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Recent Developments under the National Labor Relations Act: The Board and the Circuit Courts*

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A whole host of important and sometimes novel issues have arisen under the National Labor Relations Act during the past year. This discussion of decisions of the National Labor Relations Board and the circuit courts of appeals is necessarily selective.[1] It takes note of the rough passage that the Board has had

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[1] Significant issues which are not within the scope of this article include: (a) NLRB v. Machinists Local 1327 (Dalmo Victor), 608 F.2d 1219 (9th Cir. 1979); Gould, *Solidarity Forever—Or Hardly Ever: Union Discipline, Taft-Hartley, and the Right of Union Members to Resign*, 66 CORNELL L. REV. 74 (1980) (the union's authority to discipline members whose conduct compromises the solidarity interests of other members); (b) Donald Schriver, Inc. v. NLRB, 105 L.R.R.M. 2818 (D.C. Cir. 1980); Pacific N.W. Ch. of the Associated Builders & Contractors, Inc. v. NLRB, 107 L.R.R.M. 2065 (9th Cir. 1981) (the impact of *Connell* on construction industry proviso cases); (c) Teamsters Local 560 (Curtin Matheson Scientific), 104 L.R.R.M. 1003 (D.C. Cir. 1980);

in seeking enforcement of a number of its orders in some areas. While the Board's heavy caseload undoubtedly makes carefully articulated reasoning difficult for the agency in many instances, the fact remains that it is still struggling with new frontier issues forty-six years after the statute's enactment. The courts will frequently disagree with its conclusions.[2] In my judgment, the appointments of President Reagan will do little to alter this trend.

I. Organizational Issues and Communication of Labor's Message in Labor Disputes

A. Solicitation and picketing on private or quasi-private property

For a quarter of a century, since the Court's *Babcock & Wilcox* decision,[3] different rules have applied to non-employee union organizer access to company property than those which have obtained for employee union adherents. In general, the latter may solicit or distribute literature during non-working time.[4] In *Babcock & Wilcox* the Court held that an employer could exclude non-employee union officials from plant premises "if reasonable efforts by the union through other available channels of communication will enable it to reach the employees with its message and if the employer's notice or order does not discriminate against the union by allowing other distribution."[5]

NLRB v. Broadcast Employees Local 31, 104 L.R.R.M. 3121 (D.C. Cir. 1980); J.F. Hoff Elec. Co. v. NLRB, 105 L.R.R.M. 2345 (D.C. Cir. 1980); Teamsters Local 812 v. NLRB, 105 L.R.R.M. 2658 (D.C. Cir. 1980); Kroger Co. v. NLRB, 105 L.R.R.M. 2897 (6th Cir. 1980) (all involve significant secondary boycott issues). *See generally* Note, *Consumer Picketing of Economically Interdependent Parties: Retail Store Employees Local 1001 v. NLRB (Safeco Title Insurance Co.)*, 32 Stan. L. Rev. 631 (1980).

[2] *See* Universal Camera Corp. v. NLRB, 340 U.S. 474 (1951) (Court held that judicial review of Board orders should be based on the "record considered as a whole," *id.* at 487-88, then noted that courts of appeals should give deference to Board decisions unless they "cannot conscientiously find that the evidence supporting the decision is substantial. . . ." *id.* at 488).

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

[4] *See, e.g.*, Peyton Packing, Inc., 49 N.L.R.B. 828, 843 (1943); Beth Israel Hosp. v. NLRB, 437 U.S. 483 (1978); Republic Aviation Corp. v. NLRB, 324 U.S. 793 (1945); NLRB v. Baptist Hosp., Inc., 101 L.R.R.M. 2556 (Sup. Ct. 1979). *See also* Stoddard-Quirk Mfg. Co., 138 N.L.R.B. 615 (1962); Gould, *The Question of Union Activity on Company Property*, 18 Vand. L. Rev. 73 (1964).

[5] NLRB v. Babcock & Wilcox Co., 351 U.S. 105, 112 (1956).

The advent of employer property which is open to the public as a way of doing business, particularly shopping centers, made it considerably more difficult for unions to reach either employees or customers in a variety of labor disputes. Public sidewalks, if any existed, were remote from the locus of the dispute. It was more difficult for unions to single out employees destined for the business which the union sought to organize. Moreover, advertising a dispute through handbilling or pickets with consumers who are making "impulse" purchases at any of a number of facilities inside the shopping center was often futile because these individuals would likely forget the union message when they made their decision to buy. On the other hand, the property to which the unions sought access, which was open to the public, provided the employers with less of a property defense which was rooted in business considerations. The union's trespass would impose a lighter burden upon employer interests where the property was designed for non-employees.

In *Logan Valley*[6] the Court held that there was a first amendment right to communicate in shopping centers, inasmuch as they were the functional equivalent of downtown business centers where such rights have been asserted traditionally.[7] The Court, initially avoiding the issue,[8] eventually overruled *Logan Valley* before it had the opportunity to consider its relevance to Section 7 rights under the Act.[9] In *Hudgens v. NLRB*,[10] the case

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[6] Amalgamated Food Employees Union Local 590 v. Logan Valley Plaza, Inc., 391 U.S. 308 (1968); Gould, *Union Organizational Rights and the Concept of "Quasi Public" Property*, 49 MINN. L. REV. 505 (1965).

[7] *See, e.g.*, Marsh v. Alabama, 326 U.S. 501 (1946).

[8] Lloyd Corp. v. Tanner, 407 U.S. 551 (1972) (Court rejected reasoning of *Logan Valley*, asserting that leafletting on shopping center property, which did not relate to any purpose contemplated by the center, was not protected by the first amendment); Central Hardware Co. v. NLRB, 407 U.S. 539 (1972) (Court held that while solicitation of employees in the company-owned parking lot might be protected by Section 7, the enforcement of the company's no-solicitation rule did not violate the Federal Constitution).

[9] In Central Hardware Co. v. NLRB, 407 U.S. 539 (1972), Justice Powell distinguished *Logan Valley*, stating that that decision rests on constitutional grounds and that "before an owner of private property can be subjected to the commands of the First and Fourteenth Amendments the privately owned property must assume . . . the functional attributes of public property devoted to public use." *Id.* at 562. Instead, the Court relied on the command in *Babcock & Wilcox* that intrusion on private property is warranted only where "necessary to facilitate the exercise of employees' Section 7 rights." *Id.*

[10] 424 U.S. 507 (1976).

in which *Logan Valley* was discarded, Mr. Justice Stewart, speaking for the Court, announced that the *Babcock & Wilcox* guidelines were relevant to the question of whether union picketing in an economic dispute on a shopping center was protected under Section 7. The Court said:

> The context of the § 7 activity in the present case was different in several respects [from non-employee union organizational activity on employer property] which may or may not be relevant in striking the proper balance. First, it involved lawful economic strike activity rather than organizational activity. . . . Second, the § 7 activity here was carried on by . . . [the employer's] employees (albeit non-employees of its shopping center store), not by outsiders . . . . Third, the property interests impinged upon in this case were not those of the employer against whom the § 7 activity was directed, but of another.
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> The *Babcock & Wilcox* opinion established the basic objective under the Act: accommodation of § 7 rights and private property rights "with as little destruction of one as is consistent with the maintenance of the other." The locus of that accommodation, however, may fall at differing points along the spectrum depending on the nature and strength of the respective § 7 rights and private property rights asserted in any given context. In each generic situation, the primary responsibility for making this accommodation must rest with the Board in the first instance.[11]

On remand, the Board, examining the three factors emphasized by the Court, concluded that picketing on the shopping center was protected under the Act and that, therefore, a threat to arrest the employees for criminal trespass constituted an unfair labor practice under the Act.[12] The fact that employees were involved, said the Board, "entitled them to at least as much protection as would be afforded to nonemployee organizers such as those in *Babcock & Wilcox*."[13] However, a different accommodation might be required by the fact that the audiences are different in the two situations. In organizational campaigns, it is the employees to whom the message is beamed—whereas in a case of an economic strike and picketing as in *Hudgens*, the public as well as employees are the intended audience. Employees, stated the Board, could be reached by alternate means of communica-

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[11] *Id.* at 521-22 [citations omitted].

[12] Scott Hudgens, 95 L.R.R.M. 1351 (NLRB 1977).

[13] *Id.* at 1353. On this and the first point, *i.e.*, the importance of effective communication opportunities for employees, see NLRB v. United Steelworkers, 357 U.S. 357 (1958).

tion, *i.e.*, on the street, home visits, letters and telephone calls.[14] Since the consuming public becomes a defined group only at the time when it decided to enter the store, the above-mentioned methods, as well as radio, television and newspapers, were not "reasonable" means to publicize the dispute.

And as to the Court's third consideration, the fact that the property interests were those of a party other than the employer at whom the picketing was aimed, the Board characterized the property as open to the public and therefore the equivalent of public sidewalks. Accordingly, the Board held that picketing on a shopping center is protected Section 7 activity.

The backdrop for this past year's round of union access litigation is made more complete and also more confusing by virtue of the Court's preemption decision in the *Sears Roebuck*[15] case. In concluding that picketing on a shopping center could be regulated by state court reliance upon criminal trespass laws, Mr. Justice Stevens, writing for the majority,[16] stated that it was "arguable" that the activity was protected, inasmuch as it could not be said with "certainty" that the Board, under *Babcock & Wilcox* and *Hudgens,* would have "fixed the locus of the accommodation at the unprotected end of the spectrum. . . ."[17] The risk of state interference with protected activity was acceptable, reasoned the Court, because the instances in which trespassory union activity would be protected were "rare."[18] Said Justice Stevens:

> [A] trespass is far more likely to be unprotected than protected. Experience with trespassory organizational solicitation by nonemployees is instructive in this regard. While *Babcock* indicates that an employer may not always bar nonemployee union organizers from his property, his right to do so remains the general rule. To gain access, the union has the burden of showing that no other reasonable means of communicating its organizational message to the

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[14] Scott Hudgens, 95 L.R.R.M. 1351, 1353 (NLRB 1977).

[15] Sears Roebuck & Co. v. Carpenters, 436 U.S. 180 (1978). *See generally* H. S. Siminoff, "Access to the Property of the Employer: *Sears* and Post-*Sears* Decisions of the Courts and the Board," presented for the Building and Construction Trades Lawyers' Conference, January 1981 (copy on file U.C. DAVIS LAW REVIEW office).

[16] The majority consisted of Justice Stevens, Chief Justice Burger, Justice White, Justice Blackmun, Justice Powell, and Justice Rehnquist. Two concurring opinions were filed.

[17] Sears Roebuck & Co. v. Carpenters, 438 U.S. at 205.

[18] *Id.*

> employees exists or that the employer's access rules discriminate against union solicitation. That the burden imposed on the Union is a heavy one is evidenced by the fact that the balance struck by the Board and the courts under the *Babcock* accommodation principle has rarely been in favor of trespassory organizational activity.[19]

Justice Stevens then went on to characterize area wage-standard picketing, which seemed to be involved in *Sears Roebuck*, as presenting a "less compelling" argument for protection than trespassory organizational solicitation. Justice Stevens noted that the right to organize is at the "very core of the purpose" for which the Act was enacted. Moreover, in the case of area standard picketing, there was no "vital link" between the employees on the employer's property and the non-employee union organizers, as was the case in organizational solicitation.[20] In a prophetic dissenting opinion filed by Mr. Justice Brennan, however, it was noted that the Court's own opinion in *Hudgens* suggested that trespasses which involved picketing of shopping centers would "often be protected."[21] The cases since *Sears Roebuck* tend to support Mr. Justice Brennan's view of the law.

In a series of cases dealing with non-employee union access to company property, four circuit courts of appeals handed down important decisions. There has also been another significant decision involving employee union access. The most novel, in terms of judicial precedent, was *Seattle-First National Bank v. NLRB*.[22] In this case the union and restaurant which, along with a stock brokerage firm, occupied the 46th floor of a bank building, were unable to resolve their differences in negotiations for a

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[19] *Id.*

[20] *Id.* at 202 n.42. The Court said, "[S]everal factors make the argument for protection of trespassory area standard picketing as a category of conduct less compelling than that for trespassory organizational solicitation. First, the right to organize is at the very core of the purpose for which the NLRB was enacted. Area standards picketing, in contrast, has only recently been recognized as a Section 7 right. Hod Carriers, Local 41, 133 N.L.R.B. 512, 48 L.R.R.M. 1667." *Id.*

[21] Sears Roebuck & Co. v. Carpenters, 438 U.S. at 231-32. Indeed, the California Supreme Court had refused to follow *Babcock*, stating, "Peaceful picketing outside the store, involving neither fraud, violence, breach of the peace, nor interference with access or egress, is not subject to the injunction jurisdiction of the courts." Sears Roebuck & Co. v. Carpenters, 102 L.R.R.M. 2812, 2818 (Cal. 1979).

[22] 106 L.R.R.M. 2621 (9th Cir. 1980).

new labor contract. The union struck and stationed pickets on the public sidewalks at every entrance to and from the bank building, carried placards and handed out leaflets which described their position. The union also assigned one or two of its members to the 46th floor during lunch and dinner hours and distributed leaflets in the foyer adjoining the restaurant, advising potential customers of the labor dispute and the union's position. The question in this case was whether the union's strike-related activity on the 46th floor constituted protected activity within the meaning of Section 7.

The Board, focusing upon the balancing and accommodation between Section 7 rights and property rights dictated by the Court, held that the union was engaged in primary economic strike activity which was protected by Section 7, inasmuch as it was analogous to the shopping center picketing engaged in in *Hudgens*. The Board stated that restricting strike-related activity to public sidewalks would "excessively hinder" these efforts to "communicate a meaningful message to its intended audience."[23] The Board noted that customers who, along with non-strikers, were the intended audience of the picketing became recognizable only when they entered the restaurant.[24] In responding to the argument that ownership prerogatives include the right to exclude activities from the building, the Board noted that the area was open to the public and that there had been no misconduct.

