessary and relevant to bargaining,\textsuperscript{40} the insistence upon inclusion of non-mandatory subjects of bargaining,\textsuperscript{41} the refusal to bargain with regard to a mandatory item,\textsuperscript{42} and the unilateral change in a condition subject to collective bargaining, without prior offer and negotiation with the bargaining representative,\textsuperscript{43} are acts so destructive of the collective bargaining process, and so lacking in acceptance of the recognition and bargaining duties, that in and of themselves they have been held to constitute refusals to bargain in good faith. Inherent in each of these acts is the failure of the employer to give substance to the concept of recognition of the union, a concept which requires that the employer accept the union as a \textit{joint participant} in the determination of wages, hours, and other terms and conditions of employment.

The foregoing analysis of the bargaining obligation permits us to draw the proper distinction between hard bargaining which is lawful, and hard

\textsuperscript{36} Id. at 404 n.14.
\textsuperscript{37} 361 U.S. 477 (1960).
\textsuperscript{38} Id. at 485.
\textsuperscript{39} Ibid.
\textsuperscript{42} \textit{NLRB v. General Motors, Inc.}, 373 U.S. 734 (1963); \textit{Phelps Dodge Copper Prods. Corp.}, 101 N.L.R.B. 360 (1952).
bargaining which is only a sophisticated evasion of the bargaining obligation through observance of its procedures without its substance. Lawful hard bargaining occurs, we submit, when an employer or a union refuses to change its position after it (1) meets and confers at reasonable times and demonstrates willingness to enter into an agreement, (2) submits its proposals to the give-and-take of searching discussion, (3) freely states its reasons for the positions it takes, (4) discloses any relevant information necessary to support or evaluate its positions, and (5) states and discusses reasons as well as information relevant to its rejection of the proposals on the other side. Good faith is measured, not by what a party is willing to concede, but by his willingness to attempt to arrive at a mutually satisfactory result through the exchange of all pertinent argument and facts. If this is done, bargaining is no idle exercise. True collective bargaining is not an "either/or" proposition but, as Archibald Cox has said:

Participation in debate often produces changes in a seemingly fixed position either because new facts are brought to light or because the strengths and weaknesses of the several arguments become apparent. Sometimes the parties hit upon some novel compromise of an issue which has been thrashed over and over. Much is gained even by giving each side a better picture of the strength of the other's convictions. The cost is so slight that the potential gains easily justify legal compulsion to engage in the discussion.44

Admittedly, it is not always possible to draw the line between legitimate hard bargaining, and that which constitutes mere meeting and talking coupled with a willingness to sign a collective bargaining agreement on unilaterally conceived terms. The difficulty in drawing this line has invited the development of a refined successor to the blunt refusals to bargain of the 1930's and 1940's. The failure to attempt to draw and hold the line puts a premium on such sophistication. We venture to assert that the failure to mark that distinction clearly bears a heavy share of the responsibility for the decrease in effectiveness of collective bargaining, and the growing public concern over its future. The cynical argument that collective bargaining is threatened by the Board may well be a cover for the fear that the Board will put flesh and muscle on the skeleton of the bargaining obligation. Rather than too much involvement by the Board with the collective bargaining process, as some critics suggest is the case, perhaps there has not been enough perceptive involvement.45

Hard bargaining has sometimes been loosely described as Boulwareism. I prefer to reserve that name for a particular form of conducting labor relations advocated by Lemuel Boulware, formerly a vice-president of General Electric Company, and practiced by that company. But Boulwareism involves more than merely a hard bargaining approach. It involves, in fact, a double-pronged violation of the bargaining obligation—the denial to the union of its rightful role at the bargaining table, coupled with an attempt to market the employer's proposals for a collective bargaining agreement directly to its employees over the head of the exclusive bargaining agent. This form of bargaining negates the role of the union as the joint participant in negotiations and relegates it to a subordinate role as only one source through which the employer may ascertain the desires of its employees. At the same time that the parties sit around the bargaining table, purportedly engaging in negotiations, the employer engages in a massive distribution of communications to the employees. It is through this communication program that it attempts to obtain acceptance of its programs, and not through negotiations. It views itself as a competitor of the union for the "loyalty" of the employees. A bargaining agreement is to be reached, not through the joint efforts of the representatives of management and labor, but through the techniques of Madison Avenue.

Whether or not the form of bargaining engaged in by the General Electric Company violates the company's obligation to bargain is the subject of a pending unfair labor practice proceeding in which the trial examiner's intermediate report has issued and is pending before the Board.\textsuperscript{46} Since the writer serves as counsel to the charging party in this case, he will not attempt to approach critically the findings or conclusions of the intermediate report, nor will he use this occasion to urge support of his case.

But, it must be noted that in addition to findings that the company did not bargain in good faith, the trial examiner found specific independent violations of the act upon evaluation of the totality of the company's conduct both at and away from the bargaining table.\textsuperscript{47} Thus, he concluded that the company, at the outset of the talks between the parties and prior to negotiation of the new agreement of 1960, made unlawful unilateral changes in insurance benefits.\textsuperscript{48} Moreover, he found a second

\textsuperscript{47} Id. at 106.
\textsuperscript{48} Id. at 88.
independent violation of the bargaining obligation in the company's refusal to furnish the union information which was necessary and relevant to collective bargaining.\textsuperscript{49} Further, he found that during the course of negotiations with a national bargaining committee with respect to the terms of a national collective bargaining agreement, the company sought to deal separately with local unions on matters properly the subject of national negotiations and solicited local unions separately to abandon or refrain from supporting the existing strike.\textsuperscript{50}

He also found, on the basis of a mass of supporting evidence, that: (1) the company followed what amounted to a unilateral determination of employment terms, leaving negotiations thereafter an empty exercise with predetermined results;\textsuperscript{51} (2) that the totality of its conduct showed that it was going through the motions of bargaining at the conference table and intended to rely entirely on the effectiveness of its "direct" sales approach to its employees to resolve the bargaining issues in its favor;\textsuperscript{52} and (3) that an important objective of its massive communications program was to discredit the union leadership and to drive a wedge between the union and its members.\textsuperscript{53}

In addition, the trial examiner found numerous other indicia of the company's failure to engage in good faith bargaining at any time during its negotiations with the union in 1960. He concluded that the company's bargaining table conduct and its communications to its employees demonstrated that it did not approach the bargaining table with any serious intent to seek to adjust differences through negotiation and reach a mutually satisfactory agreement. The report does no more than apply the historical criteria of good faith bargaining, and finds that they were not met.

This case demonstrates that the obligation to bargain cannot be described and fixed in immutable terms. Any effort to do so provides easy escapes for sophisticated practitioners. Ultimately, it is the attitude with which parties approach bargaining that determines its success, as well as its compliance with the law. It is this fact which makes the totality of a party's conduct appropriate for evaluation in determining whether the bargaining obligation has been met.

\textsuperscript{49} Id. at 79.
\textsuperscript{50} Id. at 84.
\textsuperscript{51} Id. at 91.
\textsuperscript{52} Id. at 99.
\textsuperscript{53} Ibid.
CONCLUSION

In conclusion, we may say that recent developments have shown that the Board has recognized that the content of the duty to bargain, insofar as subject matter is concerned, is flexible and evolutionary, and must be continuously re-examined to make certain that it covers fully the field of wages, hours, and other terms and conditions of employment. It is no less necessary that the Board perceive, identify, and appropriately deal with recent developments in the conduct of collective bargaining which threaten to deprive that process of a function intended by Congress, namely, to mitigate and eliminate certain substantial obstructions to the free flow of commerce by encouraging the practice and procedure of collective bargaining.
SECONDARY BOYCOTTS—LOOPHOLES CLOSED OR REOPENED?

GUY FARMER*

INTRODUCTION

In a similar symposium four years ago, when the Landrum-Griffin amendments were new and untested, I undertook to make some forecasts of the future impact of these legislative changes on the shape of the law governing secondary boycotts. Prophecy is always hazardous, and nowhere is it more so than in the complex field of labor law and labor relations. Anyone who might wish to take the trouble to look back at the remarks which I made at that time, will find that I sought to cushion myself to some degree against subsequent embarrassment by opining that "some basic concepts would at this time appear to be obvious but their application to variable practical situations will only be fully understood after perhaps years of litigation and interpretation." I then went on to say, as an additional hedge against the limitless capacity of man to obscure and obfuscate the obvious, that "it would be foolhardy and presumptuous [of me] to attempt to supply all these answers." It is now apparent after four years of litigation, interpretation and continuing uncertainty that I did not then fully comprehend the folly of prophecy. We know little more today of the ultimate shape of the law of secondary boycotts than we then knew and much that we thought we knew has been cast into doubt.

It would therefore perhaps be worthwhile to re-examine some propositions which appeared, at least to me, in 1959 after the enactment of the amendments to be self-evident as a matter of legislative purpose, and seek to ascertain the extent to which these propositions have survived, have been proved invalid, or remain in controversy.

PLUGGING THE LOOPHOLES

The overriding legislative purpose most clearly apparent in the 1959 secondary boycott amendments was to close the obvious loopholes which

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2 Id. at 328.

3 Ibid.

had emerged in the language and interpretation of the old Section 8(b)-(4) of the National Labor Relations Act.\textsuperscript{5} My own view is less significant than that of the late President, then Senator, Kennedy who stated bluntly and categorically in reporting on the conference agreement:

The chief effect of the conference agreement therefore, will be to plug loopholes in the secondary boycott provisions of the National Labor Relations Act. There has never been any dispute about the desirability of plugging these artificial loopholes.\textsuperscript{6}

These artificial loopholes which Congress sought to eliminate were clearly understood when the amendments were passed, and they were explicitly delineated in the congressional debates and reports. Twelve years of administration of the National Labor Relations Act had brought these loopholes into clear focus. The old section 8(b)(4) had defined prohibited boycotts in terms which contained certain self-defeating limitations which were not apparent to Senator Taft and to the sponsors of the Taft-Hartley Act when that legislation was passed. During the 1947 debates, Senator Taft characterized as pointless any effort to distinguish one boycott from another when he remarked that all secondary boycotts were bad.\textsuperscript{7}

The statutory language chosen to accomplish this broad objective, however, proved inadequate and inept. The prohibition was couched in terms of restraints on inducements directed against employees, and incorporated terms such as "concerted refusal," "course of employment," "employer," "employee," and the like, which in the course of Board and judicial interpretation were given meanings which restricted the sweep of the prohibition and gave rise to the loopholes through which the secondary boycott could and did escape interdiction.

There is little difficulty in defining the loopholes which Congress in 1959 sought to close.

(1) \textit{Inducement of "Employee" versus "Individual"}

Old section 8(b)(4) prohibited inducement of "employees" to engage in boycotts or secondary strikes. Two loopholes developed. One was the situation in \textit{NLRB v. International Rice Milling Co.},\textsuperscript{8} where the Supreme Court, by reference to the term "concerted" appearing in the section, held that inducement of a single employee to refuse to cross a picket line

\textsuperscript{7} 93 Cong. Rec. 4023 (1947).
\textsuperscript{8} 341 U.S. 665 (1951).
was not an inducement to concerted action. The other, and by all odds the more serious loophole, stemmed from the use of the term "employee." Since that term was elsewhere in the act defined to exclude supervisors and also to exclude employees of employers not subject to the act (such as railroads, airlines, municipalities, farmers, hospitals), it was held that secondary inducement to boycott activity by a supervisor or by employees of exempt employers under the act was not prohibited. Thus, for example, if a union could induce a supervisor on the loading dock to direct employees not to load or unload a truck, this wholly effective boycott could not be restrained. In 1959 Congress sought to close this escape hatch by striking the reference to concerted action and substituting the term "individual" for "employee" and the term "person" for "employer."

(2) DIRECT COERCION OF AN EMPLOYER

Since the old section 8(b)(4) was couched in terms of employee inducement, the result was that direct pressure on the secondary employer himself was immune. Thus, a union could simply write or call the employer and threaten a strike or other reprisals unless he ceased handling the goods of another employer and in many cases could accomplish the desired boycott in this manner more effectively than by directing appeals to employees. In an effort to prohibit this short circuiting of secondary pressure, Congress in 1959 added new subsection 8(b)(4)(ii)9 which made it unlawful for a union to "threaten, coerce, or restrain any person engaged in commerce" for an object prohibited by section 8(b)(4). These objects include entering into hot cargo agreements or boycotting any other person.

(3) THE HOT CARGO AGREEMENT

The final and major loophole was, of course, the hot cargo agreement. Since, as already mentioned, a union was held free to exert direct pressure on an employer to boycott or cease business relations with another employer, it was equally lawful for an employer to agree in advance of a labor dispute to refuse to handle goods defined as "hot," or deal with a "hot" employer. When an employer changed from "cold" to "hot" was, of course, a matter of unilateral union definition.

Congress showed its determination to close this loophole once and for all by prohibiting a union from using pressure to force an employer to sign a hot cargo agreement and by enacting new section 8(e) declaring

hot cargo agreements to be unlawful. To emphasize the point, Congress also declared them void and unenforceable.

Loopholes Reopened?

Thus was the state of affairs in 1959 when the Landrum-Griffin amendments became the law. It now seems fitting to turn to the current state of the law and see how the congressional purpose of closing the old loopholes has fared in the crucible of litigation.

(1) Inducement of “individuals” not defined as “employees”

I have already indicated that there are several aspects of this particular loophole. That segment of the loophole which permitted lawful inducement of a single employee as opposed to concerted inducement has presented no problem, and we may assume that it has been effectively closed. The more important segments of this loophole relating to inducement of supervisors and employees of exempt employers are fumbling in a morass of conflicting decisions.

It should be recalled that Congress substituted the word “individual” for the word “employee” for the explicit object of prohibiting the inducement of persons in the employ of a company or concern who are by definition not “employees” within the meaning of the act. This obviously brings into focus the legality of inducing supervisory or managerial employees to boycott another employer. The NLRB has held in Local 505, Int’l Bhd. of Teamsters (Carolina Lumber Co.) that the term “individual” is not to be given its literal meaning, but rather is restricted to those individuals who are more closely related to the rank and file than to management. This led the Board to draw a dichotomy between “low level” and “high level” supervision, holding that inducement of “low level” supervisors is not permissible but inducement of “high level” supervision is permitted under section 8(b)(4)(i). In the same decision, the Board attempted to set out a rather complex set of rules to guide their determination of when an individual is or is not an individual.

The Board reasserted this stand in Wholesale Delivery Drivers (Sretvalte, Inc.), but here the Board ran afoul of the Ninth Circuit, which

12 Id. at 1444.
reversed. The court rejected the Board’s premise that the (ii) portion of 8(b)(4) would be rendered useless by a construction that barred appeals literally to all individuals employed by any person. The court held that the (i) and (ii) provisions were directed at different types of restraints, and that the congressional purpose of banning inducements of all supervisors was plain and unambiguous. We have without doubt not heard the last word on this question. The Supreme Court has granted certiorari in the Servette case. If the Board’s view is sustained, we must conclude that while this loophole has been narrowed, it has not been closed altogether. Perhaps, we will find that it has been cut in half.

Another segment of the loophole in this area relates to inducement of employees of exempt employers. This loophole Congress sought to close by the substitution of “individual” for “employee” and “person” for “employer.” This signified a congressional purpose of prohibiting coercion of a secondary employer even though he did not meet the definition of “employer” under the act.

This seemingly closed loophole appeared to be reopened in part by the Board’s decision in Local 5895, United Steelworkers (Carrier Corp.). There, the Board held that picketing of railroad employees by a production union was permissible as primary picketing because the picketed railroad property was adjacent to the struck plant. The Second Circuit reversed this ruling in a decision which is now on appeal in the Supreme Court.

In my view, the Second Circuit opinion deserves careful reading, for here the court is searching for the true objective of the picketing, and is saying that, in distinguishing between lawful primary picketing and unlawful secondary picketing, the touchstone is to be found in the object sought to be achieved. If the object is primary, incidental secondary effects are tolerable; but, if the place or character of the picketing is such as to show that involvement of neutral employees is not merely incidental, but rather is a planned objective of the picketing itself, the picketing then becomes secondary and, for that reason, unlawful. This

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14 Servette, Inc. v. NLRB, 310 F.2d 659 (9th Cir. 1962); but see NLRB v. Local 294, Teamsters Union, 298 F.2d 105 (2d Cir. 1961), where the court voiced approval of the Board’s policy in Carolina Lumber.
view of the congressional purpose as being primarily a quest for the true objective of the picketing contrasts with the Board's approach, which is becoming more and more ritualistic, as typified by its application of the *Moore Dry Dock*\(^1\) formula, where form rather than substance is permitted to govern and where more weight is given to times and places of picketing and the content of the picket signs than to the total factual pattern which discloses the true object which the union seeks to attain.

