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Developments in Fiscal Year 1978
NLRB and General Counsel
Decisions

Alvin L. Goldman†

During Fiscal Year 1978, the National Labor Relations Board decided more than 1700 contested cases covering a wide range of issues and fact situations. The author presents a selection of decisions from that period, examining their context and evaluating their impact on the practice of labor law. To accompany his statement of the current state of NLRB law, the author offers his perception of the virtues and weaknesses of the new positions and the rules they replaced.

I
INTRODUCTION

Each fiscal year the decisional work load of the NLRB and the General Counsel grows. This growth indicates that the Labor Management Relations Act has not yet brought to the United States the degree of stability, harmony, and maturity in industrial relations that is sometimes claimed. The Board's current case reports often reflect vignettes of management and union misconduct that are readily interchangeable with those reported in the earliest volumes of NLRB decisions.

Much of the conduct that comprises American labor relations resembles a vast game. Each side takes an attitude of We're Okay but They Are Untrustworthy, Worthless, Phony, Conniving, Sons of Bitches.1 Undoubtedly, on occasion such an orientation accurately portrays

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1. In transactional analysis this is known as one's existential state. E. Berne, What Do You Say After You Say Hello? 90-95 (1972).
the setting in which the parties transact their work or business relations. More often, these attitudes are at most a partial reflection of a reality that has been distorted by insecurities about one's own effectiveness, by blinding loyalties to one's immediate associates, by lack of accurate information, by fear, by greed and by laziness. It would be a much healthier human environment, and probably a much healthier economic system, if these distortions of reality were to disappear. But how should they be eliminated? Certainly that is not the charge given by Congress to the NLRB, nor would it be able to carry out such a charge. We are left, then, with tensions, bickering and street fighting tactics that the Board must referee. Much of its task involves sorting out disputed facts and then applying well-understood decisional rules. Nothing new develops from such cases except, perhaps, the mental callouses of seeing the same old, misguided stories replayed. Interspersed among these replays, however, are a few challenges to legal analysis or ingenuity and an occasional rethinking of settled principles. What follows is a selection of such developments in the NLRB and General Counsel decisions for the 1978 fiscal year.

II

GROUNDS FOR SETTING ASIDE ELECTIONS

A. Misuse of the NLRB's Name, Process or Documents

In 1977 the NLRB departed from its long practice of setting aside representation elections in which the late stages of the election campaign are marked by material misrepresentations. That departure occurred, of course, in the *Shopping Kart* case, a decision that lacked a clear majority doctrine and whose continued viability was made less certain by the fact that Board Member John Truesdale soon thereafter replaced one member of the *Shopping Kart* majority.

Member Truesdale's vote eventually resulted in the demise of *Shopping Kart*, but that did not occur until the following fiscal year. During fiscal year 1978, instead, the Board issued a number of decisions in which it dealt with the impact of campaign misrepresentation in contexts that did not require it to apply the *Shopping Kart* rule. For example, closely related to the misrepresentation doctrine that was reexamined in *Shopping Kart* is the principle that the Board will set aside an election in which the prevailing party engaged in a substantial mischaracterization or misuse of the Board's name, process or documents. In the *Shopping Kart* decision the Board expressly disclaimed any in-

tension to change the latter doctrine. That disclaimer was reinforced by its later holding in *Formco, Inc.*

The election in *Formco* had been preceded by unfair labor practice charges against the employer. A settlement agreement respecting those charges, and containing a nonadmission clause, was approved by the Regional Director. Thereafter, about seven weeks before the representation election, the union sent a letter to workers which asserted that management had been “found guilty of engaging in unfair labor practices.” Despite the ample opportunity for the employer to respond to this clear misstatement of fact, a panel of Chairman Fanning and Members Jenkins and Murphy agreed that the union’s election victory had to be set aside. The panel reasoned that it is doubtful whether an employer can credibly and effectively correct such a misstatement because the workers are likely to believe that the employer’s explanations are “an attempt to extricate itself from the damaging effects of an adverse finding by the Board.”

It should have caused no surprise to find the Board, in *Formco*, choosing to retain the policy of protecting the agency’s reputation for neutrality and objectivity by treating a misrepresentation of its process as grounds for setting aside an election. As noted above, *Shopping Kart* did not pretend to alter this well-established principle. However, the *Shopping Kart* majority rationale relied in part on a heightened concern for election finality. In addition, that rationale, based largely on a study conducted by Professors Getman, Goldberg and Herman, discounted the effectiveness and importance of campaign propaganda in shaping voter behavior. Thus, the *Shopping Kart* majority expressed a desire to let NLRB elections more closely emulate the free-wheeling political election model. Accordingly, one might have expected the Board, in *Formco*, to dismiss the objection to certifying the election. The Board’s explanation that the employer might have difficulty getting workers to believe its self-serving corrective statements about Board process is, after all, equally true of an employer’s attempts to rebut other forms of union campaign misstatements.

In contrast with *Formco*, the presence of an ample opportunity to reply to a mischaracterization of the NLRB’s participation in the election process was listed as a factor contributing to the Board’s decision in *Fabricut, Inc.* not to set aside the election results. In that case, a

5. *Id.* at 5.
6. 228 N.L.R.B. at 1313.
8. 228 N.L.R.B. at 1313.
member of the plant organizing committee prepared and distributed ten weeks before the election a leaflet that stated: "The Labor Board has given us permission to bring information in and out of [the plant] for you." A three-member panel, consisting of Chairman Fanning and Members Jenkins and Penello, rejected the Regional Director's conclusion that the leaflet implied an NLRB endorsement of the union. The Board's opinion emphasized that: (a) in most circumstances section 7 of the NLRA does give workers the right to campaign on the employer's premises, (b) the pamphlet came from an individual worker and not from the union, and (c) the employer made no effort to correct the statement in question despite its response to another part of the leaflet. The Board concluded that under the circumstances its neutrality was not put into question and that the leaflet had no impact on the election.

At first glance, then, Fabricut can be factually distinguished from Formco on the grounds that Formco involved a misuse of the Board's name or reputation whereas in Fabricut the Board found no such overreaching by the election campaigners. However, if the leaflet in Fabricut did not put the Board's neutrality in question, then neither its authorship nor the ample opportunity for response would have been relevant to the Board's resolution. Nevertheless, the Board panel that decided Fabricut took note of, and discussed the presence of, all of the above-listed factors, which suggests that the Board panel in fact was concerned about the possible misuse of the Board's name. However, based on its assessment of the leaflet's probable impact, and in light of the employer's opportunity to respond and the ambiguities in the offending leaflet, the panel was satisfied that the opportunity for a fair election had not been destroyed.

Of course, under the philosophy of Shopping Kart, the probable impact of campaign propaganda is treated as irrelevant. Accordingly, the Board's analysis in Fabricut illustrated the continued viability, at least in this category of cases, of concepts which supposedly had been abandoned in Shopping Kart. For Chairman Fanning and Member Jenkins, who continued to note their support of Hollywood Ceramics, there was nothing inconsistent in using this mode of analysis. One would have expected, however, that Member Penello, who supported the Shopping Kart decision, would have disassociated himself from that part of the Fabricut opinion which looked to the source of the challenged leaflet and the opportunity for rebuttal to help explain the result.

Another case in which the NLRB concluded that an election should not be set aside, despite some misleading references to Board
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procedures, was Monmouth Medical Center.\textsuperscript{10} There the employer unsuccessfully sought to have the election set aside based on a series of less than wholly accurate statements in the union's campaign leaflets. One of these objectionable statements was a "vote yes" notation hand printed on the front page of an NLRB informational pamphlet distributed by the union. The union later distributed unmarked copies of the same pamphlet. Relying on precedent,\textsuperscript{11} the panel of Members Jenkins, Murphy and Penello concluded that though the Board objects to such use of its publications, voters can readily identify the partisan notation as a comment coming from the union. Hence, voters are not misled.

The Board panel also rejected in Monmouth Medical Center the employer's objection to a letter sent by the union to the voters. In the letter, the union noted that an unfair labor practice hearing had been scheduled because of charges filed against the employer and asserted that "the NLRB conducts such hearings only after investigation and rendering merit to such charges." This statement, of course, incorrectly attributed to the NLRB what is in fact the role of the General Counsel. Characterizing this misstatement as "inartfully drafted," the panel concluded that it did not constitute a substantial mischaracterization.

The Board also rejected the employer's objection based on the union's incorrect statement in a letter that unfair labor practice violations are punishable by fine and imprisonment. Such statements, concluded the panel, do not involve the Board or its processes and, therefore, do not jeopardize the Board's neutral image.

The employer's remaining objection in Monmouth Medical Center dealt with a handbill in which the union had observed that the Board's professional staff members are themselves unionized. This observation implied that if these people are experts respecting labor-management relations, the route they had selected must therefore have merit. A related item cited by the employer was a letter to the employees in which the union advised the reader to phone the NLRB regional officer-of-the-day to find out the truth about anything they heard from anti-union people regarding the union organizers' statements. Still another letter sent to the voters by the union contained a similar statement.