The Ninth Circuit, speaking through Judge Sneed, approved the Section 7 legal conclusion of the Board, though it remanded on certain issues and simultaneously provided a slightly more expansive rationale[25] for the picketing's protected status. The

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[23] Seattle-First Nat'l Bank v. Hotel, Motel, Restaurant Employees & Bartenders Union, 243 N.L.R.B. No. 145, at 5-6 (1979).

[24] *Id.* at 6.

[25] Having determined that the union had the right to station pickets on the 46th floor, Judge Sneed remanded to the Board with instructions that it revise its order to restrict the number of pickets that would be allowed on the floor. In her separate opinion, concurring in part and dissenting in part, Judge Fletcher disagreed with the majority's decision that the number of pickets should be limited. Citing the Norris-La Guardia Act for the proposition that the courts may not enjoin picketing that is not unlawful and poses no threat to persons or property, she found that the Board had no authority to restrain prospective unlawful practices unless they were related to unlawful practices that the Board had found. Here, there was no charge that the union had assigned too many pickets to the floor.

court concluded that to bar the picketers from the foyer would "substantially injure the union because stationing picketers outside the building is not an effective substitute for picketing in front of the restaurant."[26] Referring to the difficulties in reaching different categories of customers or potential customers, the court based its conclusion that union access should be protected upon the "peculiar nature of picketing." Said Judge Sneed:

> Even if the union can adequately inform most of the restaurant's customers of the existence of the strike without stationing picketers on the 46th floor, the union cannot fully implement its section 7 rights without confronting the customers in front of the restaurant. Picketing is more than mere dissemination of information. "The loyalties and responses evoked by picket lines are unlike those flowing from apeals by printed words." [citing Judge Hughes of the superior court]. . . . The union's picketing is clearly *much more effective* on the 46th floor where restaurant customers and non-striking employees are identifiable than at the entrance to the building. Restricting picketing to the entrances to the building would substantially dilute the union's section 7 rights since the effectiveness of the picket line depends on the location.[27]

Referring to both *Babcock & Wilcox* and *Sears Roebuck* as

In his Statement of Position on the remand of the court of appeals, the General Counsel suggested that the Board's order be revised to read: "Threatening to cause the arrest of individuals engaged in protected, economic strike activity in the 46th floor foyer of the Seattle-First National Bank Building, *as long as those individuals are not severely disrupting business conducted on premises other than those leased to the Mirabeau Restaurant.*" This language, he felt, would satisfy the court of appeals without infringing on the protected economic strike activity any more than necessary.

On remand, the Board rejected the General Counsel's suggestion. It modified its order to limit the number of pickets on the 46th floor to two, who shall limit their activity to the "peaceful display or presentation of handbills" and to "discussion with willing listeners concerning their side of the labor dispute."

[26] *Id.* at 6. In fact, granting the union the right to picket inside may ultimately weaken its position by removing its right to stay outside. *See, e.g.*, Washington Coca-Cola Bottling Works, Inc., 107 N.L.R.B. No. 104 (1953), *enf'd* Brewery and Beverage Drivers and Workers Local Union No. 67 v. NLRB, 220 F.2d 380 (D.C. Cir. 1955) (unlawful to picket at common situs, thereby addressing secondary employees, if primary employer owned separate property at which an "effective" appeal to primary employees could take place); *but see* IBEW Local 861 (Plauche Elec., Inc.) 135 N.L.R.B. 280 (1962) (Board rejected *Washington Coca-Cola's* no separate primary situs requirement).

[27] Seattle-First Nat'l Bank v. Hotel, Motel, Restaurant Employees & Bartenders Union, 243 N.L.R.B. No. 145 at 6-7 (1979) (emphasis added).

"organizational picketing cases" (the characterization of the former case being erroneous, of course), Judge Sneed said that organizational picketing should be "more restricted" than picketing in connection with a strike in an established relationship. This was so, reasoned the court, because Section 8(b)(7)[28] indicated that organizational picketing is to be limited in certain circumstances, and "it is possible to reach the targets of organizational activity by telephone or in person, while potential customers can usually only be reached by picketing."[29] The court also distinguished the facts of *Seattle-First National Bank* from area wage-standard picketing and stated that "a different accommodation might be appropriate [in the latter circumstance where the] . . . activity [is] not at the core of the section 7 . . . ."[30] But, despite these limitations, *Seattle-First National Bank* broke new ground with its declaration that picketing, because it is more than speech, is in fact *less* than speech where it cannot be utilized at the locus of the dispute. Since the content of the idea or message is likely to be less important than the response to patrolling and placards,[31] it is likely that the effect of the picketing will quickly dissipate after the customer enters the building—particularly when, as in the shopping center in *Hudgens,* the customer is an impulse buyer.

One of the first two categories which the Ninth Circuit distinguished from *Seattle-First National Bank,* the rights of non-

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[28] 29 U.S.C. §§ 151-168 (1976).

[29] Seattle-First Nat'l Bank v. Hotel, Motel, Restaurant Employees & Bartenders Union, 243 N.L.R.B. No. 145 at 7 (1979).

[30] *Id.* at 8.

[31] For the proposition that picketing is more than speech, see Bakery & Pastry Drivers Local 802 v. Wohl, 31 N.E.2d 765, 284 N.Y. 788 (1940), *cert. denied,* 313 U.S. 572 (1942) ("picketing by an organized group is more than free speech, since it involves patrol of a particular locality and since the very presence of a picket line may induce action of one kind or another, quite irrespective of the nature of the ideas which are being disseminated"); Giboney v. Empire Storage & Ice Co. 336 U.S. 490 (1949) (Court sustained state court injunction against picketing in the nature of secondary boycotts, thereby placing the first major limitation on the right to picket); Carpenters Local 213 v. Ritter's Cafe, 315 U.S. 722 (1942). *But see* NLRB v. Fruit & Vegetable Packers Local 760 (Tree Fruits), 377 U.S. 58 (1964); Retail Store Employees Local 1001 v. NLRB, 600 F.2d 280 (5th Cir. 1980). *See* Cox, *The Supreme Court 1979 Term—Foreword: Freedom of Expression in the Burger Court,* 94 HARV. L. REV. 1, 36-39 (1980) (emphasizing importance of speech where consumer picketing involved); 32 STAN. L. REV., *supra* note 1.

employee union organizers to have access to company property to engage in organizational solicitation, was before the Fourth Circuit in *Hutzler Bros. v. NLRB.*[32] In this case the Board considered the meaning of the Court's test in *Babcock & Wilcox* that non-employee distribution of union literature can be permitted "if reasonable efforts by the union through other available channels of communication will enable it to reach employees with its message. . . ."[33] The Administrative Law Judge found that the union "made little effort to communicate with employees by any means before stationing its agents on Respondent's property."[34] The organizers were excluded from the property by the company, and subsequently the union sent a letter to the company requesting the names and addresses of employees. The employer denied the request.

The employer in *Hutzler Bros.* contended that the General Counsel had the burden of showing that the union had "attempted to use other channels of communication which were available" prior to entering the property. The Administrative Law Judge, in an opinion approved in its entirety by the Board, rejected this contention. Examining the alternative means of communication which the employer alleged to be reasonable and available to the union, the Administrative Law Judge found that the cost of advertising through newspapers, radio and television would have been "prohibitive." In an urban area where employees were spread out, the Judge rejected mass media as an effective alternative, not only because of cost considerations but also because such communication would suffer from being "wholly impersonal." Billboards, in the view of the Judge, would have suffered from the same deficiency. The costs involved in reaching such an audience certainly are a valid reason for rejecting mass media as a valid "reasonable" alternate avenue of communication. But in an age when television appears to have such an influence upon the political process, the notion that such media are deficient because they are impersonal would seem to be both speculative and subject to challenge.

The Judge also rejected the use of sound trucks on the ground that they would create noise pollution. The idea that the union could have rented space away from the work place was found to

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[32] 105 L.R.R.M. 2473 (4th Cir. 1980).

[33] NLRB v. Babcock & Wilcox Co., 351 U.S. 105, 112 (1956).

[34] Hutzler Bros., 241 N.L.R.B. 914, 915 (1979).

be inappropriate because the union needed to contact the employees before it could use a meeting place. On the use of mail, telephone solicitation or home visits, the Judge stated:

> [S]uch channels of communication are reasonable alternatives to encroachments on Respondent's property rights. However, the Union did not know the names, even less the addresses, of Respondent's employees. . . . Respondent refused the Union's request for the names and addresses of its employees. In the circumstances, mail, telephone solicitation, and home visits were channels of communication not available to the Union.[35]

The significance of the Board's opinion in *Hutzler Bros.*, aside from its appropriate characterization of alternate avenues of communication as ineffective, is its unwillingness to require the union to run the gauntlet and to expend its resources, financial and otherwise, in what would almost certainly be a vain effort to reach employees. While union organizational picketing, as Judge Sneed's opinion suggests, does raise problems which have induced Congress to regulate this tactic, the same is not true of organizational solicitation of employees. This right, so fundamental to the ability of workers to organize themselves into trade unions, as Mr. Justice Stevens noted in *Sears Roebuck*,[36] cannot be waived by the union through a collective bargaining agreement, even though the right to strike and picket can be waived.[37] The Board's holding in *Hutzler Bros.*, in my view, was

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[35] *Id.* at 916. Member Brown had taken this position previously in a dissenting opinion in Monogram Models, Inc., 192 NLRB 705, 707 (1971). However, the majority rejected this idea on the ground the Board precedent provides "assurances of access to employees at what was deemed an appropriate point in our election processes." *Id.* at 706-07. *See* Excelsior Underwear, Inc., 156 N.L.R.B. 1236 (1966). But the *Excelsior* rule provides access far too late to be of value in the early critical stages of the campaign. *Cf.* NLRB v. Tamiment, Inc., 451 F.2d 794, 798 (3d Cir. 1971) (union access to employer property denied despite failure of local organizer to secure other means of disseminating union information).

[36] *See* note 15 *supra*. *See also* NLRB v. Magnavox Co., 415 U.S. 322 (1974) (Court declared the organization rights of employees fundamental rights which may not be waived through collective bargaining).

[37] In *Magnavox* the Court stated: "[T]he union may, of course, reach an agreement as to wages and other employment benefits and waive the right to strike during the time of the agreement as the *quid pro quo* for the employer's acceptance of the grievance and arbitration procedure. . . . Such agreements, however, rest on the premise of fair representation and presuppose that the selection of the bargaining representative remains free. . . . [A] different rule should obtain where the rights of the employees to exercise their choice of a

a correct one. But the Fourth Circuit saw matters differently.[38]

On appeal, the court found that there was not substantial evidence to support the Board's conclusion that there were no other reasonably available avenues of communication. Without disagreeing with the Board's assessment of the difficulties involved with organizational contact in the circumstances of this case, the court stated that the test was not whether the contact would be difficult but "whether the difficulty can be reasonably overcome."[39] Characterizing the union's efforts in this case as "lackadaisical" and stating that a union with a "highly professional organizational department should at least make a serious attempt to organize a company before it can complain about lack of access to the employer's property," the court said that the Board could not infer inadequate access from physical evidence without an effort by the union. Accordingly, the court reversed and denied enforcement in a unanimous opinion. The court said:

> The Union's Director of Organizations in this case candidly admitted that the employees' physical isolation was not seriously challenged by the Union. The Union was busy with other organizational drives. Whether from lack of personnel, funding, or perceived employee indifference—the efforts at [the employer's] . . . store were *pro forma*. The Union did not have the time to solicit assistance from inside employees nor the time or resources to attempt other means of communication with the employees. The Union's efforts consisted of distributing handbills for a few minutes on company property and writing a letter requesting a list of employees from Hutzler management.[40]

It cannot be gainsaid that unions too frequently have been "lackadaisical" and unwilling to mount serious organizational efforts. But where the trade union movement comes forward and attempts to communicate with workers, non-employee union organizer access on company property may be vital. The Second Circuit has specifically noted that employees in an organizational effort are in need of experienced advice and assistance.[41]

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bargaining representative is involved. . . ." NLRB v. Magnavox, 415 U.S. at 325.

[38] Hutzler Bros. v. NLRB, 105 L.R.R.M. 2477 (4th Cir. 1979).

[39] *Id.* at 2476.

[40] *Id.*

[41] NLRB v. S & H Grossinger's, Inc., 372 F.2d 26, 29 (2d Cir. 1967), in which the court stated, "While some organization work can be done by employees who are willing to solicit fellow employees, it is obvious that, lacking as they do

This cannot be forthcoming unless there is contact between the union and employee at the place of work and somewhere else. Therefore, in the absence of a showing that names, addresses and telephone numbers are not easily available to the union, the Board's conclusion in *Hutzler* that no reasonable alternatives were available seems correct.

Despite the Board's finding that such union efforts would have been an exercise in futility, the Fourth Circuit, without rejecting the Board's findings, held that a more onerous burden applies. This seems to me to defy the realities involved in union organizational campaigns. It would consign most union efforts to defeat and, at a minimum, subject them to burdens that are considerably greater than those that ought to exist under a statute which promotes employee free choice and the idea that employees must be able to make informed decisions about union representation. Moreover, the Fourth Circuit standard invites the union to sham and go through the motions of running a costly gauntlet in order to convince a third party that it has attempted to do that which cannot be done, *i.e.*, reach dispersed employees without knowing who they are and where or how they can be contacted. Once the General Counsel shows that the union has made an organizational effort and has been denied names and addresses, the burden should shift to the employer to establish that adequate avenues were available.

Belcher Towing Co. v. NLRB[42] presented the burden issue in sharper focus as the Fifth Circuit was confronted with a case involving union organizer access to tugboats. The court, in an opinion written by Judge Godbold, stated that simply because company property was open to non-employees, unlawful discrimination under the *Babcock & Wilcox* rule was not made out.

