1972-1973 Annual Survey of Labor Relations Law

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INTRODUCTION

The goal of this comment—the twelfth in a series of efforts to summarize recent developments in the field of labor law—is to assist...
practitioners to keep abreast of changes in the law which occurred during the twelve months ending on March 31, 1973. Significant decisions of the National Labor Relations Board and the courts are reported in the greatest depth possible in a work of this nature.

Especially noteworthy during the Survey year were the NLRB's development of its Collyer doctrine,\(^2\) and the Supreme Court's decisions in the areas of successorship,\(^8\) solicitation/distribution rules,\(^4\) and union discipline.\(^8\)

I. NLRB EXPANSION OF THE COLLYER DOCTRINE

In a 1971 case, Collyer Insulated Wire,\(^1\) the National Labor Relations Board announced a new policy of deference to contractual grievance and arbitration procedures when it held that it would defer to arbitration because the dispute was essentially over the meaning of the parties' collective bargaining agreement. Prior to Collyer it was the Board's practice to honor existing arbitral awards if they met the standards set out in the Spielberg\(^2\) case; that is, the Board would defer to an award when it appeared that the proceedings were fair and regular, that all parties had agreed to be bound and that the result was not clearly repugnant to the purposes and policies of the National Labor Relations Act (NLRA or the Act).\(^8\) In Collyer, the Board retained jurisdiction over the dispute to insure compliance with these criteria, indicating that this test would also define the scope of Board review of arbitral awards resulting from Collyer type deferral.

Collyer represented an attempt by the Board to effectuate the national labor policy expressed in section 203(d) of the Act to encourage the voluntary settlement of industrial disputes. The facts of that case were narrow, however, involving an alleged violation based on unilateral conduct which the employer reasonably asserted was sanctioned by the bargaining agreement. In a memorandum containing guidelines for the application of Collyer, the General Counsel of the NLRB indicated that deferral should be confined to such facts.\(^4\)

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1 1965 Annual Survey of Labor Relations Law, 6 B.C. Ind. & Com. L. Rev. 815 (1965); Recent Developments in Labor Law, 5 B.C. Ind. & Com. L. Rev. 629 (1964); Recent Developments in Labor Law, 4 B.C. Ind. & Com. L. Rev. 661 (1963); Labor's New Frontier, The End of the Per Se Rules, 3 B.C. Ind. & Com. L. Rev. 487 (1962).

2 See pp. 1174-81 infra.

3 See pp. 1209-16 infra.

4 See pp. 1217-21 infra.

5 See pp. 1224-27 infra.

6 See pp. 1217-21 infra.

7 192 NLRB No. 150, 77 L.R.R.M. 1931 (1971).


9 Id. at 1082, 36 L.R.R.M. at 1153.

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However, the Board’s candid assertion that *Collyer* represented a “developmental step” in its treatment of the problem of dual jurisdiction—of the right of the Board to hear and determine unfair labor practice issues and that of the arbitrator to remedy contract violations—together with the retirement of Member Brown, one of a bare majority joining in the *Collyer* decision, provoked much speculation about the future of the *Collyer* doctrine.  

During the Survey year the Board substantially extended and refined the *Collyer* doctrine. In a landmark case, *National Radio Co.*, the Board applied its deferral policy to a section 8(a)(3) charge and declared that the “crucial determinant” of deferral was the reasonableness of the assumption that the contractual arbitration procedure would resolve the dispute in a manner consistent with the *Spielberg* criteria. The union in that case charged that the employer had violated section 8(a)(5) of the Act by unilaterally imposing a requirement that union representatives record and report their movements in the plant while processing grievances on company time. It was also charged that the employer had violated section 8(a)(3) by disciplining and subsequently discharging an employee who failed to comply with these requirements. The employer argued that the adoption of the plant movement reporting requirement was sanctioned by the contract and, therefore, that the employee had been disciplined for just cause in accordance with the contract. An additional section 8(a)(3)

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5 77 L.R.R.M. at 1938.
7 198 N.L.R.B. No. 1, 80 L.R.R.M. 1718 (1972). Members Fanning and Jenkins dissented, as they did in *Collyer*. In their view the Board is precluded from withholding its unfair labor practice procedures from the disputants in these and like cases by § 10(a) of the NLRA, which provides that the Board’s power to prevent unfair labor practices “shall not be affected by any other means of adjustment or prevention that has been or may be established by agreement, law, or otherwise.” 29 U.S.C. § 160(a) (1970). See 77 L.R.R.M. at 1943 (dissenting opinion); 80 L.R.R.M. at 1724 (dissenting opinion). Furthermore they protested the expansion of *Collyer*, in *National Radio*, to cases which involved individual rights and which did not call upon the arbitrator’s special competence in interpreting the contract. 80 L.R.R.M. at 1724-25 (dissenting opinion).