If the Supreme Court comes to grips with these fundamental questions, the decision in the *Carrier* case should set many problems to rest.

There is one aspect of the exempt employer loophole which is perhaps little known and has not been the subject of a Board or court decision since the passage of the 1959 amendments. This arises in the situation where a union's representation of employees is limited to employees of exempt employers, such as railroads and airlines. Early in the administration of Landrum-Griffin, a case arose before the General Counsel in which such a union, representing airline employees exclusively, picketed the premises of a food purveyor for an airline with which the union had a dispute. The General Counsel refused to issue a complaint.\(^2\) His reason was that, while Congress had prohibited induce-ment of airline employees by a labor organization representing covered employees, the converse was not true and Congress had not prohibited the secondary picketing of covered employers by unions which did not meet the definition of "labor organization" under the act. This union did not meet the definition, he said, because it represented no "employees" within the meaning of the act.

Since the General Counsel's ruling in this situation is final, this question could not be presented to the Board or the courts. However, in view of the clearly expressed congressional intent, this decision is at least a dubious one. Its correctness must rest on a resurrection of the same mechanical approach to section 8(b)(4) that gave rise to some, although by no means all, of the original loopholes.

(2) **Direct Pressure on a Secondary Employer**

The Congress sought to close the loophole of direct union pressure on a secondary employer by adding the new (ii) provisions to 8(b)(4), prohibiting a union from threatening, coercing or restraining an employer for a prohibited object.

The crucial question of whether this new restriction will protect the

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\(^{18}\) Sailors' Union, 92 N.L.R.B. 547 (1950) (Moore Dry Dock Co.).

\(^{19}\) Continental Air Lines, No. 21-CC-389 (1960) (unreported).
secondary employer from union picketing and other economic pressures which may not involve employee inducement is at this moment very much in doubt. The unsettled state of the law stems in large part from two key questions which are still in litigation.

(a) Is picketing coercive or must actual injury be shown?

The first of these two key issues is whether secondary picketing can be restrained or whether it is subject to restraint only where there is proof that the secondary employer was actually injured by the picketing. On this issue the NLRB and the Fifth Circuit are aligned against the District of Columbia Court of Appeals. The typical situation where this question arises is one in which a union, having a dispute with a producer, pickets retail outlets urging customers to refrain from purchasing the product of the producer. The appeals are directed at consumers but not at the employees of the retail stores; those employees continue to work, and pick-ups and deliveries continue without interruption. Must the retailer who has no dispute with the union show actual economic loss, or does the picketing itself constitute coercion and restraint of the retailer? The NLRB held that the picketing is coercive without regard to proof of actual injury and the Fifth Circuit most emphatically agreed in United Wholesale & Warehouse Employees (Perfection Mattress & Spring Co.).20 The District of Columbia Circuit, however, is contra.

Prior to the Fifth Circuit ruling in Perfection, the same question was presented to the District of Columbia Circuit in Fruit & Vegetable Packers v. NLRB (Tree Fruits).21 The character of the picketing was very similar in both cases. In Tree Fruits, two or three pickets peacefully patrolled the retail outlets selling the products of the primary employer, carrying placards urging customers not to purchase the primary employer's goods. The Board found that the picketing coerced and restrained the retail store. The District of Columbia Circuit reversed, holding that an actual showing of economic injury was required. The court said that this construction was dictated by constitutional difficulties under the first amendment which would be invoked by a contrary construction.

The Fifth Circuit pointedly disagreed. This court said that the picketing itself constituted a threat, coercion and restraint, and that no other proof of economic injury was required. The court went on to say that

if proof of actual injury were required "an amendment designed to close a major and serious loophole would be stripped of all practical utility."22

The District of Columbia Circuit decision in Tree Fruits is now on appeal in the Supreme Court23 and we may, therefore, expect some clarification on this major point.

It would come as a surprise if the District of Columbia Circuit's construction is sustained. Here it seems apparent that the Board and the Fifth Circuit have all the better of the argument. The legislative purpose seems crystal clear. Then Senator Kennedy, in explaining the final compromise with the House on the secondary boycott provisions, stated:

Under the Landrum-Griffin bill it would have been impossible for a union to inform the customers of a secondary employer that that employer or store was selling goods which were made under racket conditions or sweatshop conditions, or in a plant where an economic strike was in progress. We were not able to persuade the House conferees to permit picketing in front of that secondary shop . . . .24

The emphasis here was on picketing, for Mr. Kennedy went on to explain that informational activity "short of picketing" would be allowed. His reference here, of course, was to the publicity provision of section 8(b)(4). This forthright and clear statement is supported by other legislative history which is equally definitive.25 Nor is there any legislative expression of a contrary intent. It seems clear, indeed, that Congress made the legislative judgment that secondary picketing was, itself, coercive and imposed a burden on commerce which Congress intended to remove.

The constitutional difficulties which the District of Columbia court referred to, but carefully did not decide, do not, in my opinion, exist. A picket line is a powerful weapon of economic warfare whose potency to coerce has been demonstrated on countless picket lines. The use of so lethal an economic weapon cannot be equated with a mere expression

22 In the Perfection case, the Fifth Circuit, contrary to the Board, held that the picketing involved was also a violation of the (i) portion of section 8(b)(4) in that it constituted an unlawful inducement of the secondary employer's employees. Although the Board had originally held that the picketing was an unlawful inducement of employees, it modified its decision prior to the Fifth Circuit's opinion, since it had found in Minneapolis House Furnishing Co., 132 N.L.R.B. 40 (1961), that such picketing did not necessarily constitute an unlawful inducement of secondary employers' employees.


25 Id. at 1389, 1426-27, 1454, 1689, 1708, 1712.
of views or opinion so as to fall under an absolute constitutional protection as free speech. Moreover, and much more to the point, the Supreme Court has already considered and rejected the constitutional argument that the first amendment protects peaceful picketing from legislative restraint. That question was decided by the Court in *Denver Bldg. & Trades Council v. NLRB (Denver Bldg. Trades)*\(^{26}\) in which the constitutionality of old section 8(b)(4) was upheld. To be sure, the picketing in *Denver Bldg. Trades* was intended as an inducement of secondary employees, and the picketing here was intended to coerce the secondary employer by the threat of economic loss. But in each case the picketing was peaceful and in each case the unlawful object—to bring about a cessation of business with the primary employer—was the same. When the Supreme Court held that Congress could enjoin peaceful picketing in furtherance of an objective found by Congress to be unlawful, I think it is clear that the constitutional question was laid to rest.

**(b) What is a “producer”?**

The second of the key issues now in doubt which will determine whether the direct employer pressure loophole has been closed or reopened stems from the Board’s construction of the controversial publicity proviso.

This is the proviso, it will be recalled, that permits publicity other than picketing for the purpose of advising the public that the goods were produced by an employer with whom the union has a primary dispute. The publicity must be truthful and it must not interfere with pick-ups and deliveries or induce the employees of the distributor not to perform services at the distributor’s store.

It is obvious that handbilling, circulating unfair lists and otherwise urging a consumer boycott of a retail store can be just as effective as picketing in coercing the store owner to cease distributing the product of a producer branded as unfair. The legislative compromise, however, permits such publicity other than picketing where the terms of the proviso are met.

The question, therefore, of whether the proviso was to be given a narrow or broad interpretation became a crucial one. The question came before the Board in 1961 in *Milk Drivers & Dairy Employees (Lohman Sales Co.)*\(^{27}\). In that case, the union handbilled at retail stores requesting

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\(^{26}\) 341 U.S. 675 (1951).

\(^{27}\) 132 N.L.R.B. 901 (1961). The *Lohman* case also illustrates another apparent enlargement of the terms of the publicity proviso in that the Board there ruled that the word
customers not to buy certain products. The union, however, had no dispute with the manufacturer of the products. The dispute was with a wholesale distributor of the products. This brought into focus the meaning of the word "produced." The Board majority held that the handbilling was permissible and rejected the contention that the word "produced" was restricted in meaning to the actual producer or manufacturer of the product. The majority gave the term its broadest possible meaning, holding that "producer" is any person who adds value to the product, thus conjuring up limitless numbers of producers for every article which finds its eventual way to the retailers' shelves. Thereafter, in Local 662, Int'l Bhd. of Elec. Workers (Middle South Broadcasting Co.),\textsuperscript{28} the Board reaffirmed its view and no doubt startled General Motors and other automobile manufacturers by holding that a local broadcasting station was a "producer" of cars. The reason: The automobile dealer was advertising over a station with which the union had a dispute. Seldom has the inexorable power of logic led to a more seemingly illogical result. The Board, nevertheless, stood its ground and reaffirmed its approach in American Fed'n of Television & Radio Artists (Great Western Broadcasting Corp.).\textsuperscript{29}

This was too much for the Ninth Circuit which reversed.\textsuperscript{30} The court rejected the Board's broad contention that Congress intended to exempt secondary publicity in connection with all primary disputes. The court gave considerable weight to the legislative history which showed that Congress had rejected a substitute proposal which used much broader language in describing the primary employer than the term "produced by an employer" which is found in the proviso as adopted. This issue was also present in the Servette case, discussed above, and the Ninth Circuit reaffirmed its position announced in Great Western. The Supreme Court has granted certiorari in Servette on both the publicity proviso issue and the above discussed issue of whether supervisory employees are individuals under section 8(b)(4)(i).\textsuperscript{31}

\textsuperscript{28} 133 N.L.R.B. 1698 (1961).
\textsuperscript{30} Great Western Broadcasting Corp. v. NLRB, 310 F.2d 591 (9th Cir. 1962).
\textsuperscript{31} See note 15 supra.

"truthfully" did not require 100% truth and that where there was no "intent to deceive" or "substantial departure from fact" the requirement of the proviso was met. This condonation of a "little untruth" seems to be a "substantial departure" from the will of Congress.
The true measure of the real worth to neutral employers of the protection against direct union pressure cannot be taken until the two crucial questions raised by the *Tree Fruits* and *Great Western* cases have been finally answered. First, will a neutral retailer be protected from all secondary picketing and from consumer boycotts in labor disputes with which he is not concerned except in the limited circumstances where a union publicizes the fact that he is distributing a product manufactured by a primary employer with whom the union has a dispute? Or secondly, will the area of the neutral employer's potential involvement in the disputes of others be widened so as to subject him (1) to picketing unless he can prove actual economic rather than threatened injury, and (2) to consumer boycotts through union publicity in connection with a union dispute with any of the limitless number of firms and enterprises which have some connection with producing, advertising, transporting and marketing each of the products found in his store?

If the District of Columbia Circuit's view of consumer picketing and the Board's construction of the term "produced" prevail, the broad congressional purpose of insulating neutral and innocent employers from involvement in labor disputes to which they are not parties will be largely frustrated. The loophole which permitted direct union pressure on the secondary employer to achieve objectives declared by Congress to be unlawful, once thought securely closed, now threatens to re-open, perhaps even wider than before.

(3) THE HOT CARGO LOOPHOLE

The congressional purpose to outlaw hot cargo agreements was emphatic. The language used in new section 8(e) was so broad and sweeping that a literal reading would appear even to prohibit any agreement which could have the effect of causing the employer to cease or refrain from doing business with another employer. Thus, a literal reading would even bar an agreement not to subcontract work which had been or could be performed by bargaining unit employees.

The Board held, and I think correctly so, early in the administration of the amendments that it would not adopt this broad interpretation, but would examine each agreement to determine whether its purpose was primary or secondary.\(^2\)

In pursuance of this approach, the Board has upheld clauses preserving unit work for unit employees, but has struck down other subcon-

\(^2\) Milk Drivers & Dairy Employees, 133 N.L.R.B. 1314 (1961) (Minnesota Milk Co.).
tracting clauses which seek to limit the class of persons with which the employer can do business or to impose union standards on the secondary employer. Thus, the Board has ruled out agreements barring subcontracting to nonunion employers, or employers not approved by the union, or employers not represented by the particular union or an affiliate.

There have been, as might be expected, some ingenious attempts since the amendments to revise old hot cargo agreements to achieve the same results and to probe new loopholes in the law. Thus, clauses have been devised which give employees the right to refuse to handle hot goods, but impose an obligation on the employer to continue to handle the goods.33 Other clauses with the same general purpose have given the union the right to cancel or reopen the agreement if hot cargo or non-union goods are handled or to renegotiate certain contract clauses.34

In sum, I would conclude that the hot cargo loophole has been rather effectively closed. The Board’s case-to-case approach will no doubt permit some of the more vague and ingenious clauses to escape detection35 and may even ban some agreements which are really designed for the protection of the work of the primary employers. However, the method of case-to-case examination of agreements to ascertain their true purpose and effect appears to be the proper one.

(4) THE NEW LOOPOLE—ROVING SITUSS PICKETING

A new loophole that a truck could be driven through is threatened by the Board’s decision in International Bhd. of Elec. Workers (Plauche Elec., Inc.).36 This decision poses a serious threat to the protections afforded secondary neutral employers because it extends the area of permissible picketing to the very premises of the secondary employer, himself.

This situation can arise where the employees of the primary employer with whom the union has a dispute have occasion to make deliveries or perform work at the place of business of the neutral employer.

At the time the 1959 amendments were being considered by Congress, it was thought that the law on this question was settled by the Board

34 Employing Lithographers v. NLRB, 301 F.2d 20 (5th Cir. 1962), enforcing 130 N.L.R.B. 968 (1961); Lithographers Ass’n, 137 N.L.R.B. 1674 (1962); Lithographers & Printers Ass’n, 137 N.L.R.B. 1663 (1962).
35 See, e.g., Teamsters Local 200, 144 N.L.R.B. No. 81 (1963) (Milwaukee Cheese Co.), where the Board found certain clauses in a Teamster contract which prohibited pick-ups and deliveries except as “permitted” by certain other local agreements too vague to come within the ban of § 8(e).
and lower court decisions in Local 67, Int'l Bhd. of Teamsters (Washington Coca Cola Bottling Works, Inc.) 37 In that case which arose in 1953, union pickets followed the trucks of the primary employer to the premises of retail outlets and picketed at the retail premises. This was done in a factual context, showing that the primary employer had a regular place of business in the locality where picketing directed at his employees could effectively be conducted. The Board, with court approval, examined all the factors and determined that the true object of the picketing was the secondary one of appealing to the employees of the neutral employers. In reaching this conclusion, the Board gave weight to the fact that truly primary picketing could be conducted at the premises of the primary employer.

In Plauche, the Board overruled what it chose to call the "per se" rule of Washington Coca Cola. The Board construed Washington Coca Cola as establishing a per se rule that where the primary employer has a place of business which can be picketed, all picketing at the premises of the secondary employer will be ruled unlawful. The Board in Plauche then went on to state that it would consider the place of picketing as one circumstance among others in determining the object of the picketing.

While this statement of general principles appears unassailable, one cannot help believing that the Board, in purporting to strike down one presumed per se rule, actually established another. Even a casual reading of Washington Coca Cola will reveal that no per se rule was there formulated. The Board merely held that the place of picketing was a relevant factor in determining the object of the picketing, and since the primary employer had a place of business in the locality that could be picketed and, since no reason appeared for the secondary picketing, the Board arrived at the perfectly reasonable conclusion that the secondary picketing must have had a secondary objective.

In Plauche there was likewise no evidence presented to explain why the union chose to picket the premises of the secondary employer rather than picket the equally available premises of the primary employer. Yet, the Board elected to denominate the picketing primary and not secondary. In the absence of any evidence to countervail the inference of a secondary object arising from the place of picketing, I must conclude that the place of picketing was not deemed relevant at all. This conclusion seems borne out by the subsequent application of the new Plauche rule in United Plant Guard Workers (Houston Armored Car Co.). 38

Whether this unexpected new loophole will remain open or will be closed must now rest with the courts. If the Board's view is sustained, the neutral employer will find himself subjected to secondary pressures from which the Congress on two memorable occasions, first in 1947 and again in 1959, had sought to make him secure.