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the requisite special training and experience, they cannot convey the Union's appeal with anything like the effectiveness of professional union organizers." Indeed, the Supreme Court has said that the employees' right of self-organization and its effectiveness depend "in some measure on the ability of employees to learn the advantages of self-organization from others." NLRB v. Babcock & Wilcox Co., 351 U.S. 105, 113 (1956). The Court has also recognized that employer property rights are by no means absolute and are properly accommodated to other interests. Pruneyard Shopping Center v. Robins, 100 S. Ct. 2035 (1980).

[42] 103 L.R.R.M 2939 (5th Cir. 1980). *See also* Sabine Towing & Trans. Co. v. NLRB, 599 F.2d 663 (5th Cir. 1979) (an earlier case in which the 5th Circuit confronted this issue).

What was required, said the court, was that actual non-union solicitation be allowed in order for the union to argue discrimination and a right to access. The Fifth Circuit, in sharp contrast to the Fourth, held that while the Supreme Court has required a showing that attempts to utilize alternative avenues of communication would be "unsuccessful," "a union need not have actually attempted to communicate with the employees outside of the employer's premises."[43] But, said the court in reversing the Board, "[I]n this case an adequate showing of lack of alternate means was not made because the Board incorrectly placed the burden of showing the existence of alternative means on the employer."[44] The court noted that the Board did not "explicitly allocate the burden of proof"—just as was the case in *Hutzler Bros.* The Board *prima facie* should indeed show some organizational effort, but, the Fourth Circuit notwithstanding,[45] it should not require the union to exhaust them. *Babcock & Wilcox* should not place a burden on the union to pursue all avenues of communication, particularly when those available are ineffective.

A fourth decision, this one written by the Sixth Circuit, *Giant Food Markets v. NLRB,*[46] involves another problem alluded to by Justice Stevens and Judge Sneed—area wage-standard picketing. The Ninth Circuit indicated in *Seattle-First National Bank* that a different accommodation might be drawn in the case of such picketing. The Board in *Giant Food Markets,* however, did not do so. The Board stressed the importance of area standards picketing to a union, its objective being to protect the standards of workers in a particular geographical area. The Board distinguished *Babcock & Wilcox*, as had the Board's opinion in *Hudgens* itself, on the ground that the audience was more diffuse and difficult to reach. Again, the court relied upon the fact that the property, in this case a shopping center, was open to the public.

On appeal, the Sixth Circuit denied enforcement and remanded for further proceedings. Conceding that the employees

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[43] Belcher Towing Co. v. NLRB, 103 L.R.R.M. at 2940.

[44] *Id.*; *cf.* NLRB v. New Pines, Inc., 468 F.2d 427 (2d Cir. 1972). Both the Second and Fourth Circuits have held that in order to prove lack of alternative means a union must demonstrate that it has unsuccessfully attempted to utilize other means.

[45] To some extent the Board's burden to make a *prima facie* showing may be governed by Wright Line, 251 N.L.R.B. No. 150 (1980).

[46] 241 N.L.R.B. 727 (1979), *rev'd,* 105 L.R.R.M. 2916 (6th Cir. 1980).

in a union organizational campaign constituted a more "specific discrete number" at whom the appeal could be aimed, the court opined that this would lead to the "rather anomalous conclusion" that private property rights should yield in connection with area wage-standard picketing more frequently than would be the case with regard to "other union activities for which the law has forged a long-standing protected status."[47] The court said that perhaps this result was inevitable if one focused upon the intended audience. Sounding a theme which the Board had articulated in *Hutzler Bros.* in the context of a union organizational solicitation, the court said that reasonableness criterion with regard to alternative avenues of communication should not force the union to engage in "expensive, extensive mass media or mailer campaigns" so that it would be "forced to incur exorbitant or even heavy expenses."[48] The court also noted that the media and the mailing campaign precluded personal conduct which it, like the Board, viewed as vital. But the Court stated that here

> the choice is not between disseminating information through the media away from the store itself and on-site picketing. Instead the choice is between locating the pickets on the private property near the entrance of the store and locating them across the parking lot on public property adjoining the thoroughfare and near the entrance and exit to the parking lot.[49]

The Board had, however, held that the picketing at the parking lot was not an "effective reasonable means of communication" within the meaning of *Babcock & Wilcox*. Because there was no evidence about the extent to which the union message would be diluted by moving the picket line or whether neutral employers had been enmeshed in the controversy, or what kind of traffic flow or congestion problems would confront the union by picketing near the public thoroughfare, the court remanded to the Board. But the Ninth Circuit's views which, it is to be recalled, are not predicated upon alternate avenues since by definition they are less effective because of locus, seems to be the superior of the two. (Indeed, the intrusion upon the employer's property interest is more considerable given the relatively confined nature of restaurant foyers inside office buildings.) Accordingly, the

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[47] Giant Food Markets v. NLRB, 105 L.R.R.M. at 2920.
[48] *Id.*
[49] *Id.*

Ninth Circuit's analysis of picketing authored by Judge Sneed is good law—except insofar as it almost inadvertently denigrates organizational solicitation in the context of a discussion of organizational picketing.[50]

Finally, two interesting decisions—one authored by the Board and another by the Eighth Circuit—address unions in an established relationship.[51] Although Mr. Justice Powell, speaking for the Court in the *Central Hardware* case almost a decade ago, concluded that the principle of accommodation announced in *Babcock & Wilcox* requires the "yielding" of employer property only in organizational campaigns, that portion of the opinion now seems contrary to decided case law. *Hudgens* made it clear that Section 7 picketing could be exercised on private property in the context of an established relationship—in the case of *Hudgens* where there was a dispute about the terms of a new labor contract. The same is true of *Seattle-First National Bank*, where the court, again within the context of picketing, stressed the converse of the *Central Hardware* proposition, *i.e.*, that organizational activity has less protection than that afforded to employees involved in an economic strike. In fact, the Board has long held that Section 7 access rights belong to union officials engaged in the administration of the labor agreement.[52] And during the past year, two cases—one involving the access rights of dissident unionists to bulletin boards and the other the ability of the exclusive representative to use its functional equivalent—were decided.

In the first case, *Roadway Express, Inc.*,[53] the Board noted that unions do not possess a statutory right to company bulletin boards.[54] It then held that it was not an unfair labor practice for

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[50] *See* note 27 and accompanying text *supra*.

[51] There have been a number of cases dealing with union access in an established relationship. *See generally* Peerless Food Products, Inc., 236 N.L.R.B. 161 (1978); Villa Avila, 253 N.L.R.B. No. 10 (1980); General Machine Co., 174 N.L.R.B. 1023 (1969); Granite City Steel Co., 167 N.L.R.B. 310 (1967). *See also In re* Catalano, No. 21445 (Cal. 1981). Supreme Court authority in the organizational context has had an impact upon remedial orders involving non-employee access. *See* United Steelworkers v. NLRB, 106 L.R.R.M. 2573, 2589 (D.C. Cir. 1981).

[52] *See* note 51 *supra*.

[53] Teamsters Local 515 (Roadway Express, Inc.), 248 N.L.R.B. 83 (1980), *enforcement denied sub nom.* Helton v. NLRB, 107 L.R.R.M. 2819 (D.C. Cir. 1981).

[54] *Id.* at 83 n.2.

the Teamsters to refuse the Professional Drivers Council (PROD) access to its bulletin board, where the record did not show any evidence of retribution or threats and where PROD literature was distributed on company property.[55]

The second case, the Eighth Circuit's decision in *National Vendors v. NLRB*,[56] did not involve the right of bulletin board access.[57] Here the company prohibited "structured large group meetings" during contract negotiations from being held on non-work time in a cafeteria open to all employees, including supervisors and other non-unit personnel. The court reversed the Board and held that such activity was "disruptive" because of the presence of supervisors[58] and that it was therefore unprotected under the Act. My judgment is that the dissenting opinion of Judge Arnold is the better one. It notes that there was no showing of any disruption in *National Vendors*. Said the dissent, "[T]he mere potentiality of disruption should not be sufficient to override the important Section 7 rights of an elected union official to keep the membership informed of the progress of negotiations for a collective-bargaining contract."[59]

B. Concerted Activities

The circuit courts have continued to struggle with the question of what constitutes "concerted activity" for the purpose of "mutual aid and protection" within the meaning of Section 7 of the Act. The Court has not been called upon to deal with the range of issues which are now confronting the circuits with frequency. Of course, the Court has proclaimed broad guidelines.

In *Emporium Capwell*,[60] for instance, the Court spoke of the

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[55] *Cf.* NLRB v. Magnavox Co., 415 U.S. 322 (1974) (company bulletin board provision struck down).

[56] 105 L.R.R.M. 2281 (8th Cir. 1980).

[57] Although the company did deny Nelke's, a member of the negotiating committee, request for access to the bulletin board, "[t]here is no charge in the complaint regarding access to the bulletin board." *Id.* at 2282 n. 1. For other cases which do involve the bulletin board issue, *see, e.g.*, Container Corp. of America, 244 N.L.R.B. No. 53 (1978); Cashway Lumber, Inc., 202 N.L.R.B. 380 (1973); Firestone Tire & Rubber Co., 238 N.L.R.B. 1323 (1978) (upholding employee-union steward's right to use company parking lot despite bumper stickers on cars supporting strike).

[58] National Vendors v. NLRB, 105 L.R.R.M. 2281, 2283 (8th Cir. 1980).

[59] *Id.* at 2285.

[60] Emporium Capwell Co. v. Western Addition Community Organization,

rights contained in Section 7 as "for the most part, collective rights, rights to act in concert with one's fellow employees . . . ."[61] Before this decision the Court had made it clear that the ambit of Section 7 extended to walkouts designed to protest working conditions that were deemed to be unfair by employees.[62] The Court has also indicated in *Weingarten*[63] that concerted activity is involved where an employee seeks the aid of union representatives, at least for the purposes of defense in disciplinary proceedings, inasmuch as the union representative asserts rights for all employees within the bargaining unit group.[64] The Court, however, has not spoken with any more specificity.[65]

Ironically, most of the circuits have spent a considerable amount of time flailing the Second Circuit opinion in NLRB v. *Interboro Contractors*,[66] in which the court devised the so-called constructive concerted activity doctrine so as to conclude that "activities involving attempts to enforce the provisions of a collective bargaining agreement may be deemed to be for concerted purposes even in the absence of . . . interest by fellow employees."[67] What is especially ironic about this is that the Court in *Washington Aluminum* was particularly concerned about the Section 7 rights of employees who have "no bargaining representative" and "no representative of any kind to present their grievances to their employer."[68] It was in these circumstances that the Court was most solicitous of the assertion of Section 7 rights through "the most direct course," *i.e.*, the walkout to protest employment conditions. Accordingly, the Court of Appeals for the District of Columbia in *Kohls v. NLRB*[69] was correct to point out that normally contractual issues should be deferred to

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420 U.S. 50 (1975).

[61] *Id.* at 62.

[62] NLRB v. Washington Aluminum Co., 370 U.S. 9 (1962).

[63] NLRB v. Weingarten, Inc., 420 U.S. 251 (1975).

[64] *Id.* at 260-61.

[65] *See* Fastex, Inc. v. NLRB, 437 U.S. 556, 566 n.15 (1978), where the Court avoided consideration of the concerted activity issue.

[66] Interboro Contractors, Inc., 157 N.L.R.B. 1295 (1966), *enforced*, 388 F.2d 495 (2d Cir. 1967). *But see* Mushroom Transp. Co. v. NLRB, 330 F.2d 683 (3d Cir. 1964); NLRB v. Northern Metal Co., 440 F.2d 881 (3d Cir. 1971); NLRB v. Buddies Supermarkets, Inc., 481 F.2d 714 (5th Cir. 1973); ARO, Inc. v. NLRB, 596 F.2d 713 (6th Cir. 1979).

[67] NLRB v. Interboro Contractors, Inc., 388 F.2d 495, 500 (2d Cir. 1977).

[68] NLRB v. Washington Aluminum Co., 370 U.S. 9 (1962).

[69] 104 L.R.R.M. 3049 (D.C. Cir. 1980).

the arbitration process by the Board since they are more likely to be more contractual than statutory in nature.[70] Where procedures culminating in arbitration are available to employees and unions are able to process their grievances, quite obviously this is the preferred method. Where the D.C. Circuit went wrong, however, was to ignore the fact that cases like *Kohls* which present safety disputes can involve the enforcement of law, public policy issues and thus circumstances which do not argue as strongly for deference to arbitration as the court's opinion would indicate.[71] To compound matters, the Court of Appeals for the Second Circuit, citing *Kohls* for the authority that *Interboro* is bad law,[72] then turned around and said that *Interboro* was only applicable in the context of a collective bargaining agreement. Judge Friendly said, "We think that, except in the context of agreements between an employer and his employees which are themselves a product of concerted activities, as in *Interboro*, Section 7 . . . should be read according to its terms."[73] Interpreting the fact situation before it narrowly, the court held unprotected a walkout by one employee which was aimed at the concerns of second shift workers on the ground that the other employee had not "participated in or approved the protesting employee's impulsive . . . and . . . foolish action."[74] But the wisdom of employee self-help activity is irrelevant to the protected status issue, according to the teachings of *Washington Aluminum*. Moreover, Judge Friendly seems to have articulated a rule which would logically require workers to adopt identical means in implementing their objectives. But the requirement of concerted activity seems to be related to the purposes of employees and not the means that they utilize.[75] In essence, the Second Circuit's view seems to be predicated on the assumption that the walkout is *sui genesis*—a position seemingly inconsistent with *Washington Aluminum*. Surely Judge Friendly would not hold one employee's activity unprotected if, for instance, he engaged in a walkout of longer or shorter duration than other

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[70] *Id.* at 3052-53.