Member Murphy found that these last three items constituted an improper attempt to mislead the employees into thinking that the Board staff gave partisan support to the organizational effort. She voted, therefore, against tolerating such improprieties. The majority, on the other hand, did not read these items as conveying suggestions of

\textsuperscript{10} 234 N.L.R.B. No. 50 (1978).
\textsuperscript{11} A. Brandt Co., 199 N.L.R.B. 459 (1972).
partisanship on the part of the NLRB. Therefore, the majority overruled the setting-aside of the election results.

Wolfrich Corporation12 provides an interesting contrast with the Monmouth Medical case. As in Monmouth, the ultimate result was to reject objections to the election based on alleged misuse of the Board's name. In Wolfrich, however, the dissenter was Member Jenkins, while Member Murphy voted with Member Penello to form the majority.

The objection to the union's conduct was based on two telephone calls made by the union's business agent to two of seven bargaining unit workers. He allegedly told the two workers that he was calling from the NLRB's office and proceeded to reassure them of the gains to be made by selecting the labor organization. These calls apparently were made from the Board's regional office during recesses in a pre-election conference with both sides. At the time, neither the employer's representative nor the Board representative knew of the calls.

Member Jenkins' vigorous dissent argued that this may have improperly created the impression of NLRB partisanship. Accordingly, he voted in favor of holding an evidentiary hearing respecting the telephone calls to determine whether they had in fact jeopardized the Board's neutral image as to require setting aside the election results.13 Members Murphy and Penello, in dismissing the objection, characterized the business representative's reference to being in the Board's offices as "merely an innocuous remark" and not "tacit or implied Board approval of the Union's promises of benefit."

A variation of the objection based on the misleading intrusion of the NLRB's name into an election was presented to the Board in Columbia Tanning Corp.14 In that case, the voters received a letter on official stationery, signed by the state labor commissioner, praising the petitioning union. Most of the voters were newly arrived immigrants. Under these circumstances, the Board held that the voters likely were misled into thinking that the union had received an official sanction. Therefore, the election results were set aside.

The final case of this genre worth noting is GAF Corporation.15 There the Board voted three to two to set aside an election because the union distributed a leaflet advocating union support. Although the leaflet had the union's name at the bottom, it was inscribed in bold face type at the top "National Labor Relations Board" and had a drawing of the U.S. Capitol with the words "It's the law" superimposed. To the

13. Member Jenkins also asserted that other statements made by the union representative brought the situation within the other limited categories of cases in which, under the Shopping Kart decision, elections can be set aside due to misrepresentation. 234 N.L.R.B. No. 76, at 10-11.
majority of the NLRB this constituted a violation of the rule against appropriating the Board’s name to create the impression of partisan support.

Members Jenkins and Penello, in dissent, contended that the overall appearance and content of the leaflet failed to create any impression that it had originated with the NLRB. They asserted, further, that the majority’s position creates a per se rule prohibiting any use of the agency’s name in campaign literature. This charge was offered as criticism by Penello and Jenkins without explanation as to why per se rules should not be adopted for regulating campaign conduct. The majority opinion, on the other hand, does not admit that it has created a per se rule; it does, however, indicate that an objection to the conduct of an election will be sustained if the Board’s name unnecessarily appears as a heading in campaign literature—an approach that certainly sounds like a per se rule.

As Monmouth, Wolf rich, and GAF well illustrate, campaign conduct cases typically turn on conflicting views of what impact particular forms of behavior have upon voters. When dealing with such questions, the accuracy and reliability of the Board’s conclusions are more a problem of faith than of proof. Substituting a per se approach at least provides a higher level of predictability and consistency than does the existing case-by-case approach. Accordingly, it is disappointing that neither side in GAF discussed whether those concerned might actually be better off with many more per se rules regulating such activity.16

Indeed, in light of the fact that the strongest recommendation for the Shopping Kart doctrine is that it is a per se approach, administratively easier to apply with consistent results, it is perplexing that Member Penello, one of the persistent supporters of Shopping Kart, would complain about adopting a per se approach in GAF. Of similar puzzle ment is that Member Jenkins, an equally vigorous opponent of Shopping Kart and a defender of the Board’s responsibility to assure that NLRB elections are not tarnished by unfair campaign tactics, would object to the use of per se rules where they would deter parties from making inappropriate use of the Board’s name, reputation or materials in a representation campaign. In the short run the adoption of a series of per se rules prohibiting certain types of representation campaign tactics might result in an increased number of elections being set aside. Over time, however, such an approach should promote more rigorous adherence to the Board’s rules of conduct than is prompted by the present arrangement in which the parties may willingly take their chances

16. There is nothing new in this suggestion. See, e.g., Bok, The Regulation of Campaign Tactics in Representation Elections Under the National Labor Relations Act, 78 Harv. L. Rev. 38 (1964); J. Getman, S. Goldberg & J. Herman, supra note 6, at 159-63.
with persuading the Board of the minimal impact of their wrongdoing or of the ample opportunity available to the other side to overcome the results of that wrongdoing.

B. Prepetition Misconduct

A per se approach has in fact been adopted in establishing several of the rules by which the NLRB seeks to maximize the "laboratory conditions" for its representation elections. One such rule is that adopted in The Ideal Electric & Manufacturing Co.\(^{17}\) There, the Board announced that in determining whether a representation election should be set aside, it will weigh only those events that occurred after the representation petition was filed. In announcing that rule, the Board offered only the barest hint of the underlying rationale. That rationale appeared to be based on a desire to require the parties to forego the Board’s election machinery in circumstances in which it is unlikely that the holding of a fair election would be possible. Thus, if the prepetition misconduct is serious enough to interfere with the election process, an unfair labor practice charge should be filed and the misconduct remedied prior to starting the election machinery in motion. The rule barring objections to the election based on prepetition misconduct, therefore, operates on a waiver principle. If the petitioner seeks an election despite the prior misconduct, the petitioner is deemed to waive any assertion that the misconduct interfered with the "laboratory conditions" in which the Board seeks to conduct its representation elections.

The Board’s "blocking charge" policy is, to a degree, a companion to the Ideal Electric rule. Under the blocking charge policy, the Board normally will not go forward with a representation election if an unfair labor practice charge is pending.\(^{18}\) Thus, the victim of prepetition misconduct that constitutes an unfair labor practice can avoid the impact of Ideal Electric by filing an unfair labor practice charge prior to the election and thereby avoid an election in which the atmosphere is tarnished by activities that might improperly influence the voters. There is, however, an important exception to the blocking charge policy: normally, the party that files the blocking charges can cause the election machinery to go forward, simply by filing a request to proceed.

The net result of these rules is that there are at least two situations in which the Board will certify the election results even though the election was conducted in an atmosphere which would otherwise be deemed inappropriate for such elections. One is where the prepetition

\(^{17}\) 134 N.L.R.B. 1275 (1961).

misconduct was not discovered soon enough to file a prepetition unfair labor practice charge; the other is where the prepetition misconduct, although grounds for setting aside an election, is not the sort which constitutes an unfair labor practice. This latter category of activity was involved in \textit{NLRB v. Savair Manufacturing Co.},\textsuperscript{19} where the Supreme Court held that an election must be set aside if the prevailing union makes a pre-election announcement that it waives initiation fees for all workers who join prior to the NLRB election.

In \textit{Gibson’s Discount Center},\textsuperscript{20} the Board held that the usual rule, which limits objections to the election to conduct which occurred after the filing of the representation petition, is inapplicable to charges of misconduct based on violations of the rule of the \textit{Savair} case. In so ruling, the NLRB made it clear that this was to be a narrow exception to the prepetition rule, adopted solely because it was compelled by the Supreme Court’s holding in \textit{Savair}. The Board made no attempt to explain why the \textit{Ideal Electric} rule was appropriate in other situations involving prepetition misconduct committed by the party who filed the representation petition.

A question related to \textit{Gibson’s} and \textit{Savair} was posed in \textit{Lyon’s Restaurants}:\textsuperscript{21} whether an election should be set aside because the prevailing union had extracted authorization cards and dues from two employees by asserting incorrectly that the union security clause negotiated by a defunct predecessor was operative in favor of the local that now sought to represent the bargaining unit. Chairman Fanning and Member Jenkins found that the employees had reasonable cause to fear that the union might be able to force their discharge from work for not joining. Hence, as a panel majority they held that the execution of authorization cards under such circumstances was colored by a coercive atmosphere making the situation akin to the potentially false impression of voluntary union support condemned in \textit{Savair}. Accordingly, they concluded that, under \textit{Savair}, the union’s false statements constituted a proper basis for objecting to the certification of the election results even though the events preceded the filing of the union’s representation petition.

In dissent, Member Murphy protested that “almost any union prepetition threat could be construed as an improper inducement to sign an authorization card or as creating an erroneous impression of union strength and thus arguably come within the exception” to the rule against entertaining objections based on prepetition conduct.\textsuperscript{22}

\textsuperscript{19} 414 U.S. 270 (1973).
\textsuperscript{20} 214 N.L.R.B. 221 (1974).
\textsuperscript{21} 234 N.L.R.B. No. 10 (1978).
\textsuperscript{22} Id. at 10.
She further argued that employer threats could similarly be held to contribute an impression of lack of union strength, and that the logical extension of the majority's opinion would be to lift the prepetition bar as to objections to the election based on those threats as well.