**Conclusion**

Although four years have elapsed since Congress made its brave attempt to close the loophole in the secondary boycott prohibitions, we cannot yet make a total assessment of the success of that effort. The law is now perhaps in a greater state of confusion than ever before.

The three cases now pending in the Supreme Court—*Tree Fruits*, *Servette*, and *Carrier*—should supply some of the answers. Meanwhile, it appears that the hot cargo loophole at least has been fairly securely closed.

It has already become amply clear, however, that the avowed purposes of Congress in 1959 to close the loopholes have not yet been, and indeed may never be, fully or even substantially achieved. Perhaps the Congress may have to turn to a new and more fundamental approach.
SECONDARY BOYCOTTS—ALLIED, NEUTRAL AND SINGLE EMPLOYERS

Lester Asher*

INTRODUCTION

Section 8(b)(4)(B) of the National Labor Relations Act\(^1\) makes it an unfair labor practice for a labor organization:

(i) to engage in, or to induce or encourage any individual employed by any person engaged in commerce or in an industry affecting commerce to engage in, a strike or a refusal in the course of his employment to use, manufacture, process, transport, or otherwise handle or work on any goods, articles, materials, or commodities or to perform any services; or (ii) to threaten, coerce, or restrain any person engaged in commerce or in an industry affecting commerce, where in either case an object thereof is—

. . . . .

(B) forcing or requiring any person to cease using, selling, handling, transporting, or otherwise dealing in the products of any other producer, processor, or manufacturer, or to cease doing business with any other person, or forcing or requiring any other employer to recognize or bargain with a labor organization as the representative of his employees unless such labor organization has been certified as the representative of such employees under the provisions of section 9: Provided, That nothing contained in this clause (B) shall be construed to make unlawful, where not otherwise unlawful, any primary strike or primary picketing . . . .

The purpose of this section, as explained by Senator Taft in 1947, was to make "it unlawful to resort to a secondary boycott to injure the business of a third person who is wholly unconcerned in the disagreement between the employer and his employees.\(^2\) In 1949, Senator Taft explained further:

[T]he law was [not] intended to apply . . . where the secondary employer is so closely allied to the primary employer as to amount to an alter ego situation or an employer relationship. . . . The spirit of the Act is not intended to protect a man who . . . is cooperating with a primary employer and taking his work which he is unable to do because of the strike.\(^3\)

In view of the language of the section defining its reach in terms of

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2 93 Cong. Rec. 4323 (1947); 2 Legislative History of the Labor Management Relations Act 1106 (1948).

3 95 Cong. Rec. 8709 (1949).
the "other" person, confirmed by the legislative history describing that other as a "wholly unconcerned" third person, it has been established that no violation of section 8(b)(4)(B) occurs when pressure is brought either on the primary employer itself or on one "allied" with the primary employer. Development of criteria as to what constitutes an "allied" and a "single" primary employer has been an important part of the decisional process giving meaning to section 8(b)(4)(B). Recent NLRB and court decisions have, to my mind, unduly restricted the "allied" and "single" employer concepts.

WHAT MAKES A NEUTRAL AN ALLY?

In United Steelworkers (Tennessee Coal & Iron), the Board stated one test for determining what makes a neutral an ally:

If a third party employer engages in conduct which is inconsistent with his professed neutrality in the dispute such as performing the farmed-out struck work of the primary employer, it may be properly assumed that, by knowingly engaging in such conduct, the third party employer had abandoned his "neutral" status and laid himself open to economic pressure by the union.

This definition was in accordance with previous Board and court decisions. Application of this concept was involved in Truckdrivers Local 413 (Patton Warehouse). There, the Board had to decide whether the following contract clause sanctioned conduct prohibited by section 8(b)(4)(B) and was hence violative of section 8(e):  

It shall not be a violation of this Agreement and it shall not be a cause for discharge or disciplinary action if any employee refuses to perform any service, which, but for the existence of a controversy between a labor union and any other person (whether party to this Agreement or not), would be performed by the employees of such person.

The Board found the clause to be invalid because it was not limited to those situations where the struck work was performed by the secondary employer pursuant to an arrangement with the primary employer. To assay the validity of this limitation requires a brief look at history.

5 Id. at 824-25.
6 See, e.g., NLRB v. Business Mach. & Office Appliance Mechanics Union, 228 F.2d 553 (2d Cir. 1955); Douds v. Metropolitan Fed'n of Architects, 75 F. Supp. 672 (S.D.N.Y. 1948); International Die Sinkers Conference, 120 N.L.R.B. 1227 (1958) (General Metals Corp.).
Patton Warehouse is but the latest decision in a line of cases concerned with probing the conditions under which one who performs work that, but for a strike, would be performed by another becomes the "ally" of that other. In Douds v. Metropolitan Fed'n of Architects (Ebasco)\(^9\) the situation was obvious: the alleged secondary employer was performing work as a strike breaker. The struck work was taken from Ebasco, the primary employer, to Project Engineering Company, the alleged neutral. Project received a fee for doing the work normally performed by Ebasco and Ebasco's supervisory personnel superintended the work at Project's shop. The situation in NLRB v. Business Mach. & Office Appliance Mechanics Union (Royal Typewriter),\(^10\) was more difficult. There, Royal did not make direct arrangements with others to service machines previously repaired by its own employees, now on strike. Instead, it directed those customers entitled to free service under warranty contracts to have that service performed by independent service organizations of their own choosing and to have the service billed to Royal. The Court of Appeals for the Second Circuit, reversing the Board, after stating that the independents' activities would "inevitably tend to break the strike,"\(^11\) held that picketing the independent service companies who were doing Royal service work was not violative of 8(b)(4)(A) [now 8(b)(4)(B)] because these companies were performing Royal's struck work "pursuant to an arrangement devised and originated by" Royal. It then specifically stated: "The result must be the same whether or not the primary employer makes any direct arrangement with the employers providing the services."\(^12\)

Later Board decisions fell into the classic Ebasco mold; i.e., the primary employer retained the services of the alleged secondary employer to do work that was strike bound at his own plant.\(^13\) One would have thought that United Marine Div. of Nat'l Maritime Union (D. M. Picton & Co.)\(^14\) was such a case. Yet the Board, without discussion, upheld the trial examiner's conclusion that neutrality existed notwithstanding the following findings: the primary employer, Sabin, and the secondary employer, Picton, had, before the strike, been the only two towing com-

\(^10\) 228 F.2d 553 (2d Cir. 1955).
\(^11\) Id. at 558.
\(^12\) Id. at 559. (Emphasis added.)
\(^13\) See, e.g., International Die Sinkers Conference, 120 N.L.R.B. 1227 (1958) (General Metals Corp.); Shopmen's Local 501, 120 N.L.R.B. 856 (1958) (Oliver Whyte Co.).
panies in the Sabin waterway area. Both had contracts with some of their customers by which the customer gave one-half of its towing business to Sabin and the other half to Picton. If one were unavailable to perform a job assigned to it by the customer, the other would take over. After the strike commenced at Sabin, the latter advised its customers of the strike and told them that Picton’s service was available. Picton scrupulously refrained from doing any of Sabin’s former towing jobs unless its services were requested and paid for by Sabin’s customers. It also refused to serve many of those customers of Sabin who had exclusive towing contracts with Sabin. These facts suggest that probably Picton did Sabin’s business with Sabin’s approval and that Sabin considered that Picton had taken over its business only for the duration of the strike. Knowing that the strike would not cause a permanent loss of its customers would have added economic strength to Sabin vis-à-vis the strikers. This fact of life exists whether or not the employers have been astute enough to avoid the appearance of an arrangement.

Purposeful and knowing enhancement of the economic strength of the primary employer by the secondary employer’s action is the factor which the Board fails to consider in the “arrangement” doctrine announced in *Patton Warehouse*. Although the Board has stated that it abjures “per se” doctrines, and looks rather to the particular facts in each case, the Board in *Patton Warehouse* seems to be approaching another per se holding; *i.e.*, if there is no arrangement between the primary and secondary employer, no alliance will be found. This holding precludes consideration of the many ways a secondary employer can add to the economic strength of the primary employer without having made direct arrangements with him to do the struck work. *Royal Typewriter* is a case in point. The court majority inferentially, and Judge Learned Hand in his concurring opinion explicitly, held that the fact that Royal paid the independents for their services was the crucial factor in establishing the alliance between Royal and the independents. Royal could have reimbursed its customers rather than the independents, thus avoiding all contact between it and the independents. Yet the strikebreaking effect of the independents’ service would have been the same. In *Shopmen’s Local 501 (Oliver Whyte Co.)* and *International Die Sinkers Conference (General Metals Corp.)* the struck part of the work could have been removed from the primary em-

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16 120 N.L.R.B. 856 (1958).
17 120 N.L.R.B. 1227 (1958).
employer's premises by the customer and given to the alleged secondary employer for performance of the struck work and returned to the primary employer for finishing. The customer could have paid the alleged secondary employer and received an appropriate reduction in price. This fictional procedure would have the same strikebreaking effect as the actual course of events presented by the cases. Yet, under a literal interpretation of the Board's "arrangement" theory, the secondary employer remains a "neutral" in the first instance but becomes an "ally" in the second. Realistic application of the rationale underlying struck work requires that the Board should not draw a line mechanically at "arrangement" but should consider other relevant factors in determining what makes an "ally" of a "neutral."

Artificial limitation of the "ally" doctrine is shown by the General Counsel's application for a preliminary injunction in *Madden v. Steel Fabricators*. In this case the employees of the primary employer, Ideal, had struck its Long Island, New York plant, and in furtherance of that strike picketed Ideal's Chicago plant. Ideal's Chicago employees remained at work but deliveries and shipments to and from the Chicago plant came to a virtual standstill as truck drivers refused to cross the picket line. Following the start of picketing at the Chicago plant, Ideal arranged with Silver Star, with whom it had had no previous dealings, for shipments intended for Ideal to be delivered by truck to Silver Star's warehouse, unloaded there, and placed in boxcars. When a full carload was assembled it was to be delivered to Ideal by rail. Shipments emanating from Ideal were loaded at the Ideal plant in boxcars and taken by rail to the Silver Star warehouse three miles away. At Silver Star, the shipments were divided among carriers selected and paid by Ideal, loaded on their trucks and dispatched. For its transshipment services Silver Star was paid a fee by Ideal.

The union picketed the Silver Star facilities and attempted to dissuade drivers of trucks carrying Ideal deliveries or shipments from crossing the picket line. Alleging that these activities constituted a secondary boycott, the Board's General Counsel sought an injunction under section 10(l) of the act. In denying the injunction, the court found that, although the employees of Ideal's Chicago plant were not on strike, Silver Star employees performed some of the work which, but for the strike,

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18 54 L.R.R.M. 2368 (N.D. Ill. 1963).
19 The General Counsel based his allegation that a violation of § 8(b)(4)(i) and (ii)(B) had occurred solely on the activities of respondent union at the Silver Star docks. There was no allegation that Ideal's Chicago plant was itself a neutral situs.
would have customarily been done by Ideal's Chicago employees. As Ideal had arranged and paid for this service, the court denied the injunction on the basis of *Ebasco* and *Royal Typewriter*. The court also specifically stated:

The Union's picketing of the Chicago plant is intended to increase the effectiveness of its strike in Long Island and is lawful. Ideal's relationship with Silver Star was designed to circumvent the situation created by the picketing. This alone is not sufficient to permit picketing of a secondary employer, but when the device utilized causes work previously done by employees of the picketed plant to be assigned to the secondary employer, the ally doctrine becomes applicable.20

This is too narrow a view of the meaning of assistance. Even if Silver Star employees had not done work previously performed by Ideal employees—and the General Counsel strenuously insisted that they had not—it should not be found that the union violated section 8(b)(4)(ii)-(B) by picketing Silver Star. While the performance of struck work is the most obvious type of assistance one employer can render another to help break a strike, it is by no means the only one. The Board itself has recognized the possibility of other forms of assistance which would make the rendering employer an "ally" of the primary employer.21 Thus, it stated in *Tennessee Coal & Iron* that an alleged neutral becomes an ally when he "engages in conduct which is inconsistent with his professed neutrality in the dispute such as performing the farmed out struck work ...."22

Silver Star's conduct constituted a form of assistance which in this instance was more effective than the performance of struck work. A legal primary picket line was having its desired effect on the primary employer; *i.e.*, it interrupted the primary employer's supplies and deliveries. By an arrangement with the primary employer, and for a fee, the secondary employer agreed to perform these interrupted services, thus obviating the effect of the picket line. In short, the secondary employer sold his services to the primary employer for the specific purpose of breaking the strike. To hold that under these circumstances the secondary employer is a "neutral" because his assistance does not take the form of performance of struck work would leave the "ally" doctrine with a great deal of its meaning and purpose removed.23

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20 54 L.R.R.M. at 2370.
21 But see Employing Lithographers v. NLRB, 301 F.2d 20 (5th Cir. 1962), where the court held that only by performing struck work did a neutral become an ally.
22 127 N.L.R.B. 823, 825 (1960). (Emphasis added.)
23 I should disclose my own lack of neutrality by stating that I am counsel for the union in this case.
The Single Employer Concept

The determination of what constitutes a single employer on whom the union may legitimately bring pressure has been troublesome for the Board and has resulted in a see-saw of inconsistent decisions. Since section 8(b)(4)(ii)(B) is designed to protect the "wholly unconcerned" third person, it might have been expected that the Board, in applying the section, would determine whether the party on whom the pressure is brought is (1) the primary employer himself, or (2) an ally of the primary employer. Then, if the answer to either question were affirmative, the Board would hold that no violation of section 8(b)(4)(ii)(B) had occurred. As one can hardly be considered one's own ally, it would appear elementary that answers to the question of who is the same primary employer, on the one hand, and who is an employer allied with the primary employer, on the other, would require the evolution of two different sets of criteria. However, from the very inception of the interpretation of section 8(b)(4)(ii)(B), the Board has persisted in treating the question of what constitutes the same employer as part of the "ally" problem and in applying "ally" criteria to situations where it was admitted or obvious that the primary and alleged secondary employer were one and the same.

National Union of Marine Cooks (Irwin-Lyons Lumber Co.)\(^{24}\) was the Board's first case involving the problem of whether two separate corporations, whose stock was owned by the same individuals, could constitute a primary and secondary employer for the purpose of section 8(b)(4)(A) \[now 8(b)(4)(B)\]. Stock in both corporations was held by substantially the same individuals and the management largely coincided.\(^{25}\) The operations of the concerns were integrated; \(i.e.,\) the operations of one began where those of the other left off. The Board could have held either that the two corporations constituted the same employer because of the common ownership of the stock, or, if this finding were thought inappropriate because of the lack of 100 per cent identity of the owners, that the two companies were allies because of the common control and integration of operations. Instead, after reciting the findings of common ownership, control, and integration, the Board found "on the basis of these facts" that the alleged secondary employer "was not wholly neutral or unconcerned."\(^{26}\)

\(^{24}\) 87 N.L.R.B. 54 (1949).

\(^{25}\) Twenty-five per cent of the stock of the charging party was held by individuals having no interest in the primary employer and the organizations had different vice-presidents and managers. Id. at 83.

\(^{26}\) Id. at 56.
Having failed to distinguish in *Irwin-Lyons* between a single employer and separate but allied employers, the Board continued to use the terms “single” and “allied” in the alternative. Thus, in *United Bhd. of Carpenters (J. G. Roy & Sons Co.),*\(^{27}\) the same brothers owned the stock of both corporations and the profits of both were divided equally among them, but each corporation was independently managed by a different brother. The Board held, over Member Rodgers’ dissent, that the two employers “although separate corporate entities, were one and the same employer for the purposes of section 8(b)(4)(A) [now section 8(b)(4)(B)] or that they were so allied in their relationship as to warrant finding that Roy Construction [the alleged secondary employer] was not a neutral employer.”\(^{28}\)

In *Warehouse & Distribution Workers Union (Bachman Mach. Co.),*\(^{29}\) the Board, without discussion and again over Member Rodgers’ dissent, upheld a trial examiner who, after enumerating not only common stock ownership in substantially the same proportions by the same individuals in both the primary and alleged secondary employer, but also common control over labor policies and minor interwoven activities of both corporations, concluded:

> Upon the basis of all the facts concerning the operations and relationship of Plastics and Bachman . . . and especially the common ownership and actual common control over labor policies, I find that Plastics and Bachman constitute a single employer for the purpose of Section 8(b)(4)(A) [now 8(b)(4)(B)] and that therefore Bachman was not a neutral or wholly disinterested company in the dispute between Respondent and Plastics.\(^{30}\)

In *Tennessee Coal & Iron* the Board restated its “ally” doctrine as follows:

> [W]hen the primary and secondary employers, although separate legal entities, are commonly owned or controlled, or are engaged in closely integrated operations, they would be regarded, under certain circumstances, as a single employer under the Act and hence “allies” in, and parties to, a union’s dispute with the primary employer.\(^{31}\)

This statement is also internally confused. If the two separate corporate entities are to be considered a single employer, that should be the end of

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\(^{27}\) 118 N.L.R.B. 286 (1957).