[71] A recent Board decision in the safety area is McLean Trucking Co., 252 N.L.R.B. No. 104 (1980).

[72] Ontario Knife Co. v. NLRB, 106 L.R.R.M. 2053, 2057 (2d Cir. 1980).

[73] *Id.*

[74] *Id.* at 2058.

[75] Randolf Div., Ethan Allen, Inc. v. NLRB, 513 F.2d 706, 708 (1st Cir. 1975).

workers. What would the Second Circuit conclude if one worker picketed in the context of a strike and others did not? Suppose one worker formulated his complaint in a different manner than all other workers. The conclusion that such activity is unprotected seems unduly narrow and "hypertechnical."[76]

If the courts are in error in their attack upon *Interboro* as a basis for reading the statute narrowly—in contrast to the approach employed in *Washington Aluminum*—and thus protecting those workers who need protection the least, where should the line be drawn in connection with the coverage afforded by Section 7? Judge Friendly assumed that because one worker walked out, the action was not "concerted." The Third Circuit in *Wheeling Pittsburgh Steel*[77] referred to the fact that "fellow workers and union representation were involved in the conduct at which the employer retaliated."[78] The Seventh Circuit in *Pelton Casteel, Inc. v. NLRB*[79] has indicated just how difficult this sort of line drawing can be in determining whether the objectives involve a group. In that case, the court stated that there must be an inducement toward collective activity or an intent for the complaints about employment conditions to be made on behalf of others. The court was concerned with the question of whether grievances of a worker were put forward "generally" and with common concern. It stated that the mere fact that others were involved besides the employee in question was not sufficient to make the conduct protected. In *Pelton* the court stated that the protest was too "diffuse" and that complaints were made over the course of months, which made it difficult to characterize as a "meeting" at which grievances had been put forward by the group. The Fifth Circuit appropriately, it seems to me, has concluded that one individual can engage in protected activity on matters of common concern,[80] though, in contrast to the point of view presented here, the thrust of the opinion is to subordinate the definition of concerted activities for unorganized workers vis-a-vis employees represented by a certi-

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[76] *Cf.* NLRB v. Machinists Local 1327 (Dalmo Victor), 608 F.2d 1219 (9th Cir. 1979) (holding that union may discipline its members for crossing picket line during a strike).

[77] Wheeling-Pittsburgh Steel v. NLRB, 618 F.2d 1009 (3d Cir. 1980).

[78] *Id.* at 1017.

[79] Pelton Casteel, Inc. v. NLRB, 627 F.2d 23 (7th Cir. 1980).

[80] Anchortank, Inc. v. NLRB, 618 F.2d 1153, 104 L.R.R.M. 2689 (5th Cir. 1980); *see* note 75 *supra*.

fied union.[81] The court said, "The mere fact that an employee has acted alone does not preclude treatment of his action as concerted activity for mutual aid or protection under section 7. . . . The words 'concerted activities' in section 7 constitute a term of art rather than a factual description."[82]

I think that there are two points that must be made in support of this position. The first is that the courts must not be niggardly in applying Section 7's protection to employee complaints—outside, that is, the collective bargaining agreement context involved in *Interboro*. The worker, particularly where union representation is not involved, is not presenting his case to management with a view towards making a record for a Board proceeding. How could the worker in *Pelton* know that his complaints would be viewed as personal gripes because they were stretched over a period of months and thus regarded as too "diffuse?" Very much tied to all of this, in my view, is the fact that many employees are simply unwilling or too timid to present "outward manifestations" of group activity by risking their jobs and communicating with fellow workers. Accordingly, under some circumstances, a concern for the common employment relationship in which all workers are involved must be presumed from the subject matter of the protest.

The second point is that the courts, in my view, have been mistaken in rejecting the Board's *Alleluia Cushion*[83] doctrine, which holds that the filing of complaints under statutory working conditions, particularly health and safety matters, constitutes protected activity. As the Board said:

> [S]ince minimum safe and healthful employment conditions for the protection and well-being of employees have been legislatively declared to be in the overall public interest, the consent and concert of action emanates from the mere assertion of such statutory rights. Accordingly, where an employee speaks up and seeks to enforce statutory provisions relating to occupational safety designed for the benefit of all employees, in the absence of any evidence that fellow employees disavow such representation, we will find an implied consent thereto and deem such activity to be concerted.[84]

Unfortunately the Ninth Circuit this past year rejected this

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[81] Anchortank, Inc. v. NLRB, 618 F.2d 1153, 1161, 1162 (5th Cir. 1980).

[82] *Id.* at 1160.

[83] Alleluia Cushion Co., 221 N.L.R.B. 999 (1975).

[84] *Id.* at 1000. *See also* Brown & Root v. NLRB, 106 L.R.R.M. 2391 (5th Cir. 1981).

proposition where a safety complaint was filed in *NLRB v. Bighorn Beverage*,[85] and the Fourth Circuit, without purporting to distinguish between workers' compensation and health and safety legislation, rejected this position in *Krispy Kreme Doughnut Corp. v. NLRB*.[86] The Fourth Circuit attacked the Board's position that a "solitary employee" could contemplate group action and act as representative of other employees when his filing of a statutory claim provided representation "only in a theoretical sense."[87] Again, the court spoke of the perils of "extending" *Interboro* and concluded that the presumption of group conduct was erroneous because there was no way that the employer could rebut the presumption. But spontaneous repudiation of the employee could in fact serve as a basis for concluding that the presumption had been rebutted.[88] Moreover, the same defense that is available in all employee protests is available here—that is, that the employee was "not sincere" in his complaint. While the Board should not evaluate the merits of such disputes, in this way those that are frivolous can be screened out. At the same time, it is important to reject the position that the Tenth Circuit seemed to leave open in 1979[89] and that the Third Circuit addressed in *Wheeling Pittsburgh Steel*, that is, that the complaint need not be "reasonable" as long as it is "sincere." To impose a requirement of reasonableness would be inconsistent with the dictates of *Washington Aluminum*.

One other case has come before the Third Circuit involving some of the same issues. In *Frank Briscoe, Inc. v. NLRB*,[90] the Third Circuit, in a split decision, held that black workers who had filed unlawful employment practice charges with the Equal Employment Opportunity Commission had engaged in concerted activity within the meaning of Section 7 and were thus immunized from employer retaliation because of such filing. The court, speaking through Judge Seitz, had no difficulty in charac-

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[85] NLRB v. Bighorn Beverage, 614 F.2d 1238 (9th Cir. 1980).

[86] 105 L.R.R.M. 3407 (4th Cir. 1980); *accord* NLRB v. Dawson Cabinet Co., 566 F.2d 1079 (8th Cir. 1977).

[87] *Id.* at 3409. *But see* United Credit Bureau of America v. NLRB, 106 L.R.R.M. 2751 (4th Cir. 1981).

[88] In National Wax Co., 251 N.L.R.B. No. 147 (1980), the Board found that an individual employee's complaint about wages did not relate to others and therefore was "too remote to turn a personal protest into a concerted protest."

[89] NLRB v. Modern Carpet Indus., Inc., 611 F.2d 811 (10th Cir. 1979).

[90] 106 L.R.R.M. 2155 (3d Cir. 1981).

terizing the conduct as group action, given the charges that racial discrimination was being engaged in generally. Thus, said the court, "The record amply supports the conclusion that the EEOC complaints, by seeking to end Briscoe's alleged discriminatory practices against other workers as well as against themselves, were acting for 'mutual aid or protection' and thus were protected under Section 7."[91] The court emphasized that it was not holding that all violations of Section 704 of Title VII,[92] the anti-retaliation provisions, could be redressed by the NLRA. But the court stressed that the mere fact that employer conduct was prohibited by Title VII did not deprive the Board of jurisdiction.

This approach seems more persuasive than the point of view presented by Judge Schwartz's dissent, which purported to draw a sharp demarcation line between subject matter which is encompassed by the NLRA and Title VII. For forty years the Court has held the National Labor Relations Act cannot be enforced in isolation and that the question of protected status must have reference to public policy contained in other statutes.[93] Of course, in *Briscoe* the court did not have to rely upon such broad considerations, given the group nature of the complaint.

C. Proof of Anti-Union Discrimination

It is hard to believe that the question of what constitutes requisite anti-union animus for the purpose of proving discrimination in the Act is still with us forty-six years after the statute's passage. But it is. The circuit courts' frequent rejection of the "mixed motive" approach of the Board,[94] as well as the Supreme Court's promulgation of a "but for" test in connection with proof relating to first amendment activity by public employees, have made the courts all the more wary of the Board's approach. This past year the Board shifted gears and adopted the so-called *Mount Healthy*[95] "but for" approach to NLRB cases.

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[91] *Id.* at 2158.

[92] 42 U.S.C. § 2000e-3(a) (1976).

[93] Southern S.S. Co. v. NLRB, 316 U.S. 31 (1942). *See generally* W. GOULD, BLACK WORKERS IN WHITE UNIONS 243-78 (1972).

[94] *See, e.g.*, NLRB v. Eastern Smelting & Refining Corp., 598 F.2d 666 (1st Cir. 1979).

[95] Mt. Healthy City School Dist. Bd. of Educ. v. Doyle, 429 U.S. 274 (1977).

Analogous to the *Great Dane* rule,[96] which places the burden upon an employee to come forward with evidence of "legitimate and substantial business justifications for the conduct" where the "adverse affect" of discriminatory conduct is "comparatively slight" upon workers, the Board formulated a two-step process which is predicated upon the view that the employer has access to the information which would bear upon motivation. Accordingly, the Board in *Wright Line* stated the following causation test in Section 8(a)(3) and 8(a)(1) cases. The Board said, "First, we shall require that the General Counsel make a *prima facie* showing sufficient to support the inference that protected conduct was a 'motivating factor' in the employer's decision. Once this is established, the burden will shift to the employer to demonstrate that the same action would have taken place even in the absence of the protected conduct."[97] The Board stressed that the General Counsel still has the burden of producing the preponderance of evidence to establish a violation.

I have often regaled my Labor Law I classes with stories of Walter Weigand, the employee involved in the *Budd*[98] case, who apparently partook of alcoholic beverages which made it difficult for him to keep awake on the job. He brought a lady known as the Duchess to the back of the plant to entertain some of his coworkers and committed other indiscretions. One day Mr. Weigand joined the CIO, and he was soon dismissed. The thrust of *Wright Line* involves a more careful scrutiny of the employee's unprotected activity—and certainly a good deal of Mr. Weigand's activity was unprotected. *Wright Line* was a step in the direction of requiring an unblemished record as a requirement. But as a practical matter, the slight burden that is thrust upon the General Counsel as part of the *prima facie* case and the explicit burden upon the company to come forward with the reasons for the action may permit the General Counsel to have discovery conducted during the hearing when it has not been accomplished before the hearing.

The *Wright Line* decision was hardly surprising, given the great conflict in the circuits about the whole mixed motive issue and whether discrimination motives had to play a "dominant

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[96] NLRB v. Great Dane Trailers, Inc. 388 U.S. 26 (1967).

[97] Wright Line, 251 N.L.R.B. No. 150 (1980), slip op. at 20-21.

[98] Edward G. Budd Mfg. Co. v. NLRB, 138 F.2d 86 (3d Cir. 1943), *cert. denied,* 321 U.S. 778 (1944).

part" or "substantial part" in the employer's decision. The Ninth Circuit had even issued opinions on this matter which conflicted with one another.[99] Presumably the Board's decision will bring some order to this area of law.

D. Employer Interrogation of Union Adherents

The Board's decision in *PPG Industries, Inc.*[100] is another matter entirely. In that case the Board overruled a previous decision which held that interrogation of employees with known union sympathies was not coercive in light of their "open and active support for the union and the absence of other threats in the conversations."[101] But in *PPG Industries* the Board said:

> [W]e have recently held, however, that inquiries of this nature constitute probing into employees' union sentiments which, even when addressed to employees who have openly declared their union adherence, unreasonably tends to coerce employees in the exercise of their Section 7 rights. We have further found such probing to be coercive even in the absence of threats of reprisals or promises of benefits. The type of questioning at issue conveys an employer's displeasure with employees' union activity and thereby discourages such activity in the future. The coercive impact of these questions is not diminished by the employees' open union support or by the absence of attendant threats. Accordingly, we hereby overrule [previous authority] . . . to the extent [those decisions] . . . hold that an employer may lawfully initiate questioning about employees' union sentiments where the employees are open and known union supporters and the inquiries are unaccompanied by threats or promises.[102]

But the fact is that, as Professor Cox pointed out more than twenty years ago in connection with the employer free speech issue,[103] what is coercive in one situation is not in another. The problems with assuming coercion, coupled with the practical impact of this decision, which will require the General Counsel to issue complaints in unfair labor practice cases which, when viewed *in toto* will accomplish little, make this decision an ex-

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[99] *See* Wright Line, 251 N.L.R.B. No. 150 (1980), slip op. at 10 n.10, where the Board cites the Ninth Circuit's conflicting opinions in Western Exterminator Co. v. NLRB, 565 F.2d 1114, 1118 (9th Cir. 1977), and Penasquitos Village, Inc. v. NLRB, 565 F.2d 1074, 1082-83 (9th Cir. 1977).

[100] 251 N.L.R.B. No. 156 (1980).

[101] *Id.*, slip op. at 4.

[102] *Id.* at 4-5 (footnotes omitted).

[103] A. Cox, Law and the National Labor Policy 42-45 (1980).

tremely likely candidate for reversal by the circuit. If, for instance, fifteen separate allegations of unfair labor practice charges are filed with the Board and only the questioning of known union adherents is factually correct, does it serve the Board's purpose to add to its caseload by issuing a complaint?