Member Murphy's objections to the result in Lyon's have a shallow ring because they fail to explore the justification for the rule barring post-election objections based on prepetition misconduct. The rule regarding objections based on prepetition misconduct was adopted where the petitioner was a knowing victim of that misconduct. It started as a rule that if a party knew about objectionable conduct prior to the election that party could not thereafter seek to have the election results set aside based on that misconduct. In Great Atlantic & Pacific Tea Co., the Board expanded the opportunity to object to the election results by adopting a policy of permitting objections based on misconduct occurring during the "crucial period" of the election campaign irrespective of whether the objecting party knew of the misconduct prior to the election. Ideal Electric eventually defined this "crucial period" to be the period subsequent to the filing of the representation petition, but the Board did not address the question of why a party should be barred from asserting prepetition misconduct if the objecting party had no prior knowledge of it. Nevertheless, the petition date became the absolute cutoff for all objections to the certification of election results.

The Board's justification for the rule, when offered, has been couched in conclusory rather than explanatory terms. Thus, in R. Dakin & Co., the Board stated: "[E]quity and orderly administration require the establishment of a definite cutoff date applicable to the consideration of alleged objectionable conduct." This statement did not summarize the Board's explanation; it was the Board's explanation.

If the Board's goal is to prevent certification of elections where the atmosphere of uncoerced, informed choice has been marred by campaign misconduct, the date of the representation petition bears no reasonable relationship to accomplishing that goal. Campaign misconduct about which the objecting party had no knowledge when the representation petition was filed might very well have impaired the atmosphere sought by the Board for union-management election campaigns. Similarly, if the misconduct was committed by the petitioning party—especially if it was not punishable misconduct—what "equity" is achieved by thereafter telling another party that it cannot base objections to the election on the petitioner's prepetition misconduct? Member Murphy's dissent in Lyon's, however, fails to analyze the problem in terms of

such considerations. Instead, she mechanically calls forth the prepetition rule of *Ideal Electric* and protests that it is being ignored.

In addition, Member Murphy's dissent in *Lyon's* fails to consider the significance of the fact that the "showing of interest" in union representation is a prerequisite to a representation proceeding initiated by workers or by a labor organization. Congress has authorized the Board to proceed in a representation case only upon such a showing of interest.\(^{25}\) Where that showing of interest is improperly attained, the legitimacy of the entire representation proceeding is tainted. Arguably the Board does not even have legal competency to act in such situations: Member Murphy's complaint that the majority's decision can be extended to nullify the prepetition rule completely misses the mark. Prepetition conduct that deter workers from showing their support for a union does not carry the same consequences. If the workers are deterred, they do not sign authorization cards. Thus, the show of interest has not been tainted. Hence, any objection to certifying election results must be based on the inappropriateness of the election atmosphere and not simply on an improperly generated showing of interest.

Accordingly, there is little persuasive weight in Member Murphy's thesis that very limited application should be given to the *Gibson's* exception to the rule against considering prepetition misconduct. In contrast, there is merit to the proposition that prepetition misconduct should be weighed as an objection to an election whenever it taints the petitioner's showing of employee interest in representation—unless, perhaps, the objecting party had ample pre-election notice of that misconduct and remained mute. Indeed, if the concept of "laboratory conditions" for NLRB elections continues to govern the representation process, there is also merit in reexamining the other dimensions to the prepetition rule which operate to prevent the victim of serious prepetition misconduct from ever challenging the fairness of an election if that misconduct was not an unfair labor practice.

**III**

**GISSEL BARGAINING ORDERS**

**A. Impact of Card Solicitor's Comments**

The typical method by which employees show their interest in representation is, of course, by executing authorization cards. Although authorization cards can be used to establish the requisite thirty percent showing of interest in representation needed to support a representation petition, under the *Gissel* doctrine\(^{26}\) such cards can also become

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the basis for issuing a bargaining order. In *Serve-U-Stores, Inc.*,\(^{27}\) the full Board addressed the question of whether an authorization card can be counted toward the showing of majority support in a section 8(a)(5)\(^{28}\) bargaining order case if the card on its face says only that the signer authorizes the union to represent him and the solicitor of the card states that its sole use by the union will be to obtain an NLRB election. Splitting three to two, the Board ruled that because of the solicitor's misrepresentation, the authorization card could not be counted. The majority relied on the Court's discussion in *Gissel* that a solicitor's unambiguous statement that a card would be used only for an election cancels out what is stated in the card being signed. The dissenters, in contrast, argued that the Court's underlying policy required the Board, as finder of fact, to examine the totality of the circumstances in which the apparent intent of the signer of an unambiguous card is rendered ambiguous by the solicitor's statements. Weighing those circumstances in *Serv-U-Stores*, the dissenters concluded that the solicitor's statement likely did not alter the workers' proper understanding of the significance of signing.

Many of the problems in this area could be eliminated if the Board would exercise its rule-making power and adopt a prescribed authorization card form that clearly forewarns the signer against relying upon the solicitor's representations respecting its use.\(^ {29}\) Alternatively, in the exercise of its rule-making authority, the Board could imitate a variety of consumer protection techniques, including the prescription of particular notice language informing authorization card signers that they have a specified and limited right of rescission by following a standard revocation procedure.

**B. The Naive Employer**

In a typical scenario, a union's business agent makes an appointment to see the manager of a business enterprise. On entering the manager's office, the business agent presents cards signed by a majority of the work force, authorizing the union to act as their exclusive collective bargaining representative. The manager's response might follow any one of several patterns. In *Jerr-Dan Corp.*,\(^ {30}\) the manager was the company's president, and his response, after examining all of the cards, was to tell the union agent that it looked like he "got them all." The com-

\(^{27}\) 234 N.L.R.B. No. 191 (1978).
\(^{28}\) Section 8(a)(5) of the National Labor Relations Act, 29 U.S.C. § 158(a)(5) (1976). All sections not otherwise identified are from the NLRA, which is codified beginning at 29 U.S.C. § 151 (1976).
\(^{29}\) This is another suggestion that is not new. See Silver Fleet, Inc., 174 N.L.R.B. 873, 874-75 (1969).
\(^{30}\) 237 N.L.R.B. No. 49 (1978).
pany president asked what would happen next and the union representative said that the company should recognize the union and negotiate a contract. The Administrative Law Judge found that the parties then agreed on a meeting four days hence to negotiate a contract. Having said this much, the company president finally consulted counsel and thereafter sent a telegram to the union in which he cancelled the scheduled meeting, asserted the company's doubt of the union's majority status and of the appropriateness of the bargaining unit, and stated that the union would be recognized only if it won an NLRB election. The full Board unanimously concluded that the telegram was too late. Having agreed to bargain, the company had implicitly recognized the union and could not withdraw the recognition until there was at least a reasonable period of good faith bargaining. This result is consistent with Linden Lumber and should delight those lawyers who are forever trying to impress their clients with the wisdom of not making a move without the advice of counsel.

IV
SUPERSENIORITY

A considerable amount of the Board's and the General Counsel's energies in the 1978 fiscal year were devoted to examining several dimensions of the permissible reach of provisions in collectively bargained agreements that grant special seniority privileges (superseniority) to union officials. Although section 8(a)(2) prohibits employers from assisting unions, and section 8(a)(3) prohibits discrimination in favor of those who engage in union activity, the Board and the courts long have recognized the legitimacy of a variety of special privileges granted to workers who are union officials where those privileges functionally serve the efficient administration of the collective bargaining relationship. In the 1975 decision of Dairylea Cooperative, Inc., the Board held that granting the special privilege of superseniority to a shop steward is legitimate under the NLRA only to the extent that that privilege facilitates the performance of lawful shop steward activities. Thus, the Board held that superseniority limited to layoff and recall is proper because it facilitates shop steward participation in the mechanics of interpreting and applying the collective agreement to the work force. Superseniority provisions that are not limited to layoff and recall, the Board held, are presumptively unlawful.

In Preston Trucking Co., the collective agreement covering over-

32. 219 N.L.R.B. 656 (1975), enforced, 531 F.2d 1162 (2d Cir. 1976).
the-road drivers had a superseniority provision that granted that privilege "for all purposes including layoff, rehire, bidding and job preference." The union argued that bidding and job preference were the same, and that contract administration was aided by permitting the shop steward to select a route that provided ample opportunity to attend to business at the union hall. Chairman Fanning, a dissenter in 

Dairylea, found that the union had overcome the presumption of invalidity; he was outvoted, however, by Members Jenkins and Murphy. The latter found no proof that the shop steward's superseniority was necessitated by inadequate opportunities to conduct union business on the route assignment from which he had bid out, or that the clause restricted use of superseniority to those bids that would improve the steward's ability to represent bargaining unit members. Commenting on the Preston Trucking decision, General Counsel Irving has said that even if the superseniority provision on its face is unlawful, an enforcement "in a particular instance can be lawful if adequately justified." The General Counsel unsuccessfully challenged the scope and application of a superseniority clause in Expedient Services, Inc. The NLRB there held that other union officers besides shop stewards could also receive special privileges such as superseniority, because of their role in administering the collective agreement. The Board also held that special layoff protection can lawfully be exercised to retain not only a union official's employment but also his or her current job and pay classification.