\(^{28}\) Id. at 287.

\(^{29}\) 121 N.L.R.B. 1229 (1958).

\(^{30}\) Id. at 1234. Both the *Roy* and *Bachman* decisions were reversed by the court of appeals. *J. G. Roy & Sons Co. v. NLRB,* 251 F.2d 771 (1st Cir. 1958); *Bachman Mach. Co. v. NLRB,* 266 F.2d 599 (8th Cir. 1959).

\(^{31}\) 127 N.L.R.B. 823, 824 (1960).
it. The notion of an ally can come into play only when there is more than one employer. If singleness is found, plurality disappears, and with it any need for ally language.

The confusion came to complete fruition a short three months later when the Board handed down its decision in *International Bhd. of Teamsters (Alexander Warehouse & Sales Co.)*. There, a section 8(b)(4)(A) [now 8(b)(4)(B)] violation was alleged where strikers picketed not only the struck warehouse of the employing corporation but also two nonstruck warehouses owned by the same corporation but located in separate cities. Instead of holding that separate facilities owned by the same legal entity could not possibly be considered anything but a single employer within the meaning of the act, the Board found that the nonstruck warehouses were allied with the struck warehouse and therefore not neutrals within the purview of section 8(b)(4)(A) [now 8(b)(4)(B)]. Moreover, the finding of such an alliance was not based on the single ownership of all three warehouses—quite remarkably this was not even enumerated among the relevant criteria—but rather on their joint supervision, purchasing, and the possibility that the two nonstruck warehouses might be used to handle struck work. Reliance on these factors suggests the startling conclusion that, in their absence, a violation of section 8(b)(4)(A) [now 8(b)(4)(B)] would have been found despite the ownership of all three warehouses by the same corporation.

In *Amalgamated Lithographers (Local 78)* and *Amalgamated Lithographers (Ind.) (Local 17)* the Board again made it clear that common ownership or a subsidiary relationship, standing by themselves, would not warrant treating two separate facilities as a single employer. Both cases involved the validity under section 8(e) of the act of so-called "chain shop" clauses in which the union attempted to bind the contracting shop not to request its employees to handle struck work from other shops in the contracting employer's chain. Lithographer Local 17's attempt ran afoul of the statute, according to the Board, because it not only would have permitted

a strike in one plant of an employer where another plant of the same employer is struck, but also permits a strike in the plant of the principal company where the plant of a subsidiary is struck or vice versa, even though the principal and subsidiary do not constitute a single employer within the meaning of the act.

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33 130 N.L.R.B. 968 (1961), enforcement denied, 301 F.2d 20 (5th Cir. 1962).
34 130 N.L.R.B. 985 (1961), enforcement denied, 309 F.2d 31 (9th Cir. 1962).
35 Id. at 989.
On the other hand, Lithographer Local 78 was successful in having its chain shop clause upheld because its description of a chain shop was one "which is wholly owned and controlled by the company or commonly owned and controlled . . . ." The Board construed this clause as saying that a strike at the plant of the contracting employer in sympathy with a strike at the plant of another company which is a separate legal entity is permitted, provided that the two legal entities because of "common control" and "ownership," as the Board uses these terms, constitute a single employer within the meaning of the Act.

The Board specifically stated that common control over labor relations was one of the criteria frequently used by the Board in determining the existence of a single employer.

37 Id. at 975. This obviously was a rather strained reading of the clause. In his brief to the Ninth Circuit, the General Counsel, seeking enforcement of the Local 17 decision, distinguished the Local 17 case from the Local 78 case on the ground that the common control factor was included in the Local 78 chain shop clause and absent from Local 17's. Whether such common control actually exists, the General Counsel argued, depended on the particular facts, including the identity of management functions, the extent of interrelation and integration of operations, the measure of control over labor relations policy, etc. See International Bhd. of Teamsters, 128 N.L.R.B. 916 (1960) (Alexander Warehouse & Sales Co.). The Board was reversed in both the Local 17 and Local 78 cases. In reversing the Local 17 case, the Ninth Circuit, in a remarkably opaque opinion, stated that, as the employer committed himself only to requesting his employees not to handle his own work in his plants, the employer was not necessarily agreeing to request his employees not to handle the work of another employer. It recognized that, in actual application, the two may come down to the same thing, but concluded that this did not suffice to invalidate the agreement on its face, but merely opened the actual application of the agreement to attack when and if an illegal act took place in the future as a result of it. The court did express its skepticism as to whether a subsidiary could be another person within the meaning of § 8(e). It is unfortunate that the court did not explore this question, for it seems to present the forthright issue in the case. NLRB v. Amalgamated Lithographers (Ind.) (Local 17), 309 F.2d 31, 40-41 (9th Cir. 1962).

The Fifth Circuit reversed the Board in the Local 78 case on the ground that the Board had read more into the chain shop clause than it should have. In its view the single employer concept did not include commonly owned and controlled plants unless such factors as centralized control of labor relations, common management, integrated operations and complete dependence of one company upon the other for its work made the single employer concept applicable. Employing Lithographers v. NLRB, 301 F.2d 20, 28-29 (5th Cir. 1962).

38 130 N.L.R.B. at 975. The Board quoted and cited Dearborn Oil & Gas Corp., 125 N.L.R.B. 645 (1959), an employer unfair labor practice case, in support of the common control over labor relations criterion, thus inviting the error of using the same criteria for purposes of establishing what constitutes a single employer under both § 8(a) and § 8(b)(4).
Although the Board in Local 78 appeared to have accepted the courts’ reversals of its Roy and Bachman decisions, the Board, its composition now somewhat changed, reaffirmed its own holdings in those decisions in Local 282, Int’l Bhd. of Teamsters (Acme Concrete & Supply Corp.),\(^\text{39}\) a case which did not involve either a subsidiary or common ownership situation, but one of business alliance because of an “integrated” operation and interrelated business transactions. As it had thirteen years previously in Irwin-Lyons, the Board again explicitly refused to decide whether the two employers were a single employer or two allied ones but instead held that there was “such an identity and community of interests as to negative the claim that Acme is a neutral employer.”\(^\text{40}\)

Having thus gone out of the way to revive its own holdings in Roy and Bachman, it was to be expected that the Board, at the first opportunity, would apply these decisions to a situation of separate legal entities under common control. Instead the Board, by a panel consisting of Messrs. McCulloch, Rodgers and Leedom, decided less than three months after Acme in Miami Newspaper Printing Pressmen (Knight Newspapers, Inc.)\(^\text{41}\) that despite common ownership of stock by the same family in two separate newspaper publishing corporations, the nonstruck newspaper was entitled to the protection of 8(b)(4)(i) and (ii)(B) against picketing by employees of the struck paper. This holding was based on the facts that the papers were published in cities 800 miles apart, that practically no business relation existed between the parties, and that there was only potential (but no actual) common control over labor relations. The decision itself cites no precedent and gives no rationale beyond the statement that “in view of the foregoing—we conclude that Knight Newspapers, Inc., was entitled to the protection of section 8(b)(4) . . . .”\(^\text{42}\)

The trial examiner, however, specifically relied on the Board’s acceptance in the Local 17 case of the court reversals of Roy and Bachman. Relying on this acceptance he found that actual as well as potential common control must exist before two separate corporate entities may be considered a single employer for purposes of section 8(b)(4)(B).\(^\text{43}\)

Assuming that the Board really meant what it said in Alexander Ware-

\(^\text{39}\) 137 N.L.R.B. 1321 (1962). The Board deciding the Amalgamated Lithographers cases was composed of Messrs., Kimball, Jenkins, Leedom, Fanning and Rodgers; the Board deciding Acme, of Messrs., McCulloch, Leedom, Fanning, Rodgers and Brown.

\(^\text{40}\) Id. at 1324.

\(^\text{41}\) 138 N.L.R.B. 1346 (1962).

\(^\text{42}\) Id. at 1348.

\(^\text{43}\) Id. at 1353.
house and that Knight Newspapers represents the current view of the majority of the Board members, one arrives at the startling conclusion that current Board doctrine requires more than the existence of 100 per cent common stock control and even more than outright ownership by the same legal entity before two physically separated facilities will be considered a single employer to whom 8(b)(4)(B) is not applicable. A union picketing a nonstruck facility in aid of a struck facility, when both are owned by the same legal entity or by separate but commonly controlled legal entities, is subject to 8(b)(4)(B) unless it can prove that both facilities are actually controlled to some extent by the same management, especially in the matter of labor relations, or that there is a substantial amount of business interrelationship between both facilities.

This result would be wrong. A strike against the primary employer continues to be a legal economic weapon despite the secondary boycott prohibition. Section 8(b)(4)(B) established a code of conduct which restricts a union in its dispute with one employer from exerting pressure against another employer. To say that the same employer becomes another employer within the meaning of 8(b)(4)(B) because he chooses to operate his various facilities autonomously reads words into the statute that are not there. It is one of the purposes of the law to protect the employees' right to strike as a legal economic weapon against a primary employer. To forbid the use of this economic weapon at all of the facilities operated by the primary employer is to sap its vitality. It deprives the union of its right to apply pressure directly at the whole of the employer's enterprise.

There is no rational distinction between businessmen operating as one legal entity and the same businessmen operating as two separate legal entities. Both Judge Levin in his opinion in the preliminary injunction proceeding in the Knight Newspapers case and Judge Woodrough in his dissent in Bachman Mach. Co. v. NLRB point out that the way an

44 That Alexander Warehouse may have lost some of its bite is indicated by Amalgamated Lithographers of America (Local 78), 130 N.L.R.B. 968 (1961). There the Board majority cited Alexander Warehouse for the proposition that picketing at all of the geographically separated facilities of the same single employer was a legitimate primary activity even where a strike was in progress at only one of the picketed plants. Id. at 975. Board Members Rodgers and Jenkins, in their dissent, pointed out that Alexander Warehouse had not been based on single ownership and had minimized rather than emphasized the geographic distances between the plants. Id. at 983.


46 266 F.2d 599, 606 (8th Cir. 1959) (dissenting opinion).
individual chooses to do business should not determine the applicability of 8(b)(4)(B). The contrary court decisions in Roy and Bachman are not at all persuasive. The Eighth Circuit held in Bachman that common ownership of the two employers is immaterial even where there is common control over labor relations, concluding that in situations involving two legal entities invocation of section 8(b)(4)(A) [now 8(b)(4)(B)] is only precluded where the secondary employer performs the struck work of the primary one. This is entirely too narrow a view. The First Circuit in Roy was faced with a situation where the criteria of common control recited in Irwin-Lyons was totally lacking. The business-interrelationship criterion relied on by the Board in both Irwin-Lyons and Roy was very tenuous in the latter case. Not having been given a viable rationale by the Board decision, the court held on the basis of employer unfair labor practice cases that, absent actual common control, 8(b)(4)(A) [now 8(b)(4)(B)] could be invoked to protect a legal entity owned by the same persons as the primary employer. Obviously different criteria are appropriate to establish circumstances under which one legal entity may be held responsible for the wrongdoing of another, and those under which two legal entities may be considered one employer for the purpose of legitimate exertion of economic pressure on both. The decisive consideration for the purpose of section 8(b)(4)(B) is whether the economic pressure exerted strikes the same purse, and curtailment of income hits the same people, regardless of which of their legal entities holds the purse strings. Such pressure is designed to turn inchoate control into active control, thus providing the very criteria for lack of which the Board is given to invoking 8(b)(4)(B).

Conclusion

Adoption of the views of this article would require the Board not only to change its Knight Newspapers holding and its Alexander Warehouse rationale, but also to distinguish between allied and single employer situations. The Board would have to discontinue its practice of finding in the alternative, or not finding at all, as to the nature of the relationship

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47 As pointed out in note 37 supra, while the court of appeals in the Local 17 case did not discuss the question precisely, it is evident from its opinion that it did not think that work produced at a plant either owned by the contracting employer outright or through control of another legal entity could be considered work of another employer. 309 F.2d 31, 40-41 (9th Cir. 1962).

48 266 F.2d 599, 605 (8th Cir. 1959).

49 251 F.2d 771, 774-75 (1st Cir. 1958).
between the alleged primary and secondary employers. Above all, it would have to stop the practice, which has not been helpful to the Bar, of reciting all the facets of the relationship between the alleged primary and secondary employers and then basing its conclusion on "all the foregoing circumstances" or phrases of similar import. For it has been amply shown by the decisional history that this litany of irrelevancies soon becomes a list of essential criteria, not only for the Board, but also for the courts. A showing that the same parties own both the alleged primary and secondary employer should be enough to preclude invocation of 8(b)(4)-(B) without any further discussion of the relationship between the two.50 Courts have pierced the corporate veil before and it should not be too difficult to persuade them that the use of that veil to deprive the employees of their protected rights against their employer is a subversion of the intent of the act.

50 In situations where common ownership does not substantially coincide, the Board may wish to resort again to such criteria as business interrelationships and common control of labor policies. In such situations, however, the Board should make it clear that it is doing so on an "allied" theory and not on the "single employer" theory.
EXECUTIVE ORDER 10988: AN EXPERIMENT IN
EMPLOYEE-MANAGEMENT COOPERATION
IN THE FEDERAL SERVICE

DAVID S. BARR*

INTRODUCTION

Executive Order 10988 was signed by the President on January 17, 1962.1 In sum and substance, the Order directed federal agencies to grant qualifying employee organizations2 three levels of “recognition.” “Informal” recognition was to be accorded to any labor organization having two or more members among the employees involved. Any such organization would then have the right “to present to appropriate officials its views on matters of concern to its members.”3 “Formal” recognition was to be accorded to organizations having as members ten per cent of the employees in the bargaining unit. Such organizations would thereafter not only be listened to, but talked to and consulted with as well “in the formulation and implementation of personnel policies and practices, and matters affecting working conditions that are of concern to its members.”4 “Exclusive recognition” was reserved for a labor organization which qualified for formal recognition and in addition, could demonstrate by an election or otherwise, that it had been authorized to act as an exclusive representative by a majority of the employees in the unit involved. Such recognition would entitle the organization to be heard and consulted as to personnel problems and grievances affecting not only its members but all other employees within the bargaining unit. Additionally, it would entitle the employee organization to conclude a written agreement with the federal agency involved which, among other things, might provide that all grievances not settled by the parties be subject to advisory arbitration.5 The grant of exclusive recognition to one organization for a particular unit would preclude the grant of

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2 For the sake of simplicity, “employee organizations” may be hereinafter referred to as “labor organizations” or “unions.” It should be noted, however, that technically the former expression has broader application than the latter two.
3 Exec. Order § 4a.
4 Exec. Order § 5b.
exclusive or formal, but not of informal, recognition to any other organization within the same bargaining unit. A condition prior to exclusive recognition was to be a determination that the bargaining unit employees have "a clear and identifiable community of interest" so as to justify the separation of one or several groups of employees from the others for the purpose of collective representation. Section 11 of the Order left to each agency the responsibility for determining whether a unit of employees was appropriate and whether the organization requesting recognition represented a majority of employees within the unit, but permitted any agency or organization to request the Secretary of Labor to nominate an arbitrator for the purpose of hearing a dispute as to such issues and to render an advisory opinion to the head of the agency with respect thereto.

The need for executive action had been patent before the signing of the Order. A long-standing and wide-spread dissatisfaction with the existing scheme of employee-management relations in the federal service was brought to light by the thorough investigation (including questionnaires, hearings, fact reports and interviews) of the staff of the Presidential Task Force appointed in July 1961 to study the existing situation and recommend appropriate action. It was reported that "Federal labor-management arrangements in the separate agencies are extremely different one from the other." In most federal agencies, the report continued:

The word "dealings" rather than "negotiations" most appropriately describes the relationship between employee organizations and management. Only a minority of federal employees belong to organizations, agencies deal with such organizations as they find it convenient, such dealings are usually not regularly scheduled, and the weight given to the views of employee organizations by management is variable.