E. Bargaining Order Without Proof of Majority Status

One of the most interesting decisions of this past year involved the imposition of a *Gissel* bargaining order[104] (as an alternative Board artification) where the union had neither won a Board-conducted election nor obtained a majority of the authorization cards of the employees in the unit. In *United Dairy Farmers Cooperative Ass'n*[105] the Board split in three different directions on this issue. The position of the Board has been made much more difficult to ascertain in this and other areas by the fact that three of the five Board members involved in this decision are no longer serving.

Former Member Penello took the position that a non-majority union could not obtain a bargaining order under *Gissel* under the NLRA.[106] Members Truesdale and Murphy held that the statute contemplated such an order but only when there was no "reasonable likelihood of *ever* holding a [fair] election."[107] It is unlikely that the Board could reach such a conclusion with any degree of confidence in any case that came before it. Chairman Fanning and Member Jenkins took the position that no majority bargaining order could be imposed where (1) the Board had initially attempted to determine majority status through an election; (2) there was a "very good probability that, had employee sentiment been allowed to emerge, it should have favored the union."[108] It was in this posture that the Third Circuit heard the matter late last year and held that the Board does have remedial

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[104] In NLRB v. Gissel Packing Co., 395 U.S. 575 (1969), the Supreme Court appeared to sanction the Board's imposition of bargaining orders in the absence of a clear indication of majority support for the union.

[105] 242 N.L.R.B. 1026 (1979). *See also* Comment, *United Dairy Farmers Cooperative Association: NLRB Bargaining Orders in the Absence of a Clear Showing of a Pro-Union Majority*, 80 COLUM. L. REV. 840 (1980).

[106] United Dairy Farmers' Cooperative Ass'n, 242 N.L.R.B. 1026 (1979), at 1039.

[107] *Id.*, at 1028.

[108] *Id.*, at 1037.

authority to impose a non-majority bargaining order where "outrageous" and "pervasive" unfair labor practices have been committed.[109]

Judge Higginbotham, writing for a unanimous panel,[110] noted that the Court had not squarely answered this question in *Gissel*. But careful restrictions upon employer behavior during Board-conducted elections, said the court, were necessary "since the employer has disproportionate economic power."[111] Said the Third Circuit:

> The rationale for selecting bargaining representatives by certification election evaporates, however, when the employer has committed such serious unfair labor practices that the laboratory conditions of the past election, as well as any election in the immediate future, are destroyed. In these circumstances, because of the employer's attempt to undermine employee free choice, the goal of a free uninhibited certification election simply cannot be attained regardless of the reparative actions which may be attempted by the Board. Other means to protect employees must be pursued.[112]

Judge Higginbotham properly noted that *Gissel* is a remedy case and that while both an election and evidence of majority support through authorization cards would be preferable to the imposition of a bargaining order where no majority support has been evident, the failure to recognize remedial authority for the Board under the circumstances would undermine the statutory goal of majority choice. Judge Higginbotham stated that "[u]nions which would have attained a majority in a free and uncoerced election if the employer had not committed unfair labor practices would be deprived of recognition merely because of the employer's illegal conduct . . . [and that] the absence of such authority might create incentives for employers to engage in illegal prophylactic action with the purpose of preventing the attainment of a card majority."[113] Accordingly, the court held

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[109] United Dairy Farmers Cooperative Ass'n v. NLRB, 105 L.R.R.M. 3034, 3042 (3d Cir. 1980).

[110] The Third Circuit has also had occasion to deal with the *Gissel* bargaining order problem in a case where the union did not hold a minority of authorization cards. NLRB v. K & K Gourmet Meats, Inc., 106 L.R.R.M. 2448 (3d Cir. 1981). *See also* NLRB v. United Train Coal Sales 105 L.R.R.M. 3455 (6th Cir. 1980).

[111] United Dairy Farmers' Cooperative Ass'n v. NLRB, 105 L.R.R.M. 3034, 3042 (3d Cir. 1980).

[112] *Id.*

[113] *Id.* at 3044.

that the Board had the remedial authority to issue a bargaining order where the practices were so outrageous and pervasive "that there is no reasonable possibility that a free and uncoerced election could be held."[114] The court specifically avoided reaching the question of whether the Board had the authority where there was no reasonable possibility that the union would have obtained a majority but for the action of the employer, stating that a "reasonable possibility" existed in *United Dairy*, given the fact that the employer had committed "numerous flagrant and serious violations, and the Union lost by only two votes. . . ."[115] Quite clearly the closeness of the vote is an important factor to take into account. Where the facts are less clearcut than those in *United Dairy*, the Board might possibly limit the bargaining order for a specific period of time.[116] The court's opinion is an important step toward implementing the statutory goal of allowing employees to opt into the collective bargaining process if they wish to do so.

II. The Established Relationship between Labor and Management

A. *The* Dow Chemical Case: *A Panorama of Arbitration and the Peace Obligation*

In *Dow Chemical Co. v. NLRB*[117] the Third Circuit, for the second time in four years,[118] dealt with a case which presented a whole host of important issues. But the court, which had nearly invited the Board to fashion a federal labor law of contract in light of important Supreme Court decisions such as *Boys Markets v. Retail Clerks*,[119] marched down the hill this past fall, stating that there had been a terrible misunderstanding flowing either from its opinion in *Dow I* or in the Board's understanding of it upon remand. This seemingly never-ending saga is best understood by a brief examination of the previous holdings of the Board and the Third Circuit in *Dow I* as well as *Dow II*.

The dispute in *Dow I* involved a number of employees in the

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[114] *Id.* at 3045.
[115] *Id.* at 3045 n.16.
[116] *See* note 96 *supra*.
[117] 105 L.R.R.M. 3327 (3d Cir. 1980).
[118] *Dow I* is found at 102 L.R.R.M. 1199 (1979).
[119] 398 U.S. 235 (1970).

company's latex department who, prior to the litigation under discussion, worked a "seven and two" schedule in that they worked seven consecutive days and then had two days off. The employer reached a decision to change the schedule to a regular five-day work week with two days off and wanted to accomplish this without laying off any of the employees. It was necessary to reduce the hourly rate of one of the senior employees whose job was being eliminated and who would be transferred to another position. Further, as the Administrative Law Judge found, "because of the reduction of hours worked and the elimination of overtime, weekend, and holiday premiums . . . [it was] estimated that other employees would earn approximately $750 less per year than they would on the seven to two schedule." The Administrative Law Judge also found that he had "no doubt that it [the decision to make the change] was premised on valid economic and business considerations," *i.e.*, a drop in sales attributable to the loss of one of the company's large customers.

The Administrative Law Judge found that there was a series of meetings relating to the mechanics of the change before its planned institution and that the company refused to engage in negotiations about it. The union had taken the position that any change in shift schedule was a violation of the agreement between the parties. A meeting was held pursuant to the grievance procedure, which procedure culminated in nonmandatory arbitration, *i.e.*, arbitration may be initiated as the last step of the machinery but only with the consent of both sides. When the change was instituted, the union struck despite the existence of a no strike clause, while ignoring pleas of company representatives urging them to "order the membership back to work and process the grievance through the grievance procedure provided in the existing contract between Dow Chemical Company and District 50."[120] Subsequently, successful meetings with state mediation officials were held with a view towards attempting to resolve the dispute. After these meetings the employer rescinded the collective bargaining agreement between the parties and soon thereafter terminated the employees. A week later, employer representatives received a petition signed by fifty-five hourly employees which stated that they did not "want or need" the union as a collective bargaining representative, and the em-

[120] Dow Chemical Co., 212 N.L.R.B. 330, 337 (1974).

ployer advised the union that it no longer recognized it as the collective bargaining representative because of lack of majority support.

The Administrative Law Judge found that the company's unilateral change of working hours was not sanctioned by the collective bargaining agreement and therefore found that the announcement and scheduling of the change violated Sections 8(a)(5) and (1) of the Act. The Administrative Law Judge also found, however, that while the parties had completed and complied with the first four steps of the grievance procedure, the final step had not been completed, and "it had been the practice of the parties to always adhere to this requirement."[121] The contract provided that a right to strike was authorized by the agreement after all the contractual prerequisites had been exhausted. Accordingly, the strike was not authorized by the agreement. Applying the doctrine of the *Mastro Plastics*[122] decision and the Board's application of it in *Arlan's Department Store of Michigan, Inc.*,[123] the Administrative Law Judge concluded that, while the employer had engaged in unfair labor practices, they were not of "such serious nature"[124] so as to be "destructive of the foundation on which collective bargaining must rest."[125] The Judge stated that "there is no evidence that Respondent held any union animous [*sic*], the parties appear to have long enjoyed a harmonious relationship, and there is no evidence to indicate that Respondent wished to 'rid itself of the union.' "[126] Since there was a contract grievance procedure available for the peaceful resolution of the dispute, the Judge held that the strike was unprotected from its inception. With regard to the rescission of the contract, the Judge, relying upon the Board's *Marathon Electric*[127] decision, held that the employer did not violate its refusal to bargain obligation under the statute when it rescinded the contract in response to the union's breach of the no-strike provisions.[128]

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[121] *Id.* at 340.

[122] Mastro Plastics Corp. v. NLRB, 350 U.S. 270 (1956).

[123] 133 N.L.R.B. 802 (1961).

[124] Dow Chemical Co., 212 N.L.R.B. 330, 340 (1974).

[125] *Id.*

[126] *Id.*

[127] Marathon Electric Mfg. Corp., 106 N.L.R.B. 1171 (1955), *enforced*, 223 F.2d 338 (D.C. Cir.), *cert. denied*, 350 U.S. 981 (1956).

[128] Dow Chemical Co., 212 N.L.R.B. 330, 340-41 (1974).

In *Dow I*, by a 2-1 vote, a three-member panel affirmed the Administrative Law Judge's decision in its entirety, with Member Fanning dissenting in part. Member Fanning, relying upon his dissent in *Arlan's Department Store*,[129] noted that his position was that "a general no-strike clause in a contract for the term of that contract bars only the right to strike over disputes concerning the economic relationship between the employers and the employees, *i.e.*, an economic strike, and does not bar a strike to protest unfair labor practices in the absence of an express waiver, since such strike, in my view, is outside of the scope of contract."[130] In any event, Member Fanning would have found the employer's unilateral change of work schedules sufficiently serious to justify employee concerted action outside the grievance-arbitration provisions under the authority of *Arlan's*, inasmuch as "the injury suffered by employees in the bargaining unit is not limited to [their own losses]" but extended "to the union's status as bargaining representative . . . affecting all employees in the bargaining unit."[131] Member Fanning, applying the majority's "test of experience, good sense, and good judgment," and concluding that the strike was immune from the general no-strike prohibition, said:

> "Experience" informs us that wage reductions are among the most sensitive issues in labor relations. "Good sense" tells us that an unlawfully imposed wage cut will provoke employees into withholding their labor. "Good judgment" demands that before a no-strike be construed as applying to strikes protesting unfair labor practices there be clear and unmistakable language in the contract to that effect. It demands as well consideration of the fact that the Union and the employees withheld strike action and continued to utilize the grievance provisions of the contract in an attempt to force the Respondent to the bargaining table up to the time that Respondent decided to implement the announced change. Considering these circumstances, it is clear that responsibility for the strike rests more upon Respondent as perpetrator of the unfair labor practice than upon the Union and the employees who sought to utilize peaceful means of securing their statutory rights and only desisted therein when brought face to face with a *fait accompli*.[132]

The Third Circuit's approach in *Dow I*, in an opinion authored by Judge Aldisert, expressed the view that the Board had

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[129] 133 N.L.R.B. 802 (1961).
[130] Dow Chemical Co., 212 N.L.R.B. 330, 334 (1974).
[131] *Id.*
[132] *Id.*

probably considered the legal issues involved under inappropriate standards. The court stated that the "major question" presented was whether the Board should have considered the effect of the *Boys Markets* decisions. Preliminarily, the court noted that substantial evidence in the record justified the support of the Board's conclusion that the employer was not contractually justified in its unilateral implementation of the shift changes and that, therefore, the statute had indeed been violated. Moreover, the court noted that, since the union did not exhaust the grievance procedures nor file a written request for arbitration as provided by the contract, its strike was not authorized by the agreement's "limited reservation of a right to strike."[133]

Judge Aldisert stated that the court declined "the invitation to resolve this case by simply pigeon-holing it as within the rule of *Mastro Plastics* or that of *Arlan's*."[134] The court stated that these rules must be understood in terms of their legal settings and that "fundamental developments in national labor policy" since those decisions should have commanded the Board's attention. The court stated that the Board had not evaluated the question of whether the company could have avoided "abrogating the collective bargaining agreement and terminating the employees had *it* sought to arbitrate the dispute."[135] The court then discussed the development of modern labor policy as it relates to the collective bargaining agreement—the law as it has evolved since *Steelworkers Trilogy*—and said that its consideration was "on the facts of the instant case and with respect to the company's post-strike actions, the appropriate accommodation between these general principles and the older rules of *Mastro Plastics* and *Arlan's*."[136]

The court noted that both sides had resorted to "the tooth and claw of industrial warfare, rather than availing themselves of procedures provided in their collective bargaining agreement and encouraged by the congressionally mandated national labor policy."[137] The union had struck and the company had "disdained" the arbitration process and "ultimately resorted to re-

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[133] 91 L.R.R.M. 2275, 2279 (3d Cir. 1976).

[134] *Id.*

[135] *Id.* (emphasis in original).

[136] *Id.* at 2282.