In a similar case, the Board indicated that a superseniority clause violates the Act only if it improves the beneficiary's job status in the course of protecting him from a layoff. Member Jenkins, however, announced that in his opinion a superseniority provision should be permitted to do no more than keep the union official on the job and available to perform bargaining unit representation responsibilities. Expanding on these decisions, the General Counsel announced that in the context of a layoff or reduction in force, superseniority can be exercised lawfully to keep the union representative in his or her department or occupational group.

In dicta in Allied Supermarkets, Inc., and then in the holding of Explo, Inc., the Board announced that even if a superseniority provision is presumptively valid, a union is guilty of violating the Act if shop

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34. Id.
38. 233 N.L.R.B. No. 84 at 1 n.1 (1977).
stewardships are awarded by its leadership as personal favors to secure benefits to friends or relatives. Thus, appointments of superseniority can be used only to further the interests of bargaining unit representation.

The Board expanded on its *Dairylea* rationale in deciding *Pattern Makers' Association of Detroit*, where it held that a superseniority clause cannot be used to protect the job status of union officials whose presence on the work force does not facilitate their performance of responsibilities in representing the bargaining unit. Moreover, the Board rejected the alleged justification that such protection is necessary to combat employer discrimination against union officials resulting from their union activity. Justification for superseniority under the *Dairylea* decision, stated the Board, must be based on the benefit to "members of the bargaining unit generally by facilitating the effective administration of the collective-bargaining agreement."

In his review of superseniority decisions, the General Counsel announced that regional personnel investigating charges involving presumptively invalid provisions should affirmatively inquire into possible justifications and encourage parties to narrow their charges to specific portions of the superseniority provision. He also directed that in investigating charges directed at a particular official's enforcement, NLRB personnel need not investigate the responsibilities of all benefitted union officials. It would appear that the General Counsel, already concerned about the ability of the regional offices to handle the current workload, is trying to discourage wholesale onslaughts against superseniority provisions.

Superseniority, if limited to layoff and recall privileges, probably has not played too great a role in labor-management relations in most American industries. According to Bureau of National Affairs surveys of collective bargaining agreements, it is estimated that only about one-third of all labor contracts contain superseniority clauses giving union stewards or local union officers preferred status in the event of a work force reduction. Some, perhaps many, of these provisions no doubt have gone beyond what is permitted under *Dairylea*.

Where the agreement does have a superseniority provision, it probably has little effect on actual layoff and recall determinations. The union officer or shop steward normally is someone who comes to his position with a moderate amount of seniority. Unions are unlikely to appoint, nor members to elect, the more junior members of the work

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41. *Id.* at 4.
42. *BUREAU OF NATIONAL AFFAIRS, COLLECTIVE BARGAINING NEGOTIATIONS AND CONTRACTS* 60:1.
force as officers and shop stewards. Typically, the union and its membership want representatives who are thoroughly familiar with shop and labor relations practices. They also want representatives whose personalities are well known to the bargaining unit workers. Therefore, even absent superseniority, shop stewards and union officers normally have enough seniority to weather all but the most severe work force reductions. As a result, there seldom is much reason for a union to seek superseniority for the purpose of assuring that the shop stewards and union officers will be around when things get tight.

On the other hand, superseniority benefits that bear no relationship to layoff or recall may be attractive to unions because they provide representatives with other highly desirable special privileges. Privileges such as preference in picking work hours, less arduous or more lucrative job assignments, and desirable vacation dates may substantially contribute to the willingness of workers to accept the responsibilities of shop representation. Absent such special privileges, the inducement to undertake these representational positions must be in the nature of social or ideological incentives or cash benefits paid by the union. At one stage of American industrial relations, social and ideological inducements no doubt were adequate to enable unions to recruit desired people to serve as shop representatives. Now, such intangible inducements are often inadequate.

As a result of Dairylea and its progeny, unions can offer prospective shop representatives superseniority only in the form of special layoff/recall privileges. Thus, union members will more frequently have to finance their shop representation directly out of the union treasury. Of course, where this is done, it works to the benefit of the bargaining unit in that the membership gains a more concrete notion of the cost of shop representation than is possible when the inducement to serve is in the form of special shop privileges. The reduction of the special shop privileges might also be accompanied by the shop steward's loss of the trappings of special power. This loss, too, no doubt carries some benefits for the overall bargaining unit membership. Accordingly, the superseniority cases probably represent a net gain for organized workers.

V
DISCIPLINING OF SHOP STEWARDS

During the past year the Board also examined the question of special work responsibilities of union representatives. From time to time, employers attempt to hold shop stewards and other bargaining unit union officials to a higher standard of disciplinary responsibility under the collective agreement than that to which they hold other workers.
This occurred, for example, in *Precision Castings Co.*, where the workers engaged in a wildcat strike despite a no-strike provision in the collective agreement. The parties' labor agreement required the union to take "all reasonable steps to restore normal operations" in the event of such a walkout. Five shop stewards participated in the wildcat and the employer discharged them, but no others, on the grounds that they had failed to carry out their special responsibility to terminate such misconduct. An NLRB panel of Chairmen Fanning and Members Jenkins and Murphy held that the imposition of the special penalty on the shop stewards was a section 8(a)(3) violation. Although the Board will allow an employer to impose a more severe penalty on those who play a leadership role in an illegal walkout, whether or not they hold union office, it will not permit a greater penalty to be imposed on certain workers based solely on their union status.

An identical holding in *Gould Corp.* drew two dissenting votes. Member Truesdale, in dissent, cited the rule stated in *McLean Trucking Co.*, that if workers are unprotected, as in a strike in violation of a non-stoppage provision, the employer is free to discriminely single out certain strikers as targets for special punishment. The majority's reasoning in *Precision Castings*, he complained, would insulate union officials from the normal risks of engaging in unprotected activity. Truesdale's dissent further suggested that the union's affirmative contractual undertaking to repress wildcat strikes implicitly subjected the shop stewards to a contractual special duty, the breach of which could be specially punished. Member Penello's separate dissent adds little to that of Member Truesdale besides hyperbole and invective.

The logic of Truesdale's dissent has some appeal. While it is tempting to support policies that appear to be aimed at reducing the frequency of wildcat activity, the majority's position reflects a more realistic approach to labor relations than that proposed by Member Truesdale. Unlike Truesdale's position, the majority's holding is sensitive to the social pressures that can effectively force a shop steward to join the other workers who have gone on a wildcat strike. In addition, there is practical wisdom recommending the majority's approach even for the purpose of reducing wildcat actions. Once workers walk out on a wildcat, the shop steward who remains at work because of the coercion of his heightened vulnerability to disciplinary sanctions would not likely have even the slightest vestige of persuasive power with the strikers. In contrast, the steward who tags along can continue to provide leadership—leadership directed at a return to work once the initial

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43. 233 N.L.R.B. No. 35 (1977).
emotional outburst of the wildcat strike has been spent. 47

VI

UNILATERAL CHANGES

A. Change of the Business Operations

Without giving notice to its employees' bargaining agent, an employer closes its restaurant and lays off the staff. About a week later the restaurant reopens as a self-service cafeteria; the kitchen staff is recalled, but the waitresses are notified that they cannot expect to return to work. Has the employer violated the duty to bargain imposed by section 8(a)(5) of the NLRA? In Holiday Inn of Benton, 48 the panel of Chairman Fanning and Members Jenkins and Penello held that the displacement of employees by (in effect) customers came under the Fibreboard 49 rule against the unilateral contracting-out of work previously performed on the premises by employees. The employer's failure to bargain over both the decision and its impact on the employees was therefore an unfair labor practice.

In explaining the result in Holiday Inn of Benton, the Board attempted to distinguish several recent decisions in which it has held that an employer need not bargain about restructuring the business even though the changes would shift work from some workers to others. The panel reasoned that in these prior cases the employer was engaged in expanding or reorienting its capital investment. The new equipment needed to alter the restaurant in Holiday Inn of Benton, the Board asserted, was not a "major reinvestment of capital."