It was further noted that "a relatively large number . . . of federal agencies do not have any stated labor relations policies whatsoever," and that in those agencies which have established policies "they are minimal in extent." Some twenty-six bills before the 87th Congress, purporting by various methods to introduce the concept of union recog-

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6 Ibid.
8 Id. at 1.
9 Id. at 17.
10 Ibid.
tion to the federal service, were making no headway. The Task Force reported to the President, on November 30, 1961 that "employee organizations are capable of contributing more to the effective conduct of the public business than has heretofore been the case," and recommended the promulgation of the Executive Order.

The result was an Executive Order which portended large implications for the future. It was hailed in editorial comment as providing "the framework for a more efficient civil service in the interest of 185,000,000 employers: the people of the United States." "In the annals of government workers and their organizations," said the AFL-CIO, "the President's executive order on union recognition will rank in significance with the Lloyd-La Follette Act of 1912." Then Secretary of Labor Arthur Goldberg considered the Order as a beginning to a new era in the civil service and stated that the week of its signing "will live in the history of federal service." Simultaneously, however, some qualifying words of caution broke the optimistic air. According to the New York Times, much remained to be clarified "in enforcement machinery, in defining the areas appropriate for collective discussion and in devising methods to break negotiating deadlocks." The AFL-CIO warned that "[A]s time goes on, experience will demonstrate... the need for tightening up the procedures, principles and safeguards contained in the executive order." Both the expressions of hope and those of misgivings have thus far proved prophetic.

### The Search for Precedents

In attempting to cope with new situations people naturally tend to relate them to previous experiences of a similar nature. It was small won-

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12 The Task Force consisted of the Secretary of Labor (Chairman), the Chairman of the Civil Service Commission (Vice-Chairman), the Director of the Bureau of the Budget, the Postmaster General, the Secretary of Defense, and the Special Counsel to the President. President's Task Force on Employee-Management Relations in the Federal Service, A Policy for Employee-Management Cooperation in the Federal Service at IX (Nov. 30, 1961) [hereinafter cited as Task Force Report].
13 Id. at 4.
14 Id. at 11-27.
17 Id., p. 2, col. 6.
der, therefore, that as soon as the various branches of the government, the unions, and the employees were confronted with this new wrinkle in the face of the federal service they began to cast about for a mean-
ingful historical context or mold into which the new program could be comfortably poured. The sense of urgency surrounding the quest was due, in large part, to the fact that the Order itself was broadly phrased and its "legislative history"—a rather terse, twenty-seven page report—devoid of sufficient explication.

The most natural inclination, at least on the part of labor organiza-
tions, was to turn to the National Labor Relations Act. Here was a readily available body of law that had successfully withstood the test of time since its beginnings in 1935. It governed labor-management relations in much the same way, it appeared, as the Order was to govern such relations in the public sector. The act was, after all, something that lawyers, union leaders, administrators and arbitrators had become familiar with. The feelings of most federal agencies (with such obvious exceptions as the National Labor Relations Board and the Department of Labor) were precisely to the contrary. They were almost totally unfamiliar with the act or with decisions of the NLRB and therefore strongly suspected the motives of those who would impose upon them a set of principles, which had been formulated without their participa-
tion. Moreover, the agencies had been entrusted with the responsibility of promulgating regulations to implement the Executive Order and the intrusion of "established" doctrine would necessarily lessen their scope of power and freedom to handle their own affairs. Additionally, a feeling prevailed that the federal service was distinctly "different" from the private sector. The Navy, for example, presented the following statement in the Boston case:

Distinctions were provided in this area between the Federal Government and its employees as contrasted with private employers and employees.

. . . .

Some of the key words used in the preamble to the Executive Order are "effective conduct of public business," "efficient administration of the government," "paramount requirements of the public service." "Public service" connotes more than

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20 Task Force Report.
23 Brief for the Navy, p. 2, Boston Naval Shipyard, supra note 22.
relationships between the government and federal employees, it embraces the concept of the agency and its employees working together to furnish a service to the public (see Sec. 12 of Executive Order).

The "public service" concept offered the attractive implication that greater resistance to "outside" interference in the affairs of management would be justified than had thus far been countenanced in the private sector.

More practical considerations, however, gave the issue prominence. The concept of "community of interest" was, and remains, in the early stages of the program, the principal battleground. Under both the Order and the NLRA, a union must demonstrate that the group (or unit) of employees it seeks to represent is characterized by a community of interest among its members which would justify separate representation. It must do this before it can hope to win an election or otherwise prove its majority status and thus enter into a bargaining relationship with management, looking toward the cooperation which both bodies of law seek to promote. The NLRB had, over a period of years, evolved rules to guide the parties toward a clear understanding of the meaning of "appropriate units." A craft unit, for example—one composed of skilled craftsmen such as machinists, pattern makers or the like—would most surely be deemed appropriate by the Board if the union seeking to represent them had traditionally represented the craft.24 The same "tacit understanding," had been reached with respect to units of technical employees, office and clerical employees, and production and maintenance employees, among others.25 Even in more recent months, after the Board had adopted a more flexible case-by-case approach to the question of appropriate units,26 the parties before it have not been disappointed in their expectation that "units" previously looked upon with favor by the Board would continue to be approved under appropriate circumstances.27 The very unions whose petitions before the Board had been favorably received were now taking a most active interest in organizing the federal employees and seeking to represent them on an exclusive basis. From their standpoint, participation under the Executive Order

could be greatly facilitated and success rendered more probable if their petitions for exclusive recognition in a particular unit were supported by these numerous, authoritative decisions of the Board. Here again the viewpoint of the federal agencies necessarily differed. Absent the restrictive body of experience developed under the NLRA, they were relatively free to argue that the integrated operations of a particular military installation and the "mission" of the installation—common to all employees—compelled the establishment of one installation-wide unit and no other. The success of such a position would be disastrous to the large number of labor organizations that had made it their life-time task to represent employees solely on a craft or functional basis. Putting aside the basic philosophical dispute between "industrial" and "craft" type unionism, it certainly could not be held with cogency that the Executive Order was intended to permit the "freezing out" of such a large number of unions. Even for "industrial" unions the task of organizing a majority of 10,000 employees, whose familiarity with unionism is practically nil, was seemingly a formidable task. There was also the vexing question whether the Order permitted the agencies to "establish" what in their view was the most appropriate unit, even where no union had petitioned for such a unit, rather than requiring them to decide in each case whether a unit as petitioned for was appropriate. The NLRB had provided a clear answer; the Executive Order did not. These and other basic issues brought to the fore the search for precedents and evoked such sharp colloquies as the following:

[Union Council]: In making your unit determination were you familiar with the National Labor Relations Act and Board decisions thereunder with respect to the establishment of unions?
[Admiral]: Absolutely not; absolutely, because—
[Navy Counsel]: Wait just a moment, Admiral.
[Union Counsel]: He answered my question.
[Navy Counsel]: I know he did, but I'd like to make an objection here, a

28 This was an argument avidly pursued by the Navy and the Air Force. It was a position once favored by the Board, National Tube Co., 76 N.L.R.B. 1199 (1948), but later rejected except for four basic industries. American Potash & Chem. Corp., 107 N.L.R.B. 1418 (1954).
29 To put the matter in perspective, a naval shipyard employs approximately 10,000 civilian employees. In terms of traditional representation, the Pattern Makers would seek to represent from 6 to 20 of these employees, the American Federation of Technical Engineers 300 to 500 and the Metal Trades Council some 5000 to 7000 of them. The Navy's position would require any union to represent all 10,000 employees or none at all.
31 See pp. 430-36 infra.
continuing one, as long as we are going to be talking about that, my objection being in reference to the acts.\textsuperscript{32}

The history of the Order does not clearly suggest either a reliance upon or rejection of the NLRA as a helpful guide. The Task Force reported:

[I]t was not necessary for us to seek far or wide to come up with our recommendations. With but minor exceptions, everything which we propose as a government-wide policy for the future is at this moment the existing established policy of one Federal agency or another. We have fashioned a program of our own materials, choosing that which has already been tested and has proved its worth within the Federal Government.\textsuperscript{33}

This was a declaration of the independence of the recommended Order. Its underlying assumption, however, must be open to question in view of the findings of the Task Force staff that little had existed in the federal service in the field of labor-management relations that had either "been tested" or had "proved its worth."\textsuperscript{34} On the other hand, the report emphasized the long-time recognition of "the public interest in responsible, stable trade unions in the private sphere of the economy"\textsuperscript{35} and the close parallel between "the experience within the Federal Government"\textsuperscript{36} and "the pattern of private employment."\textsuperscript{37} Thus, it appeared to encourage the continuation of the parallel in the interpretation of the Order. "For a quarter century,"\textsuperscript{38} said the Task Force, "it has been the public policy of the Government to encourage employees in private enterprise to organize and deal collectively; yet the Government continues to have almost nothing to say concerning the role of organizations of its own employees."\textsuperscript{39} Returning once again to the independence theme, the report found "that it would be neither desirable, nor possible, to fashion a Federal system of employee-management relations directly upon the system which has grown up in the private economy."\textsuperscript{40} Shortly thereafter, the following qualification appears:

The Task Force feels, however, that certain of the ground rules which Congress has laid down for employee-management relations in the private economy should

\begin{itemize}
\item \textsuperscript{32} Record, p. 277, Norfolk Naval Shipyard, 28-Nav-BuShips-15 (1963).
\item \textsuperscript{33} Task Force Report III-IV.
\item \textsuperscript{34} See Staff Report I; Staff Report II.
\item \textsuperscript{35} Task Force Report 1.
\item \textsuperscript{36} Id. at 3.
\item \textsuperscript{37} Ibid.
\item \textsuperscript{38} Id. at 6.
\item \textsuperscript{39} Ibid.
\item \textsuperscript{40} Id. at 7.
\end{itemize}
be carried over to the Federal Government in order to ensure that the public interest and the interests of individual employees are protected.\textsuperscript{41} As examples of such "ground rules," the report cited the right of employees to organize and bargain collectively, or to refrain from so doing, and the admonition that employers may not dominate or assist any labor organization. It is therefore clear enough that by building a bridge between the Order and the NLRA in terms of "ground rules," the Task Force did not intend a limitation to strictly procedural matters. As to whether the bridge was intended to span such substantive principles as "community of interest" or "appropriate units," nothing specific was said.

The language of the Order itself proves much more illuminating. Section 1 of the Order, as indicated by the Task Force Report, does indeed contain language closely similar to that found in sections 7 and 8(a)(1), (2) and (3) of the NLRA, whereby employees are to be protected in their rights to choose their representative and bargain collectively, or refrain from such action, without discrimination, interference or, for that matter, assistance by the agency. Section 3(b) of the Order resembles sections 9(c)(3) and 9(e)(2) of the act, in that it provides a twelve-month insulation period following a grant of exclusive recognition during which the bargaining status of the "certified" union may not be questioned. Section 3(c)(1), like section 9(a) of the act, adopts a proviso permitting individual employees to present their own grievances to management regardless of union recognition. Continuing the parallel, the Order abounds with words and phrases that likewise appear in the act and have become imbued with special meaning thereunder: "recognition," "appropriate unit," and "exclusive representative." A further example is the thoroughly familiar language of section 6:

Units may be established on any plant or installation, craft, functional or other basis which will ensure a clear and identifiable community of interest among the employees concerned, but no unit shall be established solely on the basis of the extent to which employees in the proposed unit have organized.

Additionally, provisos (1)-(4) of section 6a—which would exclude from bargaining units such employees as "any managerial executive," employees engaged in personnel work, supervisors, and professionals "unless a majority of such professional employees vote for inclusion in such unit"—closely coincide with the provisions of section 9(b)(1)-(3) of the act.

\textsuperscript{41} Ibid.
These obvious similarities must be attributed more to design than to coincidence. The Executive Order cannot be explained or implemented in terms of "judicial inventiveness" without regard to the established experience of the inventors—particularly where the language of the Order borrows heavily from the established act without independent explication. This is not to suggest that every question raised under the Order is to be compared to the NLRA. The Order exhibits some radical points of departure, such as the tri-level form of recognition, the degree of showing of interest required of unions prior to the grant of recognition, and the prohibition against strikes. As to such provisions, interpretation must begin anew. However, where the provisions of the Order are clearly patterned after sections of the NLRA and the accepted terminology of the Board, the nearly thirty years of successful experience under the act would undoubtedly prove useful. While not binding, as such, decisions of the NLRB should be deemed highly relevant to the proper interpretation of the Executive Order.

This contention was adopted by Professor Cornelius J. Peck, arbitrator at the Long Beach Naval Shipyard: "A reading of the Executive Order soon reveals that it is patterned after the National Labor Relations Act." The arbitrator noted that "the Order describes its substantive mandates in broad terms and . . . those terms incorporate the broad body of experience developed under the NLRA since 1935." He concluded that "decisions of the NLRA are . . . highly relevant with respect to unit determinations made under the Executive Order." Arbi-

trator George S. Ives, in his opinion in the Norfolk Naval Shipyard case, relied heavily upon NLRB decisions and practices. The advisory opinion of Professor Taft at the Boston Naval Shipyard stated that "the conclusions of the National Labor Relations Board, while they cannot serve as precedents, must be given great weight." Deciding the unit question involving the Railroad Retirement Board, Arbi-


43 It is interesting to note, in this connection, that when asked by Congress to fashion a new body of federal law under § 301 of Taft-Hartley, the Supreme Court announced that its task would be lightened by reliance, in part, upon established decisions of both state and federal courts in the same or similar areas of law. Textile Workers Union v. Lincoln Mills, 353 U.S. 448, 457 (1957).


46 Boston Naval Shipyard, 8-Nav-BuShips-7, at 7 (1963).
Fleming noted that certain tests utilized by the NLRB to determine community of interest among employees "may have relevance,"47 and then proceeded to apply those tests.48 Perhaps the most extended discussion of the issue appears in the decision of Professor A. Howard Myers at the Portsmouth Naval Shipyard.49 Professor Myers discusses the similarities and dissimilarities between the Order and the act and concludes that "essentially . . . the Executive Order paralleled the standards for bargaining units derived from section 9(b) of the 1947 statute."50 That conclusion led to a principle which at first blush seemed rather rudimentary, but which needed expression in the early stages of the Executive Order. This principle was that

[W]here a clear and identifiable community of interest exists among a professional or a craft group the wishes of such employees as to bargaining unit ought to be given similar weight here as it is under the NLRA. The purposes of the Order will otherwise not be implemented.51

The Secretary of Labor has apparently applied to the Executive Order the NLRB's Midwest Piping rule.52 He nominated an arbitrator to hear a unit dispute at the behest of union A despite the fact that the request was made after the agency had granted exclusive recognition to union B in a different unit, pointing out that at the time of the grant of recognition to B, A's petition was pending before the agency thus raising a question concerning representation.53 Similarly, at the Puget Sound Naval Shipyard54 it was held that the signing of a contract between the agency and a union covering an over-all unit did not preclude a unit determination as to petitions previously pending for smaller units.55

There have been some expressions of implied dissent. At both the David Taylor Model Basin56 and the Veterans Administration Hospital, (Muskogee, Oklahoma),57 arbitrators rejected union petitions that would probably have been granted by the NLRB, supporting their conclusions by reference to the "uniqueness" of government installations and the

48 Id. at 8-10.
50 Id. at 5.
51 Id. at 6.
53 Department of Labor, Exec. Order No. 10988, § 11, Report No. 4.
Executive Order. Unfortunately, neither opinion undertook to define the area of "uniqueness" and how, in particular, it should affect unit determinations under the Executive Order. The opinion writers stressed that NLRB decisions cannot be "controlling" and that each case must be decided on its own merits. This emphasis was properly placed. NLRB decisions should not constitute a rubber stamp in unit determinations under the Order and the unit finding in each such case must indeed turn upon the particular facts thereof. Nothing in the NLRA or the Order suggests otherwise. But the point is that the language of the Order indicates rather clearly that its framers intended the parties to be guided by the NLRA in several areas of its implementation. That guidance is very much needed. Its rejection by many federal agencies as well as by some arbitrators has left beclouded some very basic issues whose early resolution would have facilitated progress. After all, the purpose of the Order was not to create conflict and sharpen it by legal battle but to encourage greater cooperation between the government and its employees. As will be shown, that lofty purpose has not as yet been achieved.