[137] *Id.*

scission of the contract." Said the court, "A more primitive, abrasive and disrupting example of labor-management relations is difficult to imagine. Indeed, the avoidance of such traumatic ruptures in industrial relations is the precise aim of the national labor policy. Yet the Board and the intervenor-company would have us hold that the national labor policy will sanction the company's ultimate actions."[138]

The court stated that, given the *quid pro quo* arbitration and no-strike provisions in the collective bargaining agreement, it would have "no difficulty in concluding that an employer's failure to seek *Boys Markets* injunctive relief would be an "appropriate factor" to consider in determining whether "subsequent action" was permissible under the statute. The court said, "[T]he availability of a *Boys Markets* injunction effects a *pro tanto* modification of the *Arlan*'s rule. A contrary conclusion would be a total perversion of the national labor policy espoused by Congress and the Supreme Court."[139] However, in *Dow I* the court noted that the arbitration clause was not co-extensive with the no-strike clause and that arbitration could be obtained only where both parties gave written consent. Under the circumstances *Boys Markets* injunctive relief would not be available to the company. Compliance with the grievance procedure was nevertheless mandatory. The court noted that the company did not take action to seek specific enforcement of the grievance procedure and that, inasmuch as the underlying dispute "revolved around the interpretation of the management-rights clause," it was susceptible to resolution through the arbitration process. The court indicated that the only stumbling block to proceeding to arbitration was the consent of the parties—the union indicating its desire to arbitration, the company never affirmatively having sought abritration. The court said:

> Accordingly, we believe that, although *Boys Markets* was unavailable to the company to compel arbitration, this conclusion begs the pivotal question: whether the company, having failed to take positive steps to have the dispute resolved peacefully, can build a sanctuary for subsequent actions in derogation of its previously harmonious relationship with the union. As a practical matter, had the company sought a peaceful and orderly resolution of the underlying dispute, it is highly probable that the union would have at least

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[138] *Id.*

[139] *Id.* at 2283.

suspended the strike.[140]

The court stated that its decision was "guided in the first instance by jurisprudential guideposts" provided by recent Court pronouncements on national labor policy. The court expressed its "grave doubts" about the Board's resort to the *Mastro Plastic-Arlan's* formula and its contribution to industrial peace. The opinion referred to the difficulties involved in predicting whether an unfair labor practice had been committed and whether it was a "serious" one, thereby creating a protected status for the strike. The court conceded that the union would still be "on the horns of a dilemma" in assessing the employer's unfair labor practice but that the company, when confronted with the strike would "know that it should take certain precautions before resorting to such self-help as cancellation of the contract, termination of employees and refusal to recognize the union."[141] The Board's role, said the court, would remain an important one because its expertise should be sought in the form of an *amicus* brief in the context of an employer's *Boys Markets* petition for injunction required by the Board's own rules. In any event, the court noted that the Board was itself deferring certain Section 8(a)(5) charges to arbitration.[142]

Finally, the court, with reference to *Marathon Electric,* disapproved the rule that a strike in breach of contract "automatically" provides the employer with the option to terminate the contract. Examining the facts of the instant case, the court noted that the company had both legal and contractual remedies available to it "short of contract termination," *i.e.*, compelling the completion of a grievance procedure, taking affirmative steps to have the dispute submitted to arbitration and filing a Section 301 damage suit. The court remanded to the Board for reconsideration of all aspects of the case except those relating to the Board's finding that the company had violated its bargaining obligation through its unilateral change in conditions of employment.

Dow II[143] contains at least four different opinions at the Board

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[140] *Id.* at 2284.

[141] *Id.* at 2285.

[142] *Id. See also id.* at 2280 where the court cites cases in which the Board has applied the *Collyer* doctrine to defer § 8(a)(5) cases to the arbitral process where the collective bargaining agreement provides for arbitration.

[143] Dow Chemical Co., 244 N.L.R.B. No. 129 (1979).

level. While a majority of the Board retained the *Arlan's* rule,[144] two dissenters[145] would have overruled the decision. A majority of the Board, however, over one dissent, found that there was indeed a "serious unfair labor practice" within the meaning of *Arlan's* and that, therefore, protected status for the union's strike was not dependent upon completion of the grievance procedure and a written request for arbitration. On the applicability of *Boys Markets,* the Board—as had the courts previously—noted that an injunction would not be available to the employer under the circumstances. Additionally, two Board members noted that the Court had emphasized that *Boys Markets* was a "narrow holding." But, of course, the position of the Court, when it stressed the narrow holding of *Boys Markets,* was based upon the question of whether injunctive relief would be available in light of the policies of the Norris-La Guardia Act.[146] This has nothing whatever to do with the issue that was before the Board.

With regard to the unwillingness of the employer to arbitrate, the Board concluded that on the basis of

> comparative responsibility in carrying out their contractual commitments, the onus for the strike must be placed upon the Respondent. It would not have occurred but for the Respondent's adamant insistence upon implementing the unilateral shift change before the grievance procedure could be completed and before arbitration could be set in motion, if agreed to.[147]

Member Penello concurred in part and dissented in part, proclaiming his adherence to *Arlan's* and the Board's previous conclusion that the strike was unprotected under it. Member Penello rejected the court's limitation of traditional self-help measures as "improper and unwelcome intrusion[s] into the col-

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[144] Members Penello, Murphy and Truesdale were in favor of retaining the rule. *Id.* at 5.

[145] Chairman Fanning and Member Jenkins would have overruled *Arlan's. Id.* at 5 n.8.

[146] *See id.* at 7 n.11, where the Court is quoted as saying:
> Section 301 of the Act assigns a major role to the courts in enforcing collective-bargaining agreements, but aside from the enforcement of the arbitration provisions of such contracts, *within the limits permitted by Boys Markets,* the Court had never indicated that the courts may enjoin actual or threatened contract violations despite the Norris-La Guardia Act.

[147] *Id.* at 8.

lective bargaining process."[148] The Penello opinion also expressed disagreement with the view that the company had not been willing to initiate peaceful procedures as an alternative to strike.

Finally, Member Truesdale concurred, and, like Members Penello and Murphy, he adhered to *Arlan's* because of his concern that the absence of such a rule would eliminate deterrence to strike during the term of the agreement. The Truesdale opinion was alone in addressing the *Marathon Electric* rule, concluding that any unfair labor practice committed by an employer would prohibit rescission of the contract by management in response to a strike even though the strike itself was in breach of the no-strike clause. With regard to the application of the rule, however, Member Truesdale found that the employer's unfair labor practice was a serious one, in part because of the employer's "relative unwillingness to proceed with arbitration."[149] Member Truesdale stated that he regarded rescission as "inconsistent with the peculiar nature of a collective-bargaining agreement."[150]

Dow II, an opinion authored by Judge Gibbons and issued by only one of the three judges who had been on the bench in *Dow I,* has only added to the confusion in this area. In *Dow II* the court, conceding that it had addressed the *Mastro Plastics-Arlan's* formulation "with perhaps less precision than we might have, "stated that it was "proceeding on the assumption that the strike was a material breach of contract, and that our primary interest in remanding was to determine whether, assuming such a breach, *subsequent* company actions could be considered unlawful retaliation against protected activities."[151] The court stated that, had it considered the possibility that the strike at its inception was unlawful, the opinion in *Dow I* would have been written quite differently, inasmuch as the conclusion that subsequent company rescission was retaliation for protected activity would have been "inescapable."[152]

Judge Gibbons' opinion stressed the frequency with which dis-

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[148] *Id.* at 32.

[149] *Id.* at 57 n.112.

[150] *Id.* at 57.

[151] Dow Chemical Co. v. NLRB, 105 L.R.R.M. 3327, 3332 (3d Cir. 1980) (emphasis in original).

[152] *Id.*

putes over management prerogatives clauses and potential refusal-to-bargain violations emerge and the contrast that such cases present with those involving the destruction of employee choice of bargaining representatives—the former disputes being resolved frequently and appropriately by the arbitration process. Accordingly, the court stressed its adherence to the Board's rule and emphasized the fact that the union could have sought retroactive "economic relief" through either arbitration or Board unfair labor practice charges. If, said the court, *Boys Markets* injunctive relief litigation was encouraged, the question of whether the dispute was outside the no-strike undertaking would have to be confronted by the court and would thus usurp the arbitrator's role.

The court also refused to repudiate *Marathon Electric* because, in its view, such a rule would effectively prevent the employer's attempt to hire new employees. In this connection, the court failed to take account of the fact that the employer's ability to get adequate temporary replacement may vary depending upon the labor market and type of job involved. While the court offered its *mea culpa* to the Board for the confusion that was engendered by its initial remand, its opinion was so startlingly different in *Dow II* from that in *Dow I* that in large part it can only be explained by the change in the composition of the panel. Only Judge Weiss dissented on the ground that the Board should have an opportunity to determine whether termination of the contract was justified when the company had not exhausted the available grievance procedures or refused to proceed in court.[153] The *Dow* litigation has thus ended not with a bang but a whimper—and with a highly unsatisfactory rationale at that!

B. No-Strike Obligations and Sympathy Strikes

In a series of decisions relating to the scope of no-strike clauses, both the Board and the Third Circuit have formulated a rule of labor contract law for no-strike clauses which, in my judgment, is both mistaken in all important aspects and contrary to existing arbitral precedents. In *Pacemaker Yacht Co.*,[154] the representative union had negotiated a collective bargaining agreement which provided for an employee health and welfare

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[153] *Id.* at 3336.

[154] 253 N.L.R.B. No. 95 (1980).

benefit program under which the employer was required to pay 40 cents per hour to the Teamsters' Health and Welfare Fund of Philadelphia and Vicinity, a joint employer-union venture. The Fund, in turn, retained an independent insurance carrier to underwrite the health and welfare program. The employer had no contractual obligation with respect to the benefit program, nor was it obliged to guarantee that the Fund fulfill its commitments to the insurance carrier. In early 1978 the Fund ceased paying premiums to the insurance carrier, whereupon the carrier stopped honoring medical benefit claims submitted by employees. It was undisputed that the employer had at all times complied with its contractual duty to make contributions to the Fund. A strike and sympathy stoppage resulted from the inability to resolve this matter effectively. The agreement contained a very broad and explicit no-strike clause. The employer dismissed employees involved in the unauthorized stoppages, and an arbitrator held that they were properly terminated for violating the no-strike clause. The award, however, permitted some employees to be recalled.

The Board noted that the right to strike can only be waived when there is explicit waiver language in the contract or so-called "protective extrinsic evidence" in the form of bargaining history or other relevant conduct of the parties. Reversing the Administrative Law Judge's finding that the strike had been waived, the Board said that the fact that there was no evidence that the parties "considered or discussed whether the no-strike clause would cover the situation which arose here indicates that no clear and unmistakable waiver of the right to strike over the Fund's inaction occurred."[155] The Board said that there had been no "conscious yielding" since the matter was beyond the parties' anticipation and quoted the Administrative Law Judge in this connection. Said the Board:

> This observation only lends support to our conclusion that there was no waiver of the right to strike over the matter involved in this case. It stands to reason that the Union could not have made a clear and unmistakable waiver of the employees' right to strike to put pressure on the Fund since the parties never foresaw the possibility of such a situation. The mere fact that the parties may not be in a position to foresee that the situation may arise is certainly no reason to find . . . that if they had been able to envision the type of strike involved herein they would have included it as a situ-

[155] *Id.*, slip op. at 9.

ation to which the right to strike is waived.[156]

This is a remarkable and unfortunate decision. It is deeply at odds with the tenor of *Steelworkers Trilogy* itself, which highlighted the peculiar nature of collective bargaining agreements and the unforeseen contingencies and gaps that are likely to arise. One must recall that the Court stressed the fact that the collective bargaining agreement is a "generalized code to govern a myriad of cases which the draftsmen cannot wholly anticipate."[157] This is the rationale which justified—at least in part—a policy promoting arbitration as a *quid pro quo* for the no-strike clause as a matter of federal labor law. The no-strike clause in *Pacemaker Yacht* was all-embracing and thus intended to address a wide variety of unanticipated problems. The clause was not limited to arbitrable disputes, and it was fanciful for the Board to limit it as it did. The Board stated that the conclusion that a general no-strike clause did not waive this strike was "more compelling" than in the case of sympathy strikes because here the strike was "a breakdown of one of the major components of collective bargaining agreements. . . . [U]nlike the sympathy strike, the walkout here was over a matter which intimately related to the terms and conditions of employment of the striking employees."[158] But this point cuts in exactly the opposite direction. The strike was over subject matter at which most no-strike provisions are aimed.

In *Pacemaker Yacht* the Board also held, without much discussion, that sympathy strikers could strike in the teeth of the no-strike clause which prohibited "picketing" or "other interruption of a company's operations." Although this issue is a more difficult one, the result here also seems to be erroneous. In order to understand this issue, it is important to consider the Third's Circuit's *Coca Cola Bottling Co.*[159] decision, which formulated a rule for excluding sympathy strikes from the strictures of broad no-strike clauses.

In *Coca Cola* the union entered into a broad no-strike clause

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[156] *Id.*

[157] United Steelworkers v. Warrior & Gulf Navig. Co., 363 U.S. 574, 578-80 (1960). *See* Cox, *Reflections upon Labor Arbitration* 72 HARV. L. REV. 1482 (1959).

[158] Pacemaker Yacht Co., 253 N.L.R.B. No. 95 at 11.

[159] Coca-Cola Bottling Co. v. Teamsters Local 326, 104 L.R.R.M. 2776 (3d Cir. 1980).

which prohibited any strike or any curtailment of work or restriction of service or interference with the operation of the Company or any picketing or patrolling during the term of the agreement. The grievance-arbitration clause defined a grievance as a dispute or complaint arising between the parties thereto under or out of the agreement with the interpretation, application, performance, termination or alleged breach thereof. Accordingly, it was more limited than the no-strike clause.

Coca Cola's drivers, who had been previously employed by another employer, could not negotiate a collective bargaining agreement with the company, and thus the drivers set up a picket line. The production and maintenance unit covered by the above-referenced contract clauses refused to cross the picket line, and the employer then filed a Section 301 damage action in federal district court. In a non-jury trial, the district court concluded that the work stoppage was a sympathy strike and that the no-strike clause waived the production and maintenance employees' right to engage in sympathy strikes and awarded damages. The Third Circuit reversed on this issue.