It is difficult to reconcile Holiday Inn of Benton with recent cases holding that an employer does not have a duty to bargain about those changes that result from a "basic reorientation of an employer's business." 50 What was the change from a full service to a service restaurant if not a basic reorientation of the business and investment capital? To note the weakness of the Board's attempt to distinguish Holiday Inn of Benton, however, is not to criticize the result. Fibreboard calls for prior notice to the bargaining agent before making the sort of change in business operations that result in a significant alteration of work opportuni-

47. The group dynamics of a wildcat strike are complex and dependent on many variables. Unless a steward is leading the walkout, it is unlikely that he can prevent it. See Atleson, Work Group Behavior and Wildcat Strikes: The Causes and Functions of Industrial Civil Disobedience, 34 Ohio St. L.J. 751 (1973), for an excellent analysis of the nature of wildcat activity. The dissenters' position in Precision Castings, however, received judicial support in Indiana & Mich. Elec. Co. v. NLRB, 599 F.2d 227, 230 (7th Cir. 1979).
ties. Customers were displacing the Holiday Inn waitresses every bit as much as the contractors' staff was displacing the employer's maintenance personnel in Fibreboard. Thus, Holiday Inn of Benton is consistent with Fibreboard.

The concurring opinion in Fibreboard spoke of the employer's continued prerogative to make decisions that go to the "core of entrepreneurial control." From management's vantage, most decisions regulating the terms and conditions of employment go to the core of entrepreneurial control. An increase in wages reduces the amount of capital immediately available for expanding inventory, for increasing merchandizing efforts, or for acquiring new equipment. A wage increase may mean abandoning plans to expand into new market areas. An agreement to put overtime on a voluntary basis may mean establishing an additional work shift or modifying customer services. Yet decisions such as these are unquestionably subjects of the duty to bargain and cannot be made unilaterally by management. Thus, the catchy, oft-quoted phrase of the concurring opinion in Fibreboard provides no guidance respecting the duty to bargain when managerial decisions alter the terms and conditions of employment. Nevertheless, the "core of entrepreneurial control" language from Fibreboard has become an incantation increasingly used by the Board in the past few years, and used consistently by most of the federal courts since Fibreboard, to allow management unilaterally to modify terms and conditions of employment through structural changes in business operations if the employer then goes through the largely superfluous motions of bargaining with respect to the impact of its decision.51 Rather than embarrass itself with its clumsy effort to distinguish Holiday Inn of Benton from prior decisions, it would have been more accurate and constructive for the Board to have overruled those inconsistent prior decisions and thus give the rule of Fibreboard a broader and more realistic interpretation.52


52. It is true that the majority opinion in Fibreboard took note of the fact that the change involved in that case did not alter "the Company's basic operation" and that "no capital investment was contemplated." But these observations did not go to the heart of the Court's rationale. Rather, they are found in the course of the Court's demonstration of how unobtrusive and potentially constructive it would have been to adhere to the bargaining duty in that particular case.

For a thorough discussion of what would be encompassed in a "broader and more pragmatic interpretation," see Rabin, Fibreboard and the Termination of Bargaining Unit Work: The Search for Standards in Defining the Scope of the Duty to Bargain, 71 Colum. L. Rev. 803, 821-36 (1971). This reference, however, is not an endorsement of Rabin's third criterion—that the issue must be within the expertise of both parties. Expert advice can be purchased by either side, and often it conflicts. Since the duty to bargain does not compel management to concede, the existence or lack of union "expertise" does not alter the prospects for mutual accommodations.
B. Change of Work Benefits

Many employers pay their bargaining unit union representatives for the time spent in grievance activities. In addition, though less often, some employers pay the union representatives for time spent serving as delegates for the workers at the bargaining table. For a number of years, Axelson, Inc., followed this less common practice of paying bargaining committee members for negotiating time. The collective bargaining agreement in force expressly provided that a shop committeeman would be allowed to leave his work station, if necessary, to attend contract renewal negotiations, and that he would be paid for time so spent. During negotiations for a new contract in 1976, the company informed the union that it would not make such payments but instead would be willing to meet during non-work hours.

The union filed a charge under section 8(a)(5), asserting that the company’s conduct constituted a unilateral change in a mandatory term or condition of bargaining. The NLRB upheld the union’s position and found that the collective bargaining agreement and past practices had established a right to receive remuneration from the company for time spent at the bargaining table and that the right had been unilaterally changed by the employer. The Board stated that this case was similar to other situations in which it has recognized, as mandatory bargaining subjects, matters affecting union security and the union’s ability to administer the collective agreement in the work place: “These union related matters inure to the benefit of all members of the bargaining unit by contributing to more effective collective bargaining representation. . . .”53 As such, the Board reasoned, these matters vitally affect employer-employee relations and hence involve a term or condition of employment. While no quarrel is offered concerning this reasoning, it must be noted, however, that it fails to explain why the employer here did not avoid liability through its offer to negotiate during non-work time.

VII

Recording of Negotiations

Overturning many years of precedent, the Board in the 1978 fiscal year decided that the presence or absence of a court reporter or recording devices at collective negotiations is not a term or condition of employment. Therefore, the employer in Bartlett-Collins Co.54 violated the Act when it stated that it would be available for negotiations only if the union acceded to its demand to have a court reporter present.

In a related development, the Board in *Carpenter Sprinkler Corp.* held that it will not allow into evidence recordings that were secretly made at contract negotiations. Acknowledging that the Federal Rules of Evidence permit the introduction of such materials, the Board justified its position as being designed to encourage free and open discussion among the collective bargaining participants.

The result in *Bartlett-Collins Co.* is recommended by its sound logic, and the result in *Carpenter* certainly serves to promote the sort of openness and honesty necessary for stable labor-management relations. This is not to suggest, however, that recording devices should never be used in collective bargaining. Once an atmosphere of distrust has developed, the ability to produce such material, in order to recall or ascertain what in fact was said will probably do more to reduce charges of bad faith than will any other mechanism. Of course, that benefit can be achieved only if both sides agree to its use and are free to turn off the recording device at any time.

**VIII**

**UNION ELECTION CAMPAIGN ON EMPLOYER’S PREMISES**

In *Timpte, Inc.*, an employer became disturbed at the coarse language used in literature being distributed in the plant during a campaign for union office. Citing the company’s desire to protect the sensibilities of those workers who might be offended by such language, the company directed the candidates to stop distributing material that used vulgar, disrespectful or indecent language. When the words “chicken shit” later appeared in a leaflet distributed in the plant by one of the candidates, the employer prohibited that candidate from further distribution of his campaign literature on the company’s premises. Citing numerous decisions in which the Board and the courts have held that repulsive speech is protected in the context of labor disputes, the Administrative Law Judge held that the employer unlawfully interfered with the target candidate’s protected rights by barring his access to workers. The Board affirmed the Administrative Law Judge’s conclusion without further elaboration. There being no evidence that the leaflet was gravely disruptive, the Board’s decision is consistent with its

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57. The Tenth Circuit Court of Appeals reversed this decision, announcing that it was doing so “as a matter of law.” In reaching this conclusion, the court characterized the leaflet’s content as a “combination of profanity and filthy language in the disparagement of persons at the plant.” 100 L.R.R.M. 2479 (1979). The court would thus condition § 7 rights upon the use of censored language—a result that flies in the face of the First Amendment.
approach to the use of an employer's premises for union activity and political discourse.\textsuperscript{58}

IX

WORK ASSIGNMENT DISPUTES

A. Employer's Preference

It often has been observed that the single most compelling factor in NLRB work assignment determinations appears to be the employer's preference from among the competing work groups.\textsuperscript{59} In \textit{International Association of Machinists (General Electric Co.)},\textsuperscript{60} the Board took this decisional propensity to its ultimate limit. There, the IAM and the International Brotherhood of Electrical Workers both claimed for their respective bargaining unit members the occasional power plant work of disassembling and reassembling stoker unit retorts. The Board found that both groups of workers had the requisite work tools and skills, that both groups had on occasion been assigned to do the work in the past, and that there was no guiding industry practice. The only distinguishing factor cited by the Board was that IBEW workers are always present in the power plant, whereas IAM workers are not as consistently present at the location but are regularly present at nearby locations. Rather than give this factor controlling weight, the Board concluded that both groups of workers were entitled to the work but neither group was exclusively entitled. Thus, the Board determined that the employer could, at its discretion, assign the work to employees from either group.

This result is similar to the sort of equitable, flexible adjustment that an arbitrator might adopt. It resolves the work assignment dispute without creating property rights in the task. Such proprietary claims to work assignments tend to hamper productivity and distract both workers and management from the more basic and appropriate worker interest in job security and financial success. The Board's approach in \textit{IAM (General Electric)} cannot be justified in all cases, but where it is justified it deserves more frequent use.