THE UNIT CONTROVERSY
AN APPROPRIATE UNIT

No union may be exclusively recognized absent a prior determination that the group of employees it seeks to represent constitutes an "appropriate unit," a unit which must be characterized by a "clear and identifiable community of interest" among the employees involved as required by section 6 of the Order. If historical guidelines were to be rejected, as suggested by most federal agencies, these terms could be interpreted in any manner which best suited the interpreter. Many agencies chose interpretations that would permit the establishment of but one unit in each installation.\(^58\) There was little surprise in this approach. Generally, employers would prefer to deal with one union and one contract rather than several. Several arguments have been presented to support that desired result.

It has been argued that the Order emphasized the concept of "public service" and if the approval of more than one unit would interfere with the efficient service provided by the agency, as it necessarily must, then

\(^{58}\) For example, in each arbitration decision previously cited involving a naval shipyard, the shipyard had made a determination that the only appropriate unit was installation-wide. Not all agencies, however, were so inflexible. Boston Naval Shipyard, 8-Nav-BuShips-7 (1963); Long Beach Naval Shipyard, 28-Nav-BuShips-19 (1963); Norfolk Naval Shipyard, 28-Nav-BuShips-15 (1963); Portsmouth Naval Shipyard, 9-Nav-BuShips-8 (1963); Puget Sound Naval Shipyard, 39-Nav-BuShips-22 (1963).
such approval must be withheld. Another argument states that since the Order permits the establishment of a unit on a "plant or installation" basis, such a unit carries with it an inherent "community of interest" and the inquiry need proceed no further. One argument propounded is that the installation-wide unit alone is appropriate because all of the employees thereof share a common "mission"; and, that the approval of a small unit (such as a single craft unit) would result in a flood of petitions for other small units which would unduly hamper agency operations. These arguments have been uniformly and correctly rejected by arbitrators. With respect to the "multiplicity of units" argument, the Boston Naval Shipyard opinion states: "[I]t does not appear equitable to base a denial of a request from one group upon the hypothetical grounds that similar requests might be forthcoming from others." Referring to the undeniable fact that all employees in a given installation share a common "mission," Professor Taft remarked:

The reasoning behind this argument is somewhat elusive. Workers in any and every enterprise must cooperate to produce a good or service. It cannot be shown that such cooperation is less necessary or complete in one kind of bargaining unit than in others. The mission in the ultimate sense is the same for all workers, but the method of performance, the tools, skills, education, working environment and a host of other factors are different. It is such differences which are crucial in the determination of the appropriate bargaining unit rather than the mission.

In the Norfolk Naval Air Station arbitration the Navy relied on "the pervasive influence of the Civil Service System." In answer, the arbitrator noted that "[I]f the Navy Department's argument is carried to its logical extreme, it would be difficult to justify recognizing any unit other than one which was installation-wide."

59 Portsmouth Naval Shipyard, supra note 58, at 4.
62 Id. at 7.
63 Boston Naval Shipyard, 8-Nav-BuShips-7, at 7 (1963); accord, Smithsonian Institution, Nat'l Zoological Park, 45-Smithsonian-1, at 4-5 (1963).
66 Similar conclusions have been reached in each arbitration decision previously cited involving a government military installation with the exception of one. Professor Gregory, while upholding an installation-wide unit at the Naval Ammunition Depot, St. Julien's Creek, Portsmouth, Va., 1-Nav-BuWeps-1 (1963), regretfully relied upon the fact, inter alia, that the "entire group appear [sic] to have a common objective and industrial interests—the production and supplying of adequate ammunition for the Navy." Id. at 9.
A more dangerous threat to the success of the Order, and one that has not been satisfactorily resolved by arbitration decisions, lies in agency misconception of the nature of their function, or the issue before them, in making unit determinations. The Portsmouth Naval Shipyard case\textsuperscript{67} is illustrative of the error. In that installation, as in many others, it was determined by the agency that \textit{the} unit should be shipyard-wide, despite the fact that no employee organization had petitioned for such a unit. "I established the unit," said the Admiral, "before anybody had a chance to request such recognition."\textsuperscript{68} In fact, the only unions that eventually petitioned for exclusive recognition were the American Federation of Technical Engineers and the Pattern Makers, both seeking to represent employees in smaller units. The evidence suggested, moreover, that the Navy's denial of their petitions was based not on a lack of community of interest in the units petitioned for, but simply upon the fact that said requests were inconsistent with the unit that had already been "established," in ex parte fashion, by the Navy.\textsuperscript{69} To complete the picture, it was brought out that the Admiral did not consider it his duty to determine whether the units petitioned for were, in themselves, appropriate. Consider, in this connection, the following testimony:

Q. Was it your opinion, Admiral, that the Executive Order made it incumbent upon you to determine what is in this Shipyard the \textit{most} appropriate unit after considering all the factors?

A. There is no question about this.\textsuperscript{70}

While agreeing that "any given group has a community of interest among itself," the Admiral added: "[H]owever, this is only part of the greater community of interest of all the employees of the Shipyard which all share."\textsuperscript{71}

This example demonstrates a marked tendency on the part of various governmental agencies to "establish" what from their point of view is the "preferred" or "most appropriate" unit, rather than to limit their determination to the question of whether, in each particular case, the unit requested by the petitioning union is \textit{an} appropriate one. If the unfortunate tendency persists, union petitions for certain units thought appropriate by the unions would obviously be needless and installation heads

\textsuperscript{67} 9-Nav-BuShips-8 (1963).
\textsuperscript{68} Record, p. 276, Portsmouth Naval Shipyard, supra note 67.
\textsuperscript{69} Id. at 277-80.
\textsuperscript{70} Id. at 280. (Emphasis added.)
\textsuperscript{71} Id. at 280.
would be implicitly encouraged to determine what is the most appropriate unit, as was apparently done at Portsmouth and elsewhere.

The proof of the error lies in the Order itself, in the official documents that have been issued to implement the Executive Order, and in NLRB practice. Section 6 of the Order states: “An agency shall recognize an employee organization as the exclusive representative of the employees in an appropriate unit . . . . Units may be established on any plant or installation, craft, functional or other basis. . . .”; and section 11 provides that “Each agency shall be responsible for determining in accordance with this order whether a unit is appropriate for purposes of exclusive recognition. . . .”72 A letter issued by the Civil Service Commission implementing the Order states the following:

A clear intention of the new program is that consultations and negotiations with employee groups be largely on a decentralized basis so that understandings reached will be adapted to the needs and interests of particular groups of employees and individual establishments.73

A Department of Defense Directive provided that unit determinations were to be made and recognition extended to employee organizations “upon request,” and that “a unit may be established on organizational, occupational, or functional lines. . . .”74

A memorandum addressed to the military departments by the Assistant Secretary of Defense for Manpower directed as follows:

Questions have been raised concerning determination of appropriate units under Executive Order 10988 and Department of Defense Directive 1426.1. Among these has been the question whether an installation-wide unit should be preferred as the most appropriate unit rather than having the determination of appropriate unit made on the basis of the particular facts presented when a unit is requested. This memorandum is designated to clarify Department of Defense Directive 1426.1 and the Executive Order in view of these questions.

. . . .

The keystone of unit determinations under both the Executive Order and the DOD Directive is thus clearly one of flexibility, dependent upon the specific fact situation in the particular case. As a result, no general rule may be pre-determined and no type of unit—installation-wide or otherwise—may be preferred. Rather, determination of appropriate units must be made in each case on the basis of the particular facts presented. There can be no arbitrary limit on the number of appropriate units any given installation may comprise.75

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72 Emphasis added.
74 Department of Defense Directive 1426.1, at 3 (1962) (Emphasis added.)
75 Memorandum from Norman S. Paul, assistant Secretary of Defense for Manpower for the Under Secretary of Army, Navy & Air Force, Dec. 21, 1962 (Emphasis added.)
It seems clear enough that the foregoing documentation negates the agency approach here discussed. Section 11 of the Order, while affixing responsibility upon the agencies to determine "whether a unit is appropriate," does not purport to license the establishment of a unit in disregard of union petitions nor a determination that a certain unit is to be "the" unit because it is "most" appropriate. Note, by way of analogy, that section 9(b) of the NLRA employs language similar to that found in section 11 of the Order:

_The Board shall decide in each case whether, in order to assure to employees the fullest freedom in exercising the rights guaranteed by this subchapter, the unit appropriate for the purposes of collective bargaining shall be the employer unit, craft unit, plant unit, or subdivision thereof . . . ._

Yet the Board's position has always been that the issue in representation cases is simply _whether the unit sought in the petition is an appropriate one._ As stated by the Board: "There is nothing in the statute which requires that the unit for bargaining be the only appropriate unit, or the ultimate unit, or the most appropriate unit; the Act requires only that the unit be "appropriate."_

The determination to be made under the Executive Order—"whether a unit is appropriate"—does not call for the application of considerations or principles different from those outlined above. The function of agencies under Executive Order 10988 is not to "establish" a unit, but to decide whether a unit as petitioned for by a particular employee organization is appropriate. Such determination, moreover, must be based not upon the agency's concept as to _the most_ appropriate unit, but rather upon the question whether the unit _petitioned for_ is an appropriate unit.

This issue has suffered a checkered career in arbitration proceedings. At the David Taylor Model Basin,_78_ the "most appropriate unit" argument was advanced by the Navy and impliedly rejected by the arbitrator. A similar disposition was made at the Army Infantry Center._79_ Other arbitration opinions failed completely to understand or come to grips with the problem. In a case involving the Department of Agriculture, the arbitrator wrongly concluded: "It was initially within the province of the Department to make a decision specifying _the_ appropriate unit._80_

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79 Post Eng'r Section, U.S. Army Infantry Center, 44-Army-3d-1 (1963).
80 Meat Inspection Div., Dep't of Agriculture, 14-Ag-1, at 8 (1963). (Emphasis added.)
He then compounded the error by stating that the issue before him was not only whether the unit established by the new Department was appropriate, but whether a conflicting unit sought by one of the unions in the case was "equally—or more—appropriate."81 A similar confusion occurred at the Potomac River Naval Command.82 In that case the Navy had established the installation-wide unit while the Metal Trades Council sought a "blue-collar" unit. The MTC unit was upheld, but the instant question was misunderstood. "The only issue," said the arbitrator, "is . . . whether the appropriate unit for collective bargaining includes and is restricted to those employees sought to be represented by the Council."83 Assuming the correctness of the unit decision, could there be no other appropriate units at the installation? Is it not probable that both the MTC unit and the Navy's unit were "appropriate," but that a finding of appropriateness as to the former concluded the arbitrator's function under section 11? These questions were unanswered.

The arbitrator noted the fact that "a unit determination . . . [was] made by INDMAN [even] prior to receiving a request for exclusive recognition; but the arbitrator considered the only issue raised by that fact to be one of 'timing,' the propriety of which he said was 'outside the scope of my function.' "84

Some of the shipyard cases supplied what the foregoing decisions lacked. At Long Beach, for example, the issue was stated with perfection:

[T]he question is whether the proposed smaller unit is one with a clear and identifiable community of interests which are sufficiently distinct from those of other employees in the Shipyard to justify its establishment as a separate appropriate unit.85

The arbitrator spoke directly to the question presented: "The unit to be established under Executive Order 10988, like units established under the National Labor Relations Act as amended, need not be the only appropriate unit."86 The sole union petition in the case sought a unit of technical employees. The arbitrator correctly observed that while the technical employees might appropriately be included in an over-all unit, he was not precluded from determining that a separate technical unit was in itself appropriate and therefore eligible for cognizance under the Order.

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81 Id. at 10-11.
83 Id. at 3. (Emphasis added.)
84 Id. at 4-5. (Emphasis added.)
86 Id. at 5.
The same approach has apparently been approved, at least by implication, by the Secretary of Labor. An agency asked the Secretary to dismiss a union request for arbitration on the following grounds: section 11 requires that a union be “qualified for formal recognition” in order to seek arbitration of a unit question; in order to qualify, a union must show that ten per cent of the employees in the unit are union members; the ten per cent showing, the agency argued, must apply to the “unit as defined by the agency” (in this case, an over-all unit) rather than the unit proposed by the union; since the union failed to show ten per cent membership in the large unit, its request cannot be honored. The Secretary rejected the argument, viewing the “obvious intention” of section 11 as requiring only that the ten per cent showing be made with respect “to the proposed appropriate unit, which may be either larger or smaller than the unit defined by the agency.”

If the latter decisions are correct, as is suggested here, unions will not be put to the impossible task of demonstrating in each case that their proposed unit is the most appropriate of all possible units or that a conflicting unit “established” by the agency is itself inappropriate. The Order intends only that unions prove the appropriateness of their own proposed units by a factual demonstration of a clear and identifiable community of interest among the employees therein. Any other requirement would be unworkable.

**SCOPE OF REVIEW**

Equally restrictive and unwarranted is the proposition advanced by some agencies that an arbitrator’s duty under section 11 is to uphold the agency’s unit determination unless he finds it to be “arbitrary and capricious.” Adoption of this argument would create a frightening anomaly. On the one hand, decisions of administrative agencies—rendered only after a full and fair hearing—are generally reviewable by the courts and may be upset if “unsupported by substantial evidence.” On the other hand, agency unit determinations under the Order—rendered without a hearing or any of the rudimentary requirements of due process—could only be upset if “arbitrary and capricious.” In short, agency decisions bereft of due process would be reviewed with greater leeway.

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87 Report on a Decision of the Secretary of Labor Pursuant to § 11 of Exec. Order No. 10988, Report No. 5.

It is true that courts may not review decisions of the NLRB in representation cases, unless such decisions contravene an express statutory mandate imposed upon the Board or result in a deprivation of constitutional rights.\footnote{Leedom v. Kyne, 358 U.S. 184 (1958).} However, this rule of judicial self-restraint is predicated on the fact that the NLRB is more expert than any court or any other agency in the field, that the decisions are rendered after a full and fair hearing and, most important, that the agency rendering the decisions is impartial. None of these predicates underlie agency unit determinations under the Executive Order. The plain fact is that the agencies in making such determinations are acting as the employers. This alone, it would seem, should make their determinations subject to greater instead of lesser review.

There is no need to resort to conjecture, however, where the intent of the Order is the crucial consideration. Section 11 neither seeks a "review" of an agency decision nor limits the scope of an arbitrator's inquiry in the manner suggested above. Rather, it calls for the arbitrator to "investigate the facts and issue an advisory decision as to the appropriateness of a unit." It calls for an even-handed appraisal of the merits of each unit dispute. The opinion of an agency head with respect to the unit question must of course be given some weight, but to accord such decision any special consideration is to emasculate effectively the intent of the Order and deprive all employee organizations of an effective voice in the formulation of policies under the Order.

A contrary conclusion has been reached in several cases. At the Veterans Administration Hospital (Muskogee, Oklahoma), it was concluded that "the Veterans Administration did not act . . . arbitrarily or capriciously."\footnote{Veterans Administration Hosp., 12-VA-1, at 12.} Arbitrator E. C. Burris stated "that in rendering an advisory decision he should not attempt to substitute his judgment for that of others, but instead attempt to determine and evaluate the reasons for a decision by one of the administrative agencies."\footnote{Ibid.} Another arbitrator found "some validity" in the argument that the correctness of the agency decision must be upheld "in the absence of a clear showing to the contrary."\footnote{Meat Inspection Div., Dep't of Agriculture, 14-Ag-1, at 5 (1963).} Arbitrator Holland,\footnote{Naval Eng'r Experiment Station, 2-Nav-BuShips-1 (1963).} began on one side of the issue and ended on the other. He pointed out the importance of an equal evaluation of the testimony and argument on both sides. "Deciding on the merits in a
disagreement between two parties,” he said, “is essentially the making of a choice and sustaining the stronger position that emerges from the record.”94 His final conclusion, however, was in a different vein:

[1]n a review of authorized administrative action the reviewer should exercise caution and restraint in recommending some other decision. . . . I would not recommend a change in the unit determination already made unless the case for the smaller unit came out of the record definitely stronger than the case for maintaining the status quo.95

It should make a difference, it would seem, that the “authorized administrative action” is expressly made subject to review. The language of the Executive Order extends no form of recognition to the “status quo.” Decisions of arbitrators are merely “advisory” because mandatory arbitration would create discomfort in terms of the division of authority among and between the governmental components, but the advisory nature of the process was not meant to produce timidity by arbitrators in the face of governmental decisions.