In an opinion authored by Chief Judge Seitz, the court referred back to its own precedent,[160] in which it had held that a general and broad arbitration clause—from which a no-strike commitment was implied[161]—was not explicit enough to waive the right to a sympathy strike. In these cases the court had relied upon the notion of coterminous interpretation, *i.e.*, if the subject matter of the strike was arbitrable, then the strike itself would violate the no-strike clause. This is a logical proposition, inasmuch as the no-strike obligation is derived from the arbitration clause itself. By definition, it is difficult to see how the no-strike pledge can be broader than the arbitration clause. Characterizing the coterminous interpretation idea in *Coca Cola,* the Third Circuit said that "[t]he theory underlying this is that the no-strike clause is a *quid pro quo* for the arbitration clause. . . . In short, the obligation to not strike is read to be an obligation not to strike over arbitrable issues."[162]

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[160] *Id.* at 2778 (citing United Steelworkers v. NLRB, 536 F.2d 550, 555 (3d Cir. 1976); United States Steel Corp. v. UMW (U.S. Steel II), 548 F.2d 67 (3d Cir. 1976).

[161] The Supreme Court first accepted this notion of a no-strike obligation in Teamsters Local 174 v. Lucas Flour, 369 U.S. 95 (1962).

[162] Coca-Cola Bottling Co. v. Teamsters Local 326, 104 L.R.R.M. 2776, 2779

In *Coca Cola*, where there was an express no-strike clause, the court nevertheless decided to apply the same principles and relied, in part, upon the Supreme Court's *Buffalo Forge*[163] decision, which held that an injunction could not issue under Section 301 against a sympathy strike where there was no underlying grievance triggering the stoppage which itself was susceptible to resolution through the arbitration process. In *Buffalo Forge,* therefore, there was no *quid pro quo* between the arbitration and no-strike clauses. Said the Third Circuit, "The *quid pro quo* rationale underlying coterminous interpretation also applies where the union actually gives up its right to strike instead of having it implied from the arbitration clause."[164]

The court emphasized the fact that the *Buffalo Forge* opinion had used the *quid pro quo* theory to arrive at its conclusion. But as noted above in connection with my discussion of reliance upon *Buffalo Forge* in *Dow II, Buffalo Forge* was formulated with a view towards avoiding the policy prohibiting injunctions contained in Norris-La Guardia. The court said in this connection, "Normally, the employer will not agree to arbitration unless he gets an agreement from the union that it will not strike over those arbitrable issues. In addition, in the normal case the union will not agree to a no-strike clause that extends beyond the arbitration clause."[165] But this is not so. The Third Circuit provided no evidence at all in the form of contract clause studies to demonstrate its point. And if it had looked to contract language and, indeed, the decisions of arbitrators in interpreting no-strike clauses, it would have seen that the clauses frequently are not coterminous. The no-strike clause is often broader than the arbitration clause,[166] and arbitrators have not interpreted

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(3d Cir. 1980). While the court has fashioned a doctrine of "coterminous application," it has recognized that the "two issues [arbitration provision and no-strike obligation] remain analytically distinct." Gateway Coal Co. v. United Mine Workers, 414 U.S. 368, 382 (1974).

[163] Buffalo Forge Co. v. United Steelworkers, 428 U.S. 397 (1976). I have criticized this decision in Gould, *On Labor Injunctions Pending Arbitration: Recasting Buffalo Forge,* 30 STAN. L. REV. 533 (1978). Much of my thinking in this area was first articulated in Gould, *On Labor Injunctions, Unions, and the Judges: The Boys Markets Case,* 1970 SUP. CT. REV. 215.

[164] Coca-Cola Bottling Co. v. Teamsters Local 1326, 104 L.R.R.M. 2776, 2779 (3d Cir. 1980).

[165] *Id.* at 2780.

[166] No-strike clauses appear in 92% of all agreements. Fifty-three percent of the clauses are unconditional bans on interference with production during the

labor contracts in the fashion utilized in *Coca Cola*.[167] Further, the court stated that the contract here supported coterminous interpretation. It relied upon the fact that the rights of the drivers were not protected by the agreement, and thus the underlying grievance could be dealt with through arbitration. Arbitration of the dispute presumably could be had, however—but only insofar as the no-strike issue itself was involved.

Finally, the court relied upon *Mastro Plastics* and the narrow reading given to a no-strike clause in that case. While referring to *Mastro Plastics*, the court stated that the contract "taken as a whole, dealt with the economic relations between the unfair labor practice strikers and their employer, such as wages, hours, and so forth. In effect, the no-strike clause was a promise by the union not to strike over matters covered by the contract."[168] But *Mastro Plastics* was not, as the court in *Coca Cola* indicated, a hurtful analogy, inasmuch as it excluded the subject matter from the no-strike clause (1) because of its nature and inability to resolve such problems through the arbitration process; (2) because public policy indicated that interference with employee free choice would preclude strikes over such matters.[169]

The Tenth Circuit also has had a recent opportunity to deal with the sympathy strike issue in *NLRB v. Gould, Inc.*[170] The no-strike clause stated that the union agreed "that there will be no strike, work interference, or other work stoppage. . . ."[171] But it was, in the court's view, "linked to the grievance arbitration machinery," inasmuch as the clause stated that the union had given its commitment "[i]n view of the procedure for the orderly settlement of grievances. . . ."[172] The case presented the question of whether a walkout triggered by informational pickets protesting the presence of a nonunion contractor violated the

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life of the contract, while 39% are conditional bans which permit strikes under certain circumstances. *Reported in* COLLECTIVE BARGAINING: NEGOTIATIONS AND CONTRACTS: BASIC PATTERNS CLAUSE FINDER (BNA) 77:1 (1978).

[167] *See, e.g.*, Bucyrus-Erie Co., 69 LAB. ARB. REP. (BNA) 93 (1977); Sterling Regal, Inc., 69 LAB. ARB. REP. (BNA) 513 (1977); Southern Ohio Coal Co., 66 LAB. ARB. REP. (BNA) 446 (1976).

[168] Coca-Cola Bottling Co. v. Teamsters Local 326, 104 L.R.R.M. 2776, 2780 (3d Cir. 1980).

[169] *Id.*

[170] 105 L.R.R.M. 2778 (10th Cir. 1980).

[171] *Id.* at 2789.

[172] *Id.* at 2791.

no-strike clause. An arbitrator, considering the propriety of dismissal of employees who had participated in the strike, concluded that the no-strike clause waived the right to engage in sympathy strikes. The Board disagreed, and the Tenth Circuit affirmed its conclusions.[173]

The court, noting that no extrinsic evidence had been presented to prove that the no-strike clause prohibited sympathy strikes, concluded that it was unable to infer a waiver, inasmuch as the agreement did not expressly address the issue. The court stated that the language of the no-strike clause "suggests that if the dispute involving a strike is not subject to the grievance-arbitration machinery of the contract, the strike is not prohibited by the no-strike clause."[174] Although the Tenth Circuit, like the Third, drew support for its conclusion from *Buffalo Forge,* its opinion is essentially based on the peculiar contract language involved rather than the coterminous interpretation theory so vigorously expressed in *Coca Cola.* As such, the opinion in *Gould, Inc.* is a more defensible one.

Another case presenting the same issue is *Amcar Division, ACF Industries v. NLRB.*[175] Here the Eighth Circuit stated that in considering the question of whether a right to engage in sympathy strikes has been waived by a no-strike clause, the court must "look to the language of the contract, the bargaining history, and other relevant conduct of the parties that shows this understanding of the contract."[176] Although the Third and the Tenth Circuits take the same approach, it is clear that the Eighth Circuit's assessment of the no-strike clause language is quite different. Said the court, confronted with language which was more narrow than that contained in either *Coca Cola* or *Gould, Inc.*:

> [T]his [the no-strike clause] is insufficient, in and of itself, to constitute a waiver of the right to engage in sympathy strikes. . . . [A] number of cases have interpreted general no-strike clauses to preclude sympathy strikes. The broad language of this no-strike clause, when examined in light of the bargaining history . . . and the facts surrounding the parties' actions at issue here, indicate a clear waiver of the Union's right to engage in a sympathy strike.[177]

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[173] *Id.* at 2792.
[174] *Id.* at 2791.
[175] 106 L.R.R.M. 2518 (8th Cir. 1981).
[176] *Id.* at 2522.
[177] *Id.*

This seems to me to be the sounder view. While broad contract language is not dispositive, it should create a presumption which, along with bargaining history and conduct of the parties, prohibits sympathy strikes. It properly rejects the coterminous interpretation approach, as well as the Board's refusal to consider other conduct, such as contemporaneous statements by union officials.

A final case in the no-strike arena involved a different issue. The Third Circuit was at work again in *Pittsburgh Steel Co. v. Steelworkers*,[178] where it dealt with a problem arising in the wake of the Supreme Court's *Carbon Fuel* decision.[179] *Pittsburgh Steel* involved the violation of a no-strike pledge in an agreement to which the International Union was a party. It raised the question of whether an order directing the parties to pursue a contractual arbitration remedy should be aimed at the International when the record demonstrated that it did not instigate, support, ratify or encourage the wildcat strike by the Local in question. Indeed, the record indicated that the International had actively opposed the strike and urged the local union members to return to work and arbitrate their grievances. The district court had directed injunctive relief against the International because, despite its opposition to the strike, the view of the court was that it could be ordered to take steps to end the stoppage.

In the first place, the court noted that this case, unlike *Carbon Fuel,* was not one in which the employer sought to obtain money damages from the International for the acts of members of the Local. The Third Circuit noted that the Court's *Carbon Fuel* holding had not answered the question raised here, *i.e.*, where damage liability is foreclosed by the stance of the International, may injunctive relief nevertheless be provided? The court stated that the law of prospective contract remedies was not so "stale" as to require a result that dictated that the union was immune from injunctive relief simply because it had not committed a breach which would make it liable in damages. Said Judge Seitz for the court, "When a court has a case before it justifying an injunction to prevent a breach of contract by a party to that contract, there must be authority to issue injunctive relief even

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[178] 105 L.R.R.M. 2198 (3d Cir. 1980).

[179] Carbon Fuel Co. v. UMW, 444 U.S. 212 (1979) (international union not liable for wildcat strikes).

against third parties where such relief is necessary, or perhaps merely helpful, in effectuating the relief against the contracting party in default."[180] But under the circumstances the court held that injunctive relief was not appropriate, even though the International's "lack of culpability" was not a bar to injunctive relief in all cases. The Third Circuit stated that the district court had made no finding which would suggest that an order directing the International to take steps to end the strike would either be necessary or helpful. There was no basis for assuming that an order directed only against the Local and its offices would be disobeyed and no record that the Local had a history of defiance of the terms negotiated on its behalf by the International. The court said:

> There may be circumstances in which the district court should direct such a parent union to take affirmative steps in aid of a valid *Boys Markets* injunction. But we do not think any such order should be entered absent findings by the district court: (1) that its own order directed to the local union and its members will not be fully effective; (2) that the steps already taken by the International are not likely to be effective; and (3) that specific additional steps, carefully specified in the order, will add significantly to the deterrent effect of the injunction against the local and its members. Even when the court has made these findings it should still consider whether, in view of the inevitable intrusion upon the internal affairs of the union, the marginal potential increase in the effectiveness of the *Boys Markets* injunction is justified.[181]

C. *Discipline of Union Stewards*

The Eighth Circuit in *NLRB v. Armour-Dial, Inc.*[182] dealt with another issue which involves the policy of industrial peace and the no-strike clause—the lawfulness of employer discipline of union officials for involvement in stoppages in breach of contract. The Seventh and Third Circuits have previously reversed the Board and held that such discipline does not constitute unlawful discrimination because of union activity. The Seventh Circuit has stated that deterring union officials from engaging in unlawful conduct by discipline and, in so doing, imposing a greater degree of responsibility upon them for adherence to the

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[180] Pittsburgh Steel Co. v. Steelworkers, 105 L.R.R.M. 2198, 2202 (3rd Cir. 1980).

[181] *Id.* at 2203.

[182] 106 L.R.R.M. 2265 (8th Cir. 1981).

no-strike clause is not tantamount to discouraging union members from holding union office and, therefore, does not have an unlawful "inherently adverse" effect on employee rights.[183] Similarly, the Third Circuit has concluded that no prejudice to employee rights can result from the deterrence of involvement in illegal activity and that more severe discipline may be imposed upon those individuals who have a special duty to provide compliance with the contract, *i.e.*, union officials.[184] The Third Circuit said, "It is certainly fair to assume that usually it is the steward or some other union official close to the scene who has the power, authority and influence most effectively to quash an illegal strike during its infancy or to prolong it indefinitely. The threat of his disciplinary discharge, therefore, is a valuable option which the employer should not be prohibited from exercising where it has been contractually acquired."[185] These decisions seem to make eminently good sense because they recognize the special responsibility that is thrust upon union stewards and are compatible with arbitration awards which have generally held that more severe sanctions may be imposed upon union officials who have a greater responsibility in terms of adherence to the no-strike clause.[186]

The Seventh and Third Circuits, however, have been careful to permit such penalties to be imposed only upon union stewards who actually participate in the unlawful conduct itself. What is somewhat troubling about the Eighth Circuit's opinion in *Armour-Dial* is that it held that participation in unlawful conduct can be inferred from the conduct of union representation in meetings between the union and the company. The Eighth Circuit opinion is probably correct on the facts of the

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[183] Indiana & Mich. Elec. Co. v. NLRB, 599 F.2d 227 (7th Cir. 1979).

[184] Gould, Inc. v. NLRB, 612 F.2d 728 (3d Cir. 1979).