B. Work Preservation or Work Assignments

For some years, workers represented by Longshoremen's Local 62 had been tying and untying vessels carrying bulk petroleum to a Chevron plant in Ketchikan, Alaska. In 1977, Chevron switched from self-powered tankers to tug-pulled barges for hauling the bulk petroleum

\begin{footnotes}
\p58 Eastex, Inc. v. NLRB, 437 U.S. 556 (1979); Republic Aviation Corp. v. NLRB, 324 U.S. 793 (1945).
\p60 233 N.L.R.B. No. 51 (1977).
\end{footnotes}
products and the tugboat crews began doing the tying and untying work. The longshoremen's union picketed in protest against this loss of work and a section 8(b)(4)(D) charge was filed. Chairman Fanning voted to dismiss the resulting section 10(k) proceeding on the grounds that the picketing involved work preservation and that the section 8(b)(4)(D) charge was therefore without foundation. He was outvoted, however, by Members Penello and Truesdale, who characterized the situation as involving the displacement of one form of work task by a new operation with an attendant dispute regarding the proper assignment of the new work.61

In all honesty is either characterization of what took place any more compelling than the other? Legal results often are controlled by which label one places on the bottle—as happened in the *Chevron* case. However, when those results turn on semantic quibbling, it is highly questionable whether anything is accomplished by relegating the dispute to an adjudicative process. In work assignment dispute cases, the NLRB is often put in the unenviable position of having to referee which group of workers suffer the consequences of economic dislocation—not the sort of task usually performed by an agency that was designed to facilitate concerted efforts to improve working conditions and benefits. One solution, of course, is to legislatively deal with the job security problems that generate such disputes and then to treat as unlawful any conduct which attempts to coerce a party into bypassing the machinery or results of that statutory policy.

X

CONDUCT IN SUPPORT OF THE ARBITRAL PROCESS

In *NLRB v. Acme Industrial Co.*,62 the Supreme Court held that the duty to bargain in good faith includes the duty to supply the other side with information that is material to that party's assessment of the proper performance of its duties as bargaining representative. In *Fawcett Printing Corp.*,63 the Board adopted an Administrative Law Judge's decision in which *Acme* was extended to require an employer to provide material information specifically requested by a union preparing to take a grievance to arbitration. The Board held in *Transport of New Jersey*64 that this duty to comply with what amounts to discovery requests includes the duty to furnish the names and addresses of witnesses to an event that is the subject of a grievance.

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63. 201 N.L.R.B. 964 (1973).
In contrast, the full Board in *Anheuser-Busch, Inc.*\(^6\) unanimously held that a party is not entitled to copies of witness statements. In reaching this result, the Board relied upon the Supreme Court's affirmation of its refusal to allow discovery of witness statements made to NLRB investigators.\(^6\) The potential coercion or intimidation of witnesses to change their testimony or refuse to testify, argued the Board, justifies placing this same limit upon the scope of discovery that is available under section 8(a)(5) and 8(b)(3) in preparation for grievance-arbitration proceedings. However, the force of this rationale is less compelling in grievance-arbitration proceedings. Although the grievance arbitration process has its elements of adversarial contest, these proceedings are also an extension of collective bargaining. The goal is at least as much to find an accommodation of competing interests as it is to vindicate legal rights. It makes sense, therefore, to presume that the parties are more interested in ascertaining the facts underlying their conflict than in presenting the fact finder with a false portrait of the background events. Furthermore, the interested parties normally have daily contact with the potential witnesses so that the opportunity for coercion aimed at altering or eliminating testimony is readily available irrespective of a right of access to witness statements. Pre-hearing access to written witness statements should improve the prospects for settlement and the representatives' ability to focus their preparation and presentation on the points of actual controversy. On balance, the *Anheuser-Busch* decision would have done more to achieve the ultimate goals of the NLRA had it been decided the other way.

**XI**

**ACCESS TO GOVERNMENTAL AID OR PROTECTION**

Just as access to the NLRB is a preserved right under the NLRA, access to other federal administrative agencies, such as the Wage-Hour Division of the Department of Labor, the Occupational Safety and Health Administration, and the Equal Employment Opportunities Commission, is similarly protected by statute. Some state employee benefits programs, however, do not provide protection from interference with the right of access. Thus, in jurisdictions lacking such protection, an employer can punish a worker for filing a worker's compensation or unemployment compensation claim. On occasion, the NLRB has held that the Act does not protect an employee from punishment for seeking such a benefit because the appeal does not constitute concerted activity.\(^7\) However, in *Supreme Optical Co.*,\(^8\) the Board

\(^{65}\) 237 N.L.R.B. No. 146 (1978).
\(^{67}\) See, e.g., Hunt Tool Co., 192 N.L.R.B. 145 (1971).
found an unfair labor practice violation where five workers were fired after they took time off to appear as witnesses at the unemployment compensation hearing of a discharged fellow worker. The Board noted that the five had received leave permission from their supervisor. In explaining its result, the Board stated that the common action of five workers was concerted activity for mutual aid; such activity is protected under the Act even if it promises no more immediate benefit to those acting in concert than the increased likelihood that other workers might come to their aid in a similar situation.

Although in deciding Supreme Optical the NLRB relied on the fact that several workers were acting in concert, it held in Self Cycle & Marine Distributor Co.\(^ {69}\) that an employer commits an unfair labor practice even when it discharges a single worker for pressing an unemployment compensation claim. By refusing to withdraw her claim, the Board explained, the worker was setting an example for others to follow in dealing with a situation that all might face at some time. Thus, the claimant was acting in furtherance of a collective cause.

Both the Supreme Optical and Self Cycle cases involved unemployment compensation claims. The NLRB noted that state unemployment compensation programs are encouraged specifically by federal law.\(^ {70}\) Arguably, state workers' compensation programs are less deserving of NLRB protection because they are not similarly promoted by federal legislation. Still, the rationale of the Self Cycle case logically should be extended to protect any employee who files a claim under an employee benefits program so long as the employment is otherwise covered under the NLRA.

XII

UNPROTECTED STRIKES

The Supreme Court held in Nolde Brothers, Inc. v. Bakery Workers Local 358\(^ {71}\) that the duty to resolve a grievance through contractual grievance-arbitration machinery is enforceable beyond the termination date of the collective agreement, so long as the grievance arose during the life of the contract. In Goya Foods, Inc.,\(^ {72}\) employees were disciplined when, after the term of their collective agreement had expired, they engaged in a work stoppage in support of a grievance that had arisen during the life of the contract. The union later announced that the strike supported bargaining demands as well.

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72. 238 N.L.R.B. No. 204 (1978).
Faced with this fact situation, four members of the Board reasoned from Nolde Brothers that since a provision for exclusive resolution of disputes by arbitration, such as the one in the expired agreement, carries with it an implied no-strike provision, the employees were engaged in an unprotected work stoppage; the employer could therefore refuse to reinstate the strikers when they offered to return to work.

Chairman Fanning accepted the Board's result for reasons unrelated to any implied no-strike clause. He rejected the logic of the majority position with respect to the limited post-contract no-strike obligation on the grounds that the right to strike is protected by section 7 of the Act and can be waived only upon a clear and unmistakeable showing of an intention to waive. His argument would be most compelling, were it not for the fact that the Supreme Court has long held, in cases such as Teamsters Local 174 v. Lucas Flour Co.,73 that a no-stoppage obligation is to be implied to the extent that the area of conflict is covered by an exclusive arbitration provision.

Nevertheless, Fanning's is the sounder position. It is unreasonable to assume that a union, in entering into an arbitration clause, intends to waive the right to strike after expiration of the agreement. Yet merely because one of the disputes to be resolved in renewal negotiations arose out of the interpretation of the prior agreement, the majority in Goya read such a waiver into the expired contract. Much of the bargaining process centers on the readjustment of the rules of the shop that arose out of the application of the expired or expiring agreement. By accepting arbitration, the parties agree to rely on that method for settling differences over their claimed contractual rights, not over their demands for modification of those rights in a new agreement. The result in Goya Foods distorts the arbitration provision by expanding it to alter the parties' right to resort to the normal weapons of economic pressure for readjusting the terms and conditions of their relationship.

Operating Engineers Local 18 (Davis-McKee, Inc.)74 also involved the question of the extent to which a waiver of the right to strike may be found by implication. In Davis-McKee, Inc., however, the disciplinary action being challenged in the unfair labor practice proceeding was the union's imposition of a fine upon two members who crossed another union's primary picket line. The union took its disciplinary action against the two workers even though its collective agreement contained a no-stoppage provision which read: "There will be no stoppage of work because of any difference of opinion or dispute which arise[s] between the union and the employer." If this provision effectively waived the right to respect another union's primary picket line,

73. 369 U.S. 95 (1962).
the union's disciplinary action would have been a violation of section 8(b)(1)(A)—unlawful interference with the right to refrain from concerted activity. If the no-stoppage provision did not constitute a waiver of the right to respect primary picket lines, as a result of the section 8(b)(1)(A) proviso respecting the rights of unions, the union was free to prescribe membership rules and to discipline its members because of their failure to respect a lawful picket line. The Board unanimously agreed, in *Davis-McKee, Inc.*, that the union's disciplinary action was lawful under the NLRA.

Member Penello, in a concurring opinion, disagreed with the majority's standard for deciding when the right to participate in a sympathy strike has been waived. That standard started with the premise that statutory rights such as the right to engage in concerted activity will not be found to have been contractually waived absent "a showing of 'clear and unmistakable' waiver." The majority then reasoned that waiving the right to use a work stoppage to improve or enforce terms and conditions of employment is not the equivalent of waiving the right to respect work stoppages engaged in by others. Their opinion states: "[W]e shall require that the parties at the very least have discussed the question and, preferably, have expressly embodied in their agreement their intent to extend a strike ban to sympathy strikes." The majority acknowledged that this approach is inconsistent with the Board's decision in *UMW Local 12419 (National Grinding Wheel Co.)*, where it treated a broad no-strike clause as barring sympathy strikes even though there was no evidence to support the contention that the parties intended to place such strikes within the scope of the ban. But, as correctly noted by the majority, *National Grinding Wheel* had already been overruled *sub silentio* in *Keller-Crescent Co.* and other cases.