It is urged that the burden of overcoming the “arbitrary and capricious” standard should not be placed upon the petitioning union. This stand has apparently received support from the Department of Labor:

Hearings under Section 11 of the Order should be investigatory, not adversary. Their purpose is to develop a full and complete factual record upon which the arbitrator may base a meaningful advisory decision. To accomplish this end . . . there should be no burdens of proof.96

EXCLUSIVE AND FORMAL UNITS

A further “unit” problem was raised by the decision in the David Taylor Model Basin arbitration.97 In that case the Navy established an installation-wide unit, the Metal Trades Council petitioned for a unit of ungraded (wage board) employees, and the Pattern Makers for a unit of Model Makers. Arbitrator Laurence E. Seibel found the ungraded unit to be appropriate, but not the Model Makers unit. The arbitrator recognized the fact that the Model Makers constituted “a true craft and might well be permitted under the National Labor Relations Act to have their own representative.”98 He found, however, that they were

94 Id. at 4.
95 Id. at 4-5.
97 48-Nav-BuShips-23 (1963).
98 Id. at 30.
not entitled to that unit for the purpose of exclusive recognition under the Order.

He went on to suggest, however, that the Model Makers be accorded "formal" recognition pursuant to section 5a of the Order. This would entitle the group "to be heard" but not "to bargain or to enter agreements."99 "In my opinion," he said, "the Model Makers . . . are a sufficiently distinct group to warrant being given the right to be heard, but are not sufficiently differentiable to justify a bargaining unit separate from all other crafts . . . at the installation."100 The arbitrator correctly pointed out that under section 5 a union may be accorded formal recognition "in a unit as defined by the agency," while the grant of exclusive recognition under section 6 depends on a finding of "an appropriate unit" based on a "clear and identifiable community of interest."101 There is a demonstrable difference between the two standards. But the arbitrator was incorrect in concluding that the considerations underlying unit determinations under the two sections could or should be different.

The primary dictionary definition of a "unit" is "a distinct part or member analyzable in an aggregate or whole."102 No distinction among groups of employees can be analyzable for the purpose of unit determinations except on the basis of community of interest—factors such as physical location, common skills and backgrounds, common supervision, etc., the same factors that enter into section 6 unit determinations. Many years experience with private industry as well as common sense suggest that "unit" could mean nothing else. It therefore seems a more sensible view that any unit which is deemed appropriate for the purpose of formal recognition is also appropriate for the purpose of exclusive recognition.

How, then, shall we explain the difference in language between sections 5 and 6? One explanation is that the framers of the Order were content to assume that the interpreters of section 5 would borrow the standard of section 6 and of the NLRA. Another explanation lies in section 11. Strange as it may seem, agency unit determinations are appealable to arbitration pursuant to section 11 if the determination concerns exclusive recognition (section 6), but not if it is directed to formal recognition (section 5). The agency decision under section 5 is, in effect, that of an employer; it is ex parte in nature, and it is unreviewable. As to such a deci-

99 Id. at 33.
100 Ibid.
101 Id. at 34.
102 Webster's New Collegiate Dictionary (1949).
sion, the explication of a standard would be of no aid to an aggrieved party, and while a standard would be helpful to the agency, it could be completely ignored or interpreted in such a way as to support the agency's desired result. The final decision under section 6, on the other hand, is that of an impartial arbitrator in the exercise of a judicial function. The inclusion of a standard here is necessary to enable an aggrieved party to appeal on the ground that the stated standard has been ignored or badly applied, and to serve as a guideline for the arbitrator's decision.

Whatever the explanation, it is regrettable that section 11 does not permit arbitration of unit decisions in "formal recognition" cases. The attainment of formal recognition is a singular advantage to unions and employees alike. It entitles the representative not only to be heard but to be consulted as to agency action which might affect its members. But without the right of appeal on the unit question, the advantage may well be hollow.

In order to qualify for formal or exclusive recognition, as previously mentioned, a union must show that ten per cent of the employees in the finally-determined appropriate unit are members. For exclusive recognition, it must also secure sufficient strength to win an election by a majority vote of the employees, whether members or nonmembers. But this majority strength need not be demonstrated until after the unit has been decided upon. Assuming its unit request is denied by an agency, the union must, in order to challenge the unit question in arbitration, demonstrate to the Secretary of Labor that it has the ten per cent membership plus a thirty per cent showing of interest; i.e., that thirty per cent of the employees, whether members or not, have authorized the union to represent them in the proposed unit. Any union which can show ten per cent membership in its proposed unit, but only twenty nine per cent in authorization cards cannot bring the adverse unit determination before an arbitrator. Such a union must satisfy itself with formal recognition. But if the agency had "established" an over-all unit as the only appropriate one under section 5, the union would have to show ten per cent membership in that broad unit, an impossible task in many circumstances. The unit established by the agency cannot be challenged.

Suppose, next, that the union can demonstrate both the ten per cent and the thirty per cent requirements and thus get the unit issue to an arbitrator. It knows, however, that it could never gain sufficient strength to show majority support—the ultimate requirement for exclusive recog-

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nition. Would such a union be ethically justified in filing a petition for exclusive recognition under section 6 in order to have the unit question decided under section 11? Probably not, but the union would be justified in its conduct if it entertained a reasonable hope that by the time the arbitrator decided the unit issue it will have gained majority support among the employees. If by that time it has gained majority support, the union will of course be exclusively recognized.\textsuperscript{104} If not, the union may ask the agency for formal recognition in the proposed unit, pointing to the arbitrator's decision that the requested unit is appropriate. In that situation, however, the agency would be legally justified in denying the request on the ground that the arbitrator's decision, under section 11, is applicable only to petitions for exclusive recognition.

Manifestly, in practical terms, the benefits of section 5 are limited to the following situations: First, where the agency approves the union's unit request; second, where the proposed unit is disapproved by the agency, but the union is able to show ten per cent membership in the larger unit; and third, where the union can justifiably bring the unit issue to arbitration, wins the issue before the arbitrator, switches its request from exclusive to formal recognition because of an absence of majority strength, and the agency nevertheless agrees to abide by the arbitrator's decision. Experience under the Executive Order has shown that the foregoing instances have been relatively rare. For these reasons, an amendment to the Order is called for to provide a right of appeal under section 11 in formal recognition cases.

**Election Rules**

**THE "RUN-OFF" ELECTION**

Under Taft-Hartley, the NLRB directs a "run-off" election whenever three or more entries appear on an election ballot and not one of them is able to secure a majority vote.\textsuperscript{105} The "run-off" (or new) election is conducted between the two entries that received the highest number of votes in the original election. In this manner, the choice of one entry by a majority of employees is assured and the representational dispute comes to an end.

\textsuperscript{104} While arbitration decisions under § 11 are advisory in nature, the agencies have thus far adhered to these decisions and it appears that they will continue to do so.

\textsuperscript{105} Section 9(c)(3) of the act states in part: "In any election where none of the choices on the ballot receives a majority, a run-off shall be conducted, the ballot providing for a selection between the two choices receiving the largest and second largest number of valid votes cast in the election." Added by 61 Stat. 144 (1947), 29 U.S.C. § 159(c)(3) (1958). The order does not contain a similar provision.
While the Executive Order similarly provides for elections for the purpose of determining the employees' choice of a bargaining representative, the President's Temporary Committee has decided to support an agency's refusal to conduct a "run-off" election where no majority vote had been secured on the first ballot. The factual situation to which the committee addressed itself in Administrative Ruling Number 1 was as follows: 283 votes had been cast in the election, of which Union A received 125, Union B, 138, and "no union," 19. Since a majority of the votes cast (or 142 votes) was needed to obtain exclusive recognition, the election was inconclusive. The agency denied the request of the two unions that a "run-off" election be conducted between them.\textsuperscript{106} The agency's position was upheld by the committee on the ground that:

\begin{quote}
[F]ormal recognition under the Order gives Federal employees the benefits of representation by any organization able to meet the requirements of Section 5. Accordingly, the considerations favoring run-off elections in the private sector, where there is no middle ground between exclusive recognition and none at all, have little relevance in Federal employee-management relations. The Committee therefore expressed the view that the purposes of the Order would be effectuated without a run-off.\textsuperscript{107}
\end{quote}

In failing to take into account the practical effects of its decision, the committee employed unsatisfactory reasoning and reached the wrong conclusion. It is undeniable that exclusive recognition affords unions and employees considerably greater benefits and protection than does formal recognition. For that reason, unions A and B in the above case will continue to battle one another for additional employee support until they are able to once again petition for exclusive recognition a year hence. By that time, other unions may be in the picture seeking the same benefit in the same or different units. The inter-union conflict will surely result in employee confusion and unrest. Management will be the unhappy recipient of both the conflict and the unrest. Additionally, management will have to deal with two or three unions as to all matters affecting their respective memberships, instead of concluding an agreement with one union covering all the employees in the unit. Thus, the committee's decision would not only leave unresolved the very representational dispute that justified the invocation of the provisions of section 11, but would create additional difficulties for all concerned.

The "run-off" election is, for these reasons, a necessary device in the attainment of the objectives of the Executive Order.

\textsuperscript{106} Administrative Rule of the Secretary of Labor Pursuant to § 11 of Exec. Order No. 10988, Administrative Rule No. 1.

\textsuperscript{107} Ibid.
THE SIXTY PER CENT VOTE RULE

Both the NLRA and the Executive Order predicate the grant of exclusive recognition to a union upon the union's designation as representative by a majority vote of the employees in an appropriate unit.\(^{108}\) Under normal NLRB practice, a union is certified as the bargaining representative if it receives fifty-one per cent of the \textit{votes actually cast} in the election.\(^{109}\) However, Department of Defense Directive 1426.1, implementing the Executive Order, provides a substantially different rule. It states that a union may not be accorded exclusive recognition unless at least sixty per cent of all employees \textit{eligible to vote} within the unit \textit{cast ballots} and the union receives fifty-one per cent of that vote; if less than sixty per cent of the eligibles actually vote, the union must receive fifty-one per cent of \textit{all eligible votes}.\(^{110}\) The rule works this way: Assume that the unit has 100 employees; if 60 employees vote, the union must receive 31 votes in order to win; but if only 59 employees actually cast ballots, the union must secure 51 favorable votes.

The apparent justification is that, unlike the exigencies of private industry, the public interest in efficient government requires greater assurance of a representative vote. The justification becomes suspect, however, when one realizes that presidential and congressional elections, in which the public interest has a considerably larger stake, are not characterized by a similar restriction. It is fairly obvious that the "sixty per cent rule" embodies absurd implications. In our example, the one abstention from the polls that brings the total abstentions to 41 carries the weight of 20 negative votes. Were it not for that one abstention, the union would need 31 votes to win; because of the abstention, it needs 51 votes to win. The principal fault of the rule lies in its erroneous premise. It presumes that an employee who stays away from the polls does so with a conscious desire to affect the outcome of the election. Experience seems to dictate otherwise. Whether in national or industry elections, it is far more probable that those who fail to vote do not choose their action but are apathetic to their opportunity. The rule supports their apathy.

The proper objective, it would seem, is to encourage active, affirmative participation in the democratic process. Election rules should be so designed as to impress upon employees the importance of taking an active


interest in an organizational campaign, debating fully the pros and cons, and casting a ballot for or against the union pursuant to individual conviction. The rule which accomplishes the desired objectives is that employed by the NLRB.

This is not to suggest that a "representative" vote may be deemed to have been cast in every single election. For example, where a small number of ballots were cast in a unit with a much larger complement of employees and the unit was expanding both during and after the election, the Board refused to certify the result. An election in which only 24 of 55 eligible voters cast ballots was set aside where the evidence showed that a substantial number of employees had not been given an adequate opportunity to vote. Thus, the usual rule of "majority of those voting" coupled with a case by case analysis of the representative character of the vote has apparently served well in private industry. No reason appears why it should not be similarly effective to protect the various interests under the Executive Order.

THE AGENCY AS PROSECUTOR, DEFENDER AND JUDGE

Section 1a of the Executive Order guarantees to federal employees the following basic rights:

Employees ... shall have, and shall be protected in the exercise of, the right, freely and without fear of penalty or reprisal, to form, join and assist any employee organization or to refrain from any such activity ... . The head of each ... agency ... shall take such action ... as may be required in order to assure ... that no interference, restraint, coercion or discrimination is practiced within such agency to encourage or discourage membership in any employee organization.

The importance of the rights could not be questioned, but where were the remedies for their vindication? Under section 11 advisory arbitration was limited to determinations "as to the appropriateness of a unit" and "as to related issues," or as to the majority status of a union within an appropriate unit.

The intent of the Executive Order with respect to section 1 remedies was made clear on May 21, 1963, when the White House—"pursuant

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111 Rowe-Jordan Furniture Corp., 81 N.L.R.B. 190 (1949).
113 Cf. NLRA §§ 8(a)(1), (2) and (3).
115 See Administrative Rulings of Secretary of Labor Pursuant to § 11 of Exec. Order No. 10988, Ruling No. 2.
to Executive Order 10988”—issued a “Code of Fair Labor Practices.”116 The Code created employee rights in excess of those specifically granted by section 1 of the Order. Thus, the Code prohibited “agency management” from interfering with the employees’ rights under the Executive Order “including those set forth in section 1 of the Order”; encouraging or discouraging union membership by discrimination; providing assistance to unions; discriminating against employees for having filed a complaint or having testified under the Order; refusing to accord appropriate recognition to unions which qualify for same; and refusing to negotiate, consult or bargain with a union as required by the Order.117 Additionally, the Code prohibited “employee organizations” from interfering with employee rights under the Order; attempting to induce agency coercion of employees with respect to such rights;118 coercing or disciplining any union member for the purpose of hindering the discharge of his duties as an officer or employee of the United States; engaging in any strike or other such activities against the United States; and discriminating against an employee in terms of union membership because of race, color, creed, or national origin.119

How were such rights to be protected? In the case of a strike against the government the agency may deal with the problem summarily in accordance with applicable law.120 If an employee grievance is subject to an existing grievance procedure “within the agency,” such procedure shall be used.121 In all other cases, the parties are urged to resolve the dispute informally. If they cannot do so, agency regulations must provide “for the designation of an impartial hearing officer” and “where it appears that there is substantial basis for a complaint . . . for an opportunity for a hearing before a hearing officer.” Decisions of hearing officers are “recommendations” which may be accepted or rejected by the agency. In performing their function, “hearing officers shall be responsible directly to the agency head.” Whatever action is taken by the agency ends the matter.122

117 Code § 3.2; cf. NLRA §§ 8(a)(1)-(5).
118 Code § 3.2; cf. NLRA §§ 8(b)(1) and (2).
119 Code § 3.2. This last provision is extremely salutary. The Executive has accomplished in the federal sphere what Congress could not accomplish in private industry because of political vicissitudes.
120 Code § 3.3; see note 42 supra.
121 Code § 3.3(a)(1).
122 Code §§ 3.3(a)(2) and (b).
The plain meaning of these provisions leads to bizarre consequences: The agency designates the hearing officer; the agency determines whether there is "a substantial basis for a complaint" and, if so, orders a hearing; and the agency has complete control over the hearing officer, and through him, over the hearing itself. If an employee complains over a deprivation of his rights at the hands of a union, the agency may prosecute and must judge. If the complaint is directed at the agency, the agency determines whether a hearing is called for, it defends and it judges with respect to its own alleged wrongdoing. Surely such an arrangement offends common notions of due process. Nor is the offense appreciably lessened where the complaint is lodged against a particular subordinate part of an agency; i.e., a naval shipyard and the above determinations are made not by the shipyard commander but by his superiors in Washington. For, particularly in the military, a substantial feeling of camaraderie exists which, commendable though it may be, tends to lessen the possibility of impartiality in every situation where one member of the group sets out to judge another.