[185] *Id.* at 734. The Board seems to be modifying its previous position to the extent of requiring that the same penalty be imposed on unions where a violation is found against stewards as employees; *see* Miller Brewing Co., 254 N.L.R.B. No. 24 (1981); South Central Bell Tel. Co., 254 N.L.R.B. No. 32 (1981).

[186] Provisions limiting the union's liability for violation of a no-strike pledge appear in only 35% of collective bargaining agreements, and most of these require some form of positive action by the union in order to avoid liability (for example, attempts to get the employees to return to work or public disavowal of the strike). *Reported in* COLLECTIVE BARGAINING: NEGOTIATIONS AND CONTRACTS: BASIC PATTERNS CLAUSE FINDER (BNA) 77:4 (1978).

case, inasmuch as the union leadership did seem to promote the stoppage and boycott involved in that case. But it would be extremely dangerous and counterproductive to impose sanctions simply on the basis of participation in meetings and statements which could be characterized as posturing for the rank and file. The union officials who may be dedicated to compliance with the contract obligations frequently walk a difficult line in terms both of retaining a position of leadership in the rank and file and simultaneously dissuading them from illegal conduct. The Board and the courts must handle these problems with caution and sensitivity.

D. Deference to Arbitration by the Board

The problem of reconciling the arbitration process with the National Labor Relations Act still bedevils both the Board and the courts. The Board has stressed that deference is in order only if the arbitrator has considered the unfair labor practice issue involved.[187] In a lengthy opinion (actually two opinions —the opinion of the court written by Judge Rosenn and a separate concurring opinion written by Judge Garth), the Third Circuit has held in *NLRB v. Pincus Bros.*[188] that it is an abuse of discretion for the Board to refuse to defer under its *Spielberg* doctrine to an arbitration award "where the findings of the arbitrator may arguably be characterized as not inconsistent with Board policy."[189] *Pincus Bros.* involved an employee's leafletting activity. In reversing the Board's findings, the court concluded that the leaflet was "at least arguab[ly]" defamatory or insulting material known to be false or disloyal. It therefore refused to defer to the Board's overturning of the arbitration award "because Richardson's leafletting was arguably unprotected activity and therefore not 'clearly repugnant' to the Act."[190] In a more recent case, *NLRB v. General Warehouse,*[191] a majority of a Third Circuit panel[192] concluded that the Board did not abuse

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[187] *See, e.g.,* Raytheon Co., 140 N.L.R.B. 883 (1963), *enforcement denied on other grounds,* 326 F.2d 471 (1st Cir. 1964); Suburban Motor Freight, 103 L.R.R.M. 1113 (1980).

[188] 620 F.2d 367 (3d Cir. 1980).

[189] *Id.* at 374.

[190] *Id.* at 375.

[191] 106 L.R.R.M. 2729 (3d Cir. 1981).

[192] Judge Hunter was joined in his opinion by Judge Higginbotham. Judge

its discretion in refusing to defer to an arbitration award which held that a dismissal was for "just cause" under the agreement but did not address other discriminatory grounds alleged to be the basis for the dismissal.[193]

The Ninth Circuit, in *NLRB v. Max Factor & Co.*,[194] has taken a view at odds with the first Third Circuit opinion, concluding, quite properly it seems to me, at least in the context of individual employee complaints of discrimination, that *Pincus Bros.* will create numerous problems. The court declared that it would (1) interfere with the Board's authority to articulate its own self-imposed *Spielberg* criterion; (2) require the Board to engage in the never ending task of ruling out every arguable rationale for finding the employee's conduct unprotected; (3) be "inherently imprecise"; and (4) exclude, without statutory and decisional authority, reliance on factors other than the "obviousness of the protected status of the employee's conduct."[195]

In a subsequent decision of the Ninth Circuit, *Ad Art, Inc. v. NLRB*,[196] the court confronted an issue which will arise more frequently now that the Board has explicitly required that unfair labor practice issues be presented and considered by the arbitrator as a prerequisite to invoking deference under the *Spielberg* criteria. The court held that its previously imposed requirement that the unfair labor practice issue "be clearly decided" meant that the arbitrator's decision itself must specifically deal with the statutory issue. Said Judge Skopil, speaking for the Ninth Circuit, "This means that the arbitrator must be presented with a statutory issue and adequately consider it as a basis for the decision. It is not necessary, however, for the arbitrator expressly to review the statutory issue in a written memo-

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Aldisert wrote a dissenting opinion.

[193] The arbitrator's decision addressed only the contractual questions in the dispute. He did not consider the other motives the company may have had for discharging the employee. "These other motives," said the court, "if found to be discriminatory and the 'real cause' of Coon's dismissal, could form the basis of an unfair labor practices charge." *Id.* at 2732.

[194] 105 L.R.R.M. 2765 (9th Cir. 1980).

[195] *Id.* at 2769 n.7. Added support for the view that the Board should carefully review arbitration awards can be found in Barrentine v. Arkansas Best Freight System, 24 Wage and Hour Cases 1285 (1981), where the court held that courts must not defer to arbitration awards where Fair Labor Standards Act issues are raised.

[196] 106 L.R.R.M. 2010 (9th Cir. 1980). *See also* Stephenson v. NLRB, 550 F.2d 535 (9th Cir. 1977).

randum. . . . [I]f there is 'substantial and definite proof' that the unfair labor practice issue was presented and the arbitral decision indisputably resolves that issue, then the 'clearly decided' requirement is met."[197]

One issue that is bound to surface with regularity in the future as the result of the above arbitration requirement relates to employer unilateral changes in working conditions where there is no *status quo* clause in the agreement prohibiting unilateral changes but where the NLRA nevertheless makes it an unfair labor practice unilaterally to institute changes without bargaining to the point of impasse.[198] In this area, the Board must articulate clearly the view that while the arbitrator can take into account many considerations including the policies and decisions under the National Labor Relations Act, his authority is based upon the contract unless the parties provide otherwise.[199] Since (1) such a shift is the equivalent of the negotiation of a *status quo* clause and, therefore, a fundamental change, and (2) Supreme Court authority which adopts an anti-deference posture seems to be based upon the concern that individuals could be harmed by a union's interest in the group, it may be that arbitrators should not be required to adhere to Board law in such circumstances.

In one *Spielberg* type case[200] the Board, in *Aeronca, Inc.*,[201] held that it would not defer to an arbitrator's award upholding the employer's actions where an employer had discontinued the giving of Christmas turkeys to all unit employees contrary to its past practice. The contract did not contain a maintenance of benefits clause or a similar provision, but it did contain a waiver or zipper clause which waived the right to bargain over any subject matter within or outside the agreement "even though such subject matter may not have been within the knowledge or contemplation of either or or both of the parties at the time they negotiated or signed this Agreement." The Agreement also contained a provision which stated that the document itself contained "the entire Agreement," and the union had proposed a

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[197] Ad Art, Inc. v. NLRB, 106 L.R.R.M. 2010, 2015 (9th Cir. 1950).

[198] *See, e.g.*, NLRB v. Katz, 369 U.S. 736 (1962).

[199] United States Steelworkers v. Enterprise & Wheel, 363 U.S. 593 (1960).

[200] *See* Barrentine v. Arkansas Best Freight System, 24 Wage and Hour Cases 1285 (1981).

[201] 253 N.L.R.B. No. 26 (1980).

maintenance of benefits provision which the parties had not dropped. Because the arbitrator rejected the grievance on the grounds that the bonus was not coveted or protected by the contract, the Board took the position that the statutory issue had not been considered:

> The factors cited by Respondent as having been considered by the arbitrator are all based on the wording of the contract—the length of the contract, the zipper clause, the silence of the contract on Christmas turkeys, and the clause that the document contained the entire agreement. Yet the arbitrator refused to determine whether the turkeys were mentioned during negotiations and failed to consider the parties' past practices under the predecessor agreement and in 1976 under the new agreement. Thus, we find that the arbitrator reached a result at odds with Board law and that deferral is therefore inappropriate.[202]

A case that is somewhat related, inasmuch as it involves the question of whether the right to bargain was waived, but arises outside the *Spielberg* deferral context is *Henry Vogt Machine Co.*[203] In this case, prior to the selection of the union's collective bargaining representative, laboratory employees were permitted to utilize the employer's cafeteria where they were able to purchase five hot lunches weekly at a total cost to each employee of $1.00 per week. As soon as the collective bargaining agreement was negotiated, after a "brief exchange" regarding a union proposal on the idea of building a lunch room for unit employees, the employer unilaterally discontinued the cafeterial benefits without prior notification or consultation with the union. The employees had indeed feared that the privileges would be withdrawn in the event that the union was selected as bargaining representative and had expressed their fears to the union committee while contract proposals were being formulated. The union, however, did not raise the issue at the bargaining table, and the employer did not announce his intention to make the change until two days before the contract was presented to the membership for ratification. The Board concluded that failure to raise the issue was not a waiver, inasmuch as the employer had given no indication of its intention to discontinue the benefits during months of negotiations. It does seem that a cat and mouse game was being played in the course of negotiations, and one cannot help but be sympathetic to

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[202] *Id.*, slip op. at 10-11.

[203] 251 N.L.R.B. No. 40 (1980).

Member Penello's dissenting opinion, in which he found a waiver but simultaneously proclaimed a "plague on both your houses" statement condemning the parties for failing to resolve their differences through the collective bargaining process. Member Penello said, "[B]oth sides maneuvered around the edges of good-faith bargaining in an effort to outwit the opposition and achieved their objectives by circumventing the frank and open discussion that is the heart of collective bargaining."[204]

In sum, it seems to me that, *Pincus Bros.* notwithstanding, the Board and the courts recognize that *Spielberg* deferrals are appropriate only where the unfair labor practice issue has been addressed, and that increasingly under the NLRA, as in employment discrimination law,[205] the line between public and private labor law is a blurred one. At the same time, the Board can gain from arbitral expertise in the process. If the Board had paid more attention to arbitral precedent in the no-strike clause cases referred to above, its decisions would more faithfully implement national labor policy. Moreover, its decision might then find more favor with the courts.

E. Superseniority for Union Stewards

In *Paintsmiths, Inc. v. NLRB,*[206] the Eighth Circuit dealt with one variation on a theme which has confronted the Board and the courts in a number of instances in the past few years—job preferences for union stewards under the NLRA. In *Paintsmiths*, a majority of the court reversed the Board's holding that a union official's appointment of a relative and "college buddy" as steward which displaced another worker was not unlawful under the statute. The Board had concluded that the appointment of the stewart from outside the regular workforce was in furtherance of a legitimate union objective under the collective bargaining relationship. In a previous decision the Board had concluded that a union did have a "substantial and legitimate business purpose"[207] to discriminate in favor of union stewards where an outsider was selected with a view towards handling re-

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[204] *Id.*, slip op. at 10.

[205] *See, e.g.*, Alexander v. Gardner-Denver Co., 415 U.S. 36 (1974); Barrentine v. Arkansas Best Freight System, 24 Wage and Hour Cases 1285 (1981).

[206] 104 L.R.R.M. 2368 (8th Cir. 1980).

[207] Painters, Dist. Council 2 (Paintsmiths, Inc.), 100 L.R.R.M. 1152 (NLRB 1979).

portedly complex jurisdictional claims. In *Paintsmiths*, the Board held that the union's concern in appointing stewards was presumptively legitimate, inasmuch as in its view there was a substantial reason for making the appointment, *i.e.*, to place a particularly knowledgeable steward on a troublesome job site or to place a steward with a particularly difficult employer as distinguished from a blanket hiring preference on every job for union-designated stewards. The court reversed the Board on the ground that a worker was laid off who had a "vested interest in completing" the job and that the union had made no "specific showing" of its legitimate and substantial interest. This is a hard case because there was more than a hint that the union official was placing his friends as stewards. The Eighth Circuit opinion makes bad law, however, because it will both invite litigation about particular problems allegedly the basis for steward appointments, *e.g.*, jurisdictional disputes,[208] and unnecessarily intrude into internal union policy judgments.[209] It also fails to take into account the special need that building trade unions have for appointment of stewards on temporary jobs which may frequently dictate displacement of another worker.

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[208] *See, e.g.*, Ashley, Hickham-Uhr Co., 210 N.L.R.B. 32 (1974).

[209] *See, e.g.*, Paintsmiths, Inc. v. N.L.R.B. 104 L.R.R.M. 2368, 2374 (8th Cir. 1980) where the court makes the following judgment about the Union's internal process: "The Union was at most justified in appointing a steward from among the experienced workers already on the job. The Union might also seek to put in place a more reliable mechanism for learning when new jobs are about to begin." *See also* NLRB v. Milk Drivers & Dairy Employees Local 338, 531 F.2d 1162, 1166 (2d Cir. 1976), where the court said, "If a union finds that it must offer incentives to attract qualified stewards, it may pay a salary to the stewards, or may give them other non-job benefits"; *but see* American Can Co., 244 N.L.R.B. No. 78 (1979), slip op. at 17, where Board Members Fanning and Truesdale assert in their dissent:

> A description of the officers' duties showing no visible or direct impact by them on contract administration is not sufficient to rebut the presumption of lawfulness. We would not, on the basis of such evidence, second-guess a union's decision as to which officers aid the union in effectively representing the unit. To do otherwise would be contrary to the realities of bargaining, would ignore the often vital indirect impact on contract administration by apparently low-level officers, and would put the employer in the impossible position of trying to determine which officials it can lawfully give superseniority. For these reasons, we would dismiss the complaint in its entirety.

CONCLUSION

The problems confronting the Board and the circuits during the past year are both variegated and complex. In my judgment, the Board has shown itself to possess the expertise which the courts say it has (when they affirm the Board!) on issues like solicitation and picketing. The busy Third Circuit has had to fill the void in *Gissel* bargaining orders where the union does not have a majority of the cards. The Board has taken a wrong turn in the no-strike area. These issues, and others identified in this paper, are sure to be in the Supreme Court before long.