The majority's reluctance to infer from the no-strike clause an intention to ban sympathy strikes finds some support in the Supreme Court's decision in *Buffalo Forge Co. v. United Steelworkers of America.* There, the Court, in holding that a federal court cannot enjoin a sympathy strike, distinguished work stoppages for the strikers' own benefit from stoppages aimed at giving support to the efforts of other workers. Member Penello asserted that *Buffalo Forge*, if at all relevant, supports his own position that a broad no-stoppage provision

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76. 238 N.L.R.B. No. 58, at 3.
77. *Id.* at 4.
79. 238 N.L.R.B. No. 58, at 4-5.
80. 217 N.L.R.B. 685 (1975), *enforcement denied on other grounds*, 538 F.2d 1291 (7th Cir. 1976).
should be found to ban all forms of stoppage including sympathy strikes. His main reliance, however, was on his interpretation of the Supreme Court's holding in *NLRB v. Rockaway News Supply Co.*\(^8\) that the employer lawfully discharged a worker who refused to cross a picket line. In that case, an arbitration panel had already ruled that the discharged worker did not have a grievance under the collective agreement because the refusal to cross the picket line violated the no-strike provision. The arbitration award was based on an industry practice of explicitly spelling out the right to respect picket lines as an express limitation to a peace clause.

For the majority in *Davis-McKee, Inc.*, the arbitration award in *Rockaway News* was significant in that the Supreme Court deferred to the interpretation placed on the collective agreement by the arbitrator. For Member Penello, the arbitration award was for the Court "only . . . a convenient makeweight to confirm its own reading of the no-strike provision of the contract."\(^3\) Nevertheless, Penello concurred in the Board's result in *Davis-McKee, Inc.* because the no-stoppage clause was not phrased in the sort of language that is found in the *Rockaway News* collective agreement.

There is full agreement in *Davis-McKee, Inc.* that in that case, as in *Rockaway News, National Grinding Wheel*, and *Buffalo Forge*, the ultimate question in deciding whether any disciplinary action is lawful turns on whether the contracting parties intended to waive the workers' right to engage in sympathetic concerted activity. In most instances, the parties to collective agreements have designated arbitration as the tribunal for contract interpretation. Therefore, there was in *Rockaway News* sound reason for the Court to rely on the arbitration award to find the meaning of the collective agreement. In *Buffalo Forge*, there was equally good reason to avoid construing the no-stoppage provision in advance of arbitration. Absent the availability of an arbitrator's interpretation, however, the hearing tribunal must give its own construction to the collective agreement.

In the long run it should make little difference whether broad no-strike clauses are construed by the Board to encompass or not encompass sympathy strikes and refusals to cross picket lines. The Board should, however, take a consistent approach. With the benefit of a consistently applied presumption of coverage or non-coverage, the parties are clearly forewarned of the impact of entering into a broad no-stoppage agreement. If their intention is contrary to that presumption, they can explicitly write their intention into the contract. Absent such ex-

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82. 345 U.S. 71 (1953).
83. 238 N.L.R.B. No. 58, at 18.
press language, it is reasonable to treat the parties’ intent as being consistent with the prevailing interpretive presumption.

Because most collective agreements select arbitration as the tribunal for contract interpretation, the soundest approach for the Board in shaping that presumption would be to take guidance from the pattern of arbitral awards. However, neither opinion in Davis-McKee, Inc. discusses or places reliance upon the prevailing interpretive approach of labor arbitrators. Were the Board to examine recent reported arbitration awards, it would find that overall they support Member Penello’s approach. It must be noted, though, that the case opinions generally lack careful, thorough analysis of this issue; the number of recent decisions even addressing the question is insufficient to represent a reliable sampling of arbitrator opinion.  

There is additional evidence suggesting that the Board’s approach in Davis-McKee is at odds with the normal expectation of those who negotiate collective agreements. The Bureau of National Affairs regularly surveys collective agreements and reports on the frequency with which various provisions appear. Its sampling reveals that a total of twenty-two percent of all collective agreements have no-stoppage clauses which contain explicit provisions permitting workers to observe picket lines in specific situations. For manufacturing industries, that figure is twelve percent; for the apparel industry, it is one-third; in the retail industry, it is about seventy percent; and in the maritime and construction industries, it is about fifty percent. The BNA study does not state the frequency with which provisions explicitly prohibiting workers from respecting picket lines are found.

The prevalence of agreements in which the parties spell out the right of workers to observe picket lines indicates that those who negotiate and draft such agreements generally operate under the assumption that a no-stoppage provision encompasses refusals to cross picket lines. If their understanding were otherwise, there would be no need to spell out that right when the parties intend to preserve it under the collective agreement. Therefore, the Board’s approach would more closely resemble reality if it were to assume that, absent specific contractual language to the contrary, a union waives the right of workers to refuse to

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cross picket lines when it enters into a broadly-worded ban on work stoppages.

Whether the language in Davis-McKee constitutes such a typical broad no-stoppages provision is a closer question. Because the language in that provision spoke specifically of disputes between the employer and the union, there is sound reason to accept Member Penello's assumption that the parties did not intend to reach the situation in dispute and that the particular provision should be distinguished from the sort providing that, "there shall be no workstoppages for any reason whatsoever."

XIII
DEFERRAL TO ARBITRATION

As a result of the Board's decision in Croatian Fraternal Union of America,86 the General Counsel announced in November 1977 that in determining whether to defer to arbitration when issuance of a complaint has been sought, Regional Directors should no longer give any weight to the financial ability of the parties to afford arbitration. However, the General Counsel left open the possibility of refusing to abate in situations in which there is a pattern of an employer repeatedly violating section 8(a)(5) with the knowledge that the bargaining agent cannot afford to seek redress under the contractual dispute-resolution machinery.

The Kansas City Star Co.87 case provided Member Truesdale with his debut for addressing the running controversy respecting the proper application of the Spielberg88 doctrine governing the Board's deferral to arbitral awards. In a concurring opinion, Member Truesdale espoused the Board's responsibility to accept the arbitrator's award so long as (1) the hearing was fair; (2) the parties had agreed to be bound; (3) the issue at hand was addressed by the arbitrator; and (4) the result was not clearly repugnant to the Act. Applying those principles, the majority upheld an award in favor of an employer that discharged wildcat strikers and declared the collective agreement rescinded.

While Truesdale's clear and well-reasoned endorsement of the Spielberg deferral doctrine deserves praise, it is disappointing that no member of the Board explored whether the arbitrator's approval of the employer's rescission of the collective agreement was not clearly repugnant to the Labor Act. Collectively bargained agreements are not ordinary contracts; hence, the normal rules of contract law often are

inapplicable. Their interpretation should reflect the goal of federal labor legislation to promote stability in labor-management relations by encouraging parties to adopt and to live in conformity with their negotiated agreements. Considerable government resources are invested in facilitating the enforcement and interpretation of such agreements—resources greater than those provided in support of ordinary contracts. With such a powerful underlying policy of holding the parties to their collective agreement, the doctrine of rescission ought not be a part of our national law of labor agreements and the Board should unequivocally reject any suggestions to the contrary.

An especially interesting problem concerning the application of the Spielberg doctrine was presented in Douglas Aircraft Co. The Douglas Aircraft case arose when the company discharged a union committeeman whose sole responsibility as a Douglas worker was to represent the bargaining unit employees. The committeeman grieved the discharge and also filed a charge of anti-union discrimination. In the grievance procedure, the company and union agreed to reinstate the committeeman and submit the back pay question to arbitration upon the withdrawal of the unfair labor practice charge. The committeeman refused to withdraw his charge, with the result that the entire dispute went to arbitration. The arbitrator ordered the reinstatement of the committeeman but denied backpay. According to the Board’s report, the arbitrator “indicated” that the denial of backpay was based on the facts that the committeeman had been guilty of abusive behavior and that he had rejected the settlement offer.

A complaint was thereafter issued on the unfair labor practice charge. Prior to the Board hearing, the parties to the arbitration proceeding, at their joint request, received from the arbitrator a clarification stating that he would have denied the backpay even in the absence of a rejected settlement offer. The Administrative Law Judge thereafter dismissed the unfair labor practice case because it was appropriate to defer to the arbitration award.

A majority of the Board, however, held that the Spielberg standards were not satisfied, and remanded the case for a hearing on the unfair labor practice charge. The Board listed two reasons for its action. First, penalizing an employee for pressing his rights under the law is inherently repugnant to the Act; a decision involving such a penalty therefore fails to satisfy the Spielberg rule. The arbitrator’s clarification, the Board ruled, did not totally eliminate that reason. Moreover, the Board indicated that such a clarification procedure was

91. 234 N.L.R.B. No. 80 (1978).
unacceptably prejudicial since it sought to remove a substantive defect from an unambiguous opinion. Second, the arbitrator's opinion did not indicate whether he had taken into account that the incidents in question arose when the committeeman was representing a grievance—a factor of considerable importance in judging whether this was a just cause discharge under the Act.