Simple solutions are at hand. First, the Executive Order may be amended to permit section 11 arbitration of alleged violations of the Code. This remedy is least desirable from a legal standpoint because the specific employee rights granted by the Code far exceed those enumerated in the Order. Second, the code may be reconstructed so as to assure that a hearing officer is designated in each case by all the parties involved therein and that no one party may block a hearing on the basis of its ex parte determination that the lodged complaint is not "substantial." Third, the Code may be amended to provide for hearings before, and final and conclusive decisions by, an independent agency as to all matters arising under the Code. This is by far the most preferable of the possible solutions. If none of these solutions are adopted, it is to be fervently hoped that agencies construe the Code to dictate that the designated hearing officer be truly impartial, that after his designation he shall be subject to no pressure or suggestion from the agency, either as to substance or procedure, and that hearings be permitted in every case of dispute unless the complaint is obviously frivolous. The danger of multiplied hearings must surely be subordinated to the desirability of multiplied degrees of democracy.

A similar problem exists with respect to section 3(a) of the Order:

[N]o recognition shall be accorded to any employee organization which the head of the agency considers to be so subject to corrupt influences or influences opposed
to basic democratic principles that recognition would be inconsistent with the objectives of this order. 123

Here again no standards or remedies were provided in the Order. 124 These were supplied on May 21, 1963, by the executive's issuance of "Standards of Conduct for Employee Organizations." 125 Pursuant to these Standards, an agency may deny, suspend or withdraw recognition under the Order as to any union which is not subject to specific requirements calling for the following: The maintenance of democratic procedures and practices, the exclusion from union office of communistic or corrupt persons, the prohibition of conflict of interest on the part of the union officials and agents, and the maintenance of fiscal integrity. 126 Prior to taking action under this provision, the agency must afford the union an opportunity to amend or modify its constitution or bylaws to accord with the standards and must "consult with the Secretary of Labor." 127 These provisions are necessary and proper. Their requirements are satisfied by the inclusion in a union's constitution or bylaws or the constitution of its parent union or federation of specific provisions adopting the above standards. While it is true that these sections may have the effect of permitting agencies to judge union constitutions and to some extent dictate their content, the standards are precise and mandatory enough to preclude the exercise of too much discretion by the agencies, while advancing the cause of the public interest. The provisions are designed to impose upon the unions in the federal sphere the same responsibility required of unions under the Landrum-Griffin Act. 128

The Standards, however, go much further. In section 2.4, it is stated that any union which had adopted the above standards shall not be required to furnish other evidence of its freedom from influences described in section 3a of the Order unless "(1) the agency has 'cause to believe' that the union has been or is subject to expulsion or other sanction by a parent union or federation because of its failure to comply with the

123 Exec. Order § 3a. (Emphasis added.)
126 Standards § 2.2.
127 Standards § 2.3.
standards of section 2.2,” or (2) recognition has been denied, suspended or withdrawn as to such union by another agency for failure to abide by the Standards, or (3) “there is reasonable cause to believe that the organization, notwithstanding its compliance with section 2.2, is in fact subject to influence such as would preclude recognition pursuant to the Order.” Before taking final action, the agency must afford the union a hearing, “shall” make available to the union a summary of facts on which it intends to rely in deciding the case, “may” make available to the union the entire report of the agency investigation, and “shall” consult with the Secretary of Labor.

Here again the ends do not justify the means. The Standards impose upon a union a presumption of guilt if it had been suspended or expelled by a parent union or federation for allegedly undemocratic behavior. Initially, the presumption is unjust in that it applies to any expelled union even if its expulsion by a parent body had not been based upon independent fact findings in the course of a full hearing. A troublesome question is whether the expulsion of an international union from a federation, such as the AFL-CIO, would expose all the former’s locals to the presumption. The Standards are susceptible to an interpretative answer in the affirmative. It is not unreasonable to suppose, for example, that the AFL-CIO’s expulsion of the Teamsters Union was intended, and continues, to apply to each of its 900 locals so long as they remain affiliated with the international. Yet the automatic application of the presumption to the locals would constitute nothing more than “guilt by association,” a concept generally frowned on in a free society.

What of a local union that has been expelled from its international for undemocratic conduct many years ago, but whose return to the fold is precluded not by its continued aversion to the democratic process but by a personality or political conflict between the leaders of the respective organizations? Would the local be permitted to present such proof and, if so, are such circumstances, however realistic, in fact provable? Is it fair to attach a presumption of guilt to a union expelled from a parent organization for the stated reason that the former was corrupt without an independent inquiry to determine whether the expulsion was justified by the evidence?

Next, the presumption attaches to any union that had been denied recognition by another agency under section 3 of the Order or of the Standards if such denial remains in effect. Suppose that in 1962 a union was denied recognition by agency A pursuant to the Standards. The same union then seeks recognition from agency B in 1972, having by that time com-
pletely purged itself of the prior violation. In that situation, the presumption still attaches. This is so because the union's failure to resubmit its petition to agency A left that agency's prior denial in full force and effect. Moreover, it must be remembered that even though agency A's decision is not subject to impartial review, agency B is not required to inquire into the fairness of the hearing before agency A nor the correctness or reasonableness of its decision prior to attaching the presumption.

Finally, the presumption attaches where the agency has "reasonable cause to believe" that despite its compliance with section 2.2 the union "is in fact" subject to such influences as are prohibited by the Order: "corrupt influences" or "influences opposed to basic democratic principles." In this situation, the agency is guided not by an identifiable, objective, external standard but by its own unpracticed notions as to the meaning of vague standards which allow a considerable application of personal prejudices and with which judges and lawyers would have grave difficulties in interpretation. Governmental agencies are simply not capable of making the required determination. But the Standards order them to do so and, in the process, place in their hands the power to impose an onerous presumption of guilt upon unions on the basis of personal predilections.

The presumption is all the more reprehensible by virtue of the absence of a full and fair hearing wherein it may be overcome. The agency is the employer. The employer has the power to impose the presumption, subject to unsatisfactory standards, as shown. The employer conducts the hearing. The employer must make available to the union a "summary of facts" on which it intends to rely, but nothing more. The accused union is not entitled, as of right, to confront its accusers, or to learn of all the facts unearthed by the agency investigation. Therefore, in attempting to overcome the presumption the union may be required to fight in darkness. Even as to any dispute over the accuracy or sufficiency of information that is provided by the agency, "the final determination shall be made by the agency head." The employer makes the final determination of corruption vel non.

The exclusion of corrupt and undemocratic elements from participation in the federal program is very much in the public interest—more so, quite understandably, than in private industry. To expel the undemocratic by the use of undemocratic means is to compound the felony. One solution

129 In fact, after an agency has denied, suspended or withdrawn recognition from a union under these procedures, any other agency may similarly deprive that union of recognition without a hearing. Standards § 2.4(d).
would be to trust the good judgment of federal employees in their selection of a representative, but this solution places too much emphasis on employee interests and too little on the public interest. The latter interest would not suffer, however, if section 2.4 were devoid of the presumption of guilt, and if the final decision were rendered, after a full and fair hearing by an impartial arbitrator; or better yet by an independent agency established for that purpose and armed with specific standards to guide it in determining "corruption."130

The Need for Central Authority

By section 10 of the Order, the head of each agency is directed to issue "appropriate policies, rules and regulations for the implementation of this order." Section 11 places in the hands of the Secretary of Labor, "subject to such necessary rules as he may prescribe," all matters pertaining to advisory arbitration. The Civil Service Commission, pursuant to section 12, is to "establish and maintain a program to assist in carrying out the objectives of this order." Section 13 directs the Civil Service Commission and the Department of Labor to prepare jointly the Standards and Code previously discussed. It also establishes the President's Temporary Committee on the Implementation of the Federal Employee-Management Relations Program.131

Quite predictably, the result has been an unwise diffusion of authority and a proliferation of rules and regulations. One illustration will suffice. In connection with a request for exclusive recognition at the Coast Guard Yard in Baltimore, the parties involved should familiarize themselves with the following documents: The Task Force Report; the Executive Order; the Standards; the Code; FPM Letter No. 700-1, issued by the Civil Service Commission on April 10, 1962; Procedural Guide for Majority Status Determinations under Section 11 of Executive Order 10988, Department of Labor, October 3, 1963; Rules for the Nomination of Arbitrators, Department of Labor, September 7, 1963; Procedural Guide for Advisory Arbitration Proceedings, Department of Labor; Form EO 10988-1, Department of Labor; Treasury Department Regulations; U.S. Coast Guard Instruction No. 12721.1 (November 14, 1962); and instructions issued by the Yard itself (YCPI). Do these docu-

130 To justify unfair procedures on the ground that the penalty for wrongful action is light is to ignore reality. An adverse decision under the Standards means not only a deprivation of recognition but a deprivation of respect and allegiance on the part of union members and the public. The stigma is very real.

131 Apparently, this committee continues to function on an informal basis.
ments make a contribution? In this connection, Coast Guard Instruction 12721.1 makes a revealing comment:

The policy and procedural instructions contained herein are based on Treasury Department regulations which adhere to the said Executive Order and were guided by the statements of the President, the report of the President's Task Force . . . and statements issued by the President's Temporary Committee . . . and by advice given by the Civil Service Commission and the Department of Labor.

In short, these regulations say the same thing that everyone else has said; and the Yard instructions say it once more.

Furthermore, the difficulty is multiplied by the number of agencies that a party has to deal with. Nor is it helped by the fact that some agency regulations are arguably inconsistent with the spirit and intent of the Order. Consider, for example, the following excerpt from Air Force Regulation No. 40-702:

[T]he [appropriate] unit normally will be an installation. In those limited situations where there may be a basis for establishing a unit of less than an installation, prior approval will be requested through the major air command headquarters. If the major air command concurs in the establishing of a unit of less than an installation, the request will be forwarded to Headquarters USAF (AFPCP-B) for a decision along with the comments of the major air command.182

The very existence of these documents, inconsistencies, and varied sources of authority dissuades the parties from venturing into the field without an attorney at their elbow. The cooperation envisaged by the Order was to be among agencies, unions and employees, not among their attorneys; any cooperation is difficult to accomplish in the face of the rules and regulations imbroglio.

The key to the problem rests in quasi-political considerations at several levels. The subject matter of the Order calls for the competence of the Civil Service Commission insofar as it involves personnel problems, and the expertise of the Labor Department in its application to the field of labor-management relations. Presumably, it would be difficult for either to step aside without endangering the reputation of its expertise and jurisdiction and establishing a precedent. On yet another level, the Labor Department has done an outstanding job in administer-

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182 AFR 40-702, ¶ 8(a), p. 5 (1962). Union attorneys have consistently taken the position that their clients are not bound by agency regulations which violate the spirit and intent of the Order. Presumably the Labor Department would take the same position in its administration of ¶ 11. Yet, if the agency involved remained adamant, the Executive Order simply would not be implemented.
ing section 11 of the Order, yet in doing so, it has suffered from its lack of authority over the "agencies" covered by the Order, for example, Departments of Defense, Health, Education and Welfare, and Treasury. Each Department is of equal rank within the governmental hierarchy. No administrator can be truly effective in the absence of some degree of superior authority over those to whom the administration is directed. Yet the Department of Labor cannot direct the conduct of any other agency. Each is extremely jealous of its jurisdiction, and, more important, its sovereignty. The Department of Labor has been able to alleviate the burden by effective use of persuasion, suggestion, debate and cajolery, and by the skillful use of the system of "credits" that is popular among politicians and administrators alike. It has been able to function through connections with personnel in each agency who, by common consent, possess the power to cut substantial chunks of red tape when the situation demands it with the least amount of embarrassment. Such means have obvious limitations. On yet another level, the agencies (particularly the military agencies) have not found it expedient, nor were they asked, to alter the normal "channels" of communication and command to suit the purposes of the Order. This is best demonstrated by the multifarious regulations issued at all levels of a particular agency to "implement" the Order. There have been other manifestations of the same problem. An appeal from an adverse decision of an installation commander addressed to the Secretary of the Navy must reach the latter personage "via" the commander, "via" the Bureau of Ships or the Bureau of Weapons or whatever management function exists at the intermediate step. When the Labor Department has reason to believe that installation commanders are misconstruing the Order, the message has to be relayed through a tortuous route. Labor first has to convince Defense. When Defense agrees, it then has to send a memorandum to the Under-Secretaries of the Army, Navy and Air Force. The memorandum is then relayed to the management bureaus or intermediate commands and, through them, to the installation commanders.

When these difficulties are coupled with the variegated decisions of arbitrators under section 6 of the Order and the unwise procedure established to enforce the Code and the Standards, the need for central authority becomes clear. Accordingly, it is proposed that the Executive establish an independent agency, much like the NLRB, to render mandatory decisions governing all unit questions arising under section 6, grievances and charges arising under the Code, and allegations of corruption under the Standards. Additionally, the agency must be empowered to evolve uniform rules and regulations implementing the
Order and, generally, to administer all aspects of employee-management relations within the confines of the orders issued since January 17, 1962.

CONCLUSION

The major part of this article has been directed to adverse criticism of the Executive Order and its present operation because the time for such criticism and for the correction of errors is now, while the Executive Order is young enough to undergo reinterpretation or transformation without undue discomfort. Nevertheless, it must be noted in all fairness to a noble experiment that its effect upon labor-management relations has been salutary. Most of its present faults would normally be expected of any new endeavor on a grand scale in the governmental sphere. Despite these faults, the good points are many and the future is apparently bright.

Many agencies and unions that previously could not communicate in a common tongue are now speaking the same language. They have been aided considerably by wise and well-reasoned arbitration decisions. The naval shipyards, for example, which once constituted the major battleground of the "appropriate unit" dispute, are now prepared for serious collective bargaining. After the first four shipyard cases were decided contrary to the Navy's installation-wide unit determinations, the Navy reconsidered its decision at Philadelphia and agreed to recognize the unions involved in the units of their choice. When the fifth decision came down the same way, the Navy agreed to reconsider its decision in New York. At the David Taylor Model Basin, the Navy has voluntarily accorded exclusive recognition to the Pattern Makers in the unit of their

133 Whether or not the independent agency is established, it is plain that all rules and regulations purporting to interpret the Order should emanate from one source. Presumably, different procedural rules may be needed for intra-agency action depending on the varying modes of operation of the several agencies. Even these, however, should be centralized and tightened.

134 John W. Macy, Jr., Chairman, Civil Service Commission, apparently disagrees. On January 17, 1964, the second anniversary of the Executive Order, Mr. Macy reported to President Johnson that the program "is continuing to move ahead satisfactorily." While agreeing that "there have been difficulties and some complaints" such as the sixty per cent election rule, the prohibition against run-off elections and the need for a central agency to administer the program, Mr. Macy concludes: "I find no reason to recommend any change at this time." BNA, Government Employee Relations Report No. 21, p. C-1 (February 3, 1964).


choice, despite an arbitrator’s decision that the Navy’s original rejection of the unit request was correct. Not to be overlooked is the fact that many agencies, notably the Department of the Army, have consistently approved the reasonable unit requests of labor organizations without the necessity for appeal or arbitration. Some of the questionable agency regulations have been amended to accord with the intent of the Order after full and frank consultations between the parties concerned and, usually, with the Department of Labor in the role of an effective mediator. Although the basic problem created by the proliferation of agency regulations remains, the Labor Department is considering the possibility of printing all of its own rules and regulations in a single booklet. This would be a step in the right direction.

The Bremerton (Washington) Metal Trades Council and the Puget Sound Naval Shipyard have signed a collective bargaining agreement of which both may be extremely proud. Many other contracts have since been signed and many are presently being negotiated in all parts of the country. Federal employees, most of whom have no conception of trade unionism in the traditional sense, are being patiently educated to the benefits of collective action afforded them by the Order. The latest statistics show that unions have gained exclusive bargaining rights for an estimated 160,000 civilian employees since promulgation of the Order.136 Most important, however, is the fact that former antagonists are rapidly learning that the best method for resolving conflict is to discuss it with one another.

The spotlight next turns to the process of collective bargaining. Will it function properly and beneficially in the federal service? That test will be met in the coming year and on it depends the ultimate success of the Executive Order. An immediate threat to the process might stem from the lack of economic power on the union side of the bargaining table. The absence of the strike weapon would result in impasse whenever management posed a strong objection to an urgent union proposal. In that event, the parties would be well advised to refer the issue to their respective national representatives and thereafter, if necessary, to mediation. If the threat materializes to any substantial degree, it may well be necessary to write the suggested procedure into the Executive Order or implementing regulations.

In the light of experiences thus far, cautious optimism remains the mood of the day.

136 For a breakdown of the agencies, unions and units involved, see BNA, No. 15, p. B-1 (Dec. 23, 1963). These statistics do not reveal the granting of formal or informal recognition.