In a strongly worded dissent, Member Penello pointed out that in the clarification procedure the arbitrator stated that the discrimination charge was such a "thin and unsupported contention" that he had not bothered to deal with it. Clarification, declared Penello, is a well-recognized arbitration device; and since this award as clarified was "not palpably wrong," it was entitled to recognition. Member Penello accused the majority of "microscopically dissecting the arbitration award" in search of an excuse to reject it. This tactic, he said, is "utilized all too often by the majority to reach results which clearly tend to emasculate the Board decision in Spielberg."92

XIV

UNION DISCIPLINARY AUTHORITY

A. Compelling Support for Organizing Effort

Relying largely on the option of members to resign any time they disagree with their union's course of conduct, the Board, Members Murphy and Penello dissenting, held in Amalgamated Meat Cutters (S&M Grocers, Inc.)93 that a union does not commit an unfair labor practice when it threatens to expel or fine members who fail to support the union's organizational drive. The dissenters pointed out that this result undermines the Board's persistent efforts to assure that representation elections are conducted in an atmosphere conducive to free, informed choice.

B. Excluding Dissidents from Representational Responsibilities

Shenango Inc.94 arose when a union was charged with removing a member of the plant safety committee because he supported a dissident candidate for the union's international presidency. Such removal, it was charged, unlawfully interfered with the member's section 7 right to engage in internal union activities. This contention was rejected by a three-member panel of the Board on the grounds that the union's interest in internal harmony out-weighed the interests of the individual member. There was no showing that the safety committee member's

92. 234 N.L.R.B. No. 80, at 11.
conduct had any relationship to his rigorous pursuit of committee responsibilities.

In rejecting the safety committee member's unfair labor practice charge, the Board did not look for guidance in the decisions of the courts reviewing similar situations under the Landrum-Griffin Act. A number of those decisions have found violations of the union member's Bill of Rights where the conduct involved was similar to that found in Shenango. Since a central focus of the Landrum-Griffin Act is the regulation of internal union affairs, one would have expected the Board to pay greater attention to that line of decisions and, at the very least, explain why it was reaching an inconsistent result.

C. Duty to Obey Union Despite Possible Peace Clause Violation

It is established that an employee who is a union member can be disciplined by the union for refusing to participate in a union-sponsored work stoppage. But can a union discipline a member who refuses to participate in concerted activity that arguably violates a peace clause found in the collective bargaining agreement? By a two-to-one split, the Board gave an affirmative answer in Insurance Workers International Union (John Hancock Mutual Life Insurance Co.) The prevailing opinion accepted the premise that the union's action would have been an unfair labor practice if the concerted activity was unprotected. However, the majority's examination of the collective agreement satisfied it that the contract did not by clear and unmistakable language waive the right of the bargaining unit workers to engage in the particular form of concerted activity. Moreover, the majority ruled that the union's legitimate interest in solidarity could not be subverted by the individual member's fears arising from personal interpretation of the collective agreement.

The Board offered no suggestion regarding the member's recourse if it turned out that the conduct was unprotected and the member was discharged because of that concerted activity. Nor did the Board offer any suggestion regarding the member's recourse in the event that an arbitrator were to interpret the provision differently from the Board and uphold the disciplinary action. The answer for the worker would seem to be "when in doubt, play it safe, quit the union and stay on the job"—not a very satisfactory answer from the union's vantage.

96. 236 N.L.R.B. No. 50 (1978).
97. See discussion in text at note 37 supra.
D. Compulsory Attendance at Union Meetings

Lack of membership participation in union affairs is a serious threat to the concept of union democracy. One solution is to hold union meetings during work hours at the work site. In *Maui Surf Hotel Co.*, the parties had a collective agreement giving the union the right to call meetings during work hours, leaving a skeletal staff to take care of necessities. Workers were not paid for this meeting time and several refused to participate. The Board found that although they ultimately were not compelled to attend the union meeting, the threat of sanctions for working during such a meeting resulted in these employees clocking out and losing pay during the meeting period. Over the dissent of Member Jenkins, a three-member panel decided that the loss of pay caused by the threat of sanctions was an unlawful interference with section 7 rights.

XV

House-Keeping Decisions

A. Sequestration Rule

The National Labor Relations Act requires that the Federal Rules of Evidence be followed in unfair labor practice proceedings “so far as practicable.” The amended Federal Rules require, upon a party’s request, that a judge exclude witnesses from hearing the testimony of other witnesses. There are three stated exceptions: (1) a party who is a natural person cannot be excluded; (2) the designated representative of an entity that is a party cannot be excluded; and (3) a person whose presence is shown to be essential to the presentation of a party’s cause cannot be excluded.

In the past, the Administrative Law Judge was given discretion by the Board to exclude all witnesses but alleged victims of prohibited employer or union discrimination. However, alleged discriminatees could also be excluded from hearing testimony not directly involving their own interests. In *UNGA Painting Corp.*, the Board, in a Supplemental Decision and Order, announced that it had reconsidered its sequestration policy. After propounding upon the virtues of the sequestration technique, the Board, with Member Murphy dissenting, announced that at the request of a party all witnesses who are alleged discriminatees shall be excluded only during that portion of the hearing when another General Counsel or charging party witness is testifying about the same events testified to, or to be testified to, by the alleged discriminatee.

discriminantes. Further, the Administrative Law Judge is given authority to allow in special circumstances the unrestricted presence or total exclusion of discriminatees who are not testifying.

It is doubtful whether the benefits to be gained by this rule change outweigh the hearing delay and acrimony that will be generated by efforts to sort out the inevitable confusion regarding its proper application in any given case. Furthermore, in light of the Board's own admission that an alleged discriminatee is in a real sense a party to an unfair labor practice proceeding, the exclusions provided in the Board's rule are unlikely to withstand challenge under the strictures of the Act which require the Board to attempt to adhere to the Federal Rules of Evidence. Perhaps the labor bar will ease the burdens of the *UNGA Painting Corp.* "reform," however, by keeping to a minimum the instances in which there is a request to exclude potential witnesses from the hearing room. After all, with the potential witnesses gone, nobody is left to observe counsel's masterful performance but an audience whose appreciation may be tainted by professional jealousies.

**B. Ballot Alteration**

Because the NLRB uses paper ballots, it has to deal with a number of administrative questions that arise out of the mechanics of marking and casting such ballots. One would expect an agency with over forty years of experience in supervising elections to adopt regulations that fix the mechanics for determining which ballots will be counted, and to publish those regulations in an easy to read, readily available election rulebook. Instead, the Board preserves these questions for case-by-case reconsideration in the course of determining objections raised to the certification of election results. Consequently, at the very end of the 1977 fiscal year, in *Duvall Transfer & Delivery Service,* a panel was called upon to decide whether a ballot marked in ink should be counted where an "X" in the "Neither" square had been scratched out with circular markings and another "X" was marked in the square accompanying the name of the Teamsters' union. Two members of the panel voted to distinguish this case from situations in which ballots have been counted despite the erasure of one of the markings. Chairman Fanning, in dissent, voted to support the Regional Director's decision to count the ballot.

However, less than a year later Chairman Fanning was able to muster the requisite support, in *Abtex Beverage Corp.*, to overrule

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100. *Id.* at 6.
Duvall. Of course, the majority did allow that it was not going so far as to permit ballots to be counted in which two squares are marked, one with an “X” and the other with a single vertical line; no doubt the Board will continue to give careful scrutiny to such balloting situations.

XVI

CONCLUSION

Generally, reviewing is easier than doing. If from time to time notes of sarcasm have slipped into this review, it is not out of lack of respect for the ability and dedication of the Board, the General Counsel and their staff, or a lack of appreciation for the strenuous work load carried by the agency.¹⁰⁴ That very work load,¹⁰⁵ though, necessitates that the Board turn more to processes that reduce the frequency with which separate judgments of policy—balancing of competing interests—must be made in individual cases. Substantive rule-making is the most obvious means toward that end. The agency’s work load also necessitates that needless litigation be discouraged through enhanced predictability of the results. Tampering with previously made policy choices, therefore, ought to be confined to those situations in which the past error of judgment is clear and demonstrable.

Fiscal year 1978 was not a year of major change. It was, however, a year in which there was considerable tinkering with and adjustment of the mechanism for regulating labor-management relations. That tinkering did little to enhance predictability or to eliminate the need to engage in case-by-case judgments involving the balancing of competing interests. It was a year, therefore, that made but one thing certain—in the next fiscal year the Board would see a lot more of the same.

¹⁰⁴. Id. at 2-3.
¹⁰⁵. The Board decided 1,762 contested cases in fiscal year 1978. NATIONAL LABOR RELATIONS BOARD, 43d ANNUAL REPORT 16 (1978).