The appellate courts, however, have consistently enforced decisions in which the Board has relied upon section 10(a) as establishing a discretionary right to exercise jurisdiction. See Anderson, Concurrent Jurisdiction—NLRB and Private Arbitration: A Pragmatic Analysis, 12 B.C. Ind. & Com. L. Rev. 179, 181 (1970). Furthermore, the Supreme Court, in *Carey v. Westinghouse Elec. Corp.*, 375 U.S. 261, 271 (1964), cited with approval language of the Board to the effect that it has considerable discretion in exercising its jurisdiction.

9 80 L.R.R.M. at 1723.
10 29 U.S.C. § 158(a)(5) (1970) makes it an unfair labor practice for an employer to refuse to bargain collectively with the representatives of his employees.
charge rested upon the employer's suspension of the same employee, an active union member, for destroying a list containing the names of employees who had manufactured defective parts. The administrative law judge rejected the employer's request to stay the unfair labor practice proceedings pending the outcome of arbitration proceedings already invoked, and found that the employer had violated section 8(a)(5) and (3) of that Act.\(^{11}\)

The Board viewed the section 8(a)(5) charge as identical to that presented in *Collyer* in that it involved a dispute over the meaning of a contractual provision. The issue was distinguishable from that presented in *Collyer*, however, on the basis of the allegation, in *National Radio*, that the employer was motivated by union animus in disciplining the employee for failure to comply with the plant movement requirement. The import of this distinction lies in the fact that although in *Collyer* resolution of the contract dispute would resolve the unfair labor practice issue, there was a possibility in *National Radio* that the conduct in question was sanctioned by the contract but prohibited by the Act because effected with a discriminatory motive. The Board recognized that this possibility necessitated caution in declining to assert jurisdiction. Nevertheless, it held that the issues presented by the employer's adoption of the plant movement procedure and discipline of the employee for failure to comply with it should not be considered by it in advance of an authoritative determination of the contractual issues by the arbitrator.\(^{12}\)

The Board next considered the allegation that the employer violated section 8(a)(3) when it suspended the same employee for destroying the list. The issue presented by this charge differed significantly from that presented in *Collyer* because the basis urged for deferral was not the arbitrator's special skill and expertise in interpreting the provisions of the bargaining contract. Rather, deference was urged on the broad ground that the contract prohibited discipline for other than just cause and provided a method for vindicating employee rights when the clause was violated. The Board stated, nevertheless, that the fundamental considerations—an alleged wrong remediable in both a statutory and a contractual forum and the necessity for a rational accommodation of the Board's duty to foster the collective bargaining process with its duty to prevent unfair labor practices—were the same as in *Collyer*.\(^{13}\) Holding that deference was appropriate in *National Radio* and similar cases because it was reasonable to assume that the arbitration procedure would operate to resolve the dispute

\(^{11}\) 80 L.R.R.M. at 1718-19.

\(^{12}\) Id. at 1721.

\(^{13}\) Id. at 1722.
fully and in a manner consistent with the Spielberg standards, the Board withheld its unfair labor practice processes. It retained jurisdiction, as in Collyer, to insure compliance with the Spielberg standards.\(^{14}\)

*National Radio* represents a major expansion of the Board’s deferral policy. It extends *Collyer* to section 8(a)(3) cases and does away with the requirements that the dispute be essentially over the substantive meaning of a contract term and that a reasonable construction of the contract preclude a finding that the conduct in question violated the Act. The rationale behind *Collyer*—that of promoting private resolution of industrial disputes by the Board’s declining to exercise its jurisdiction when arbitration is available—has become the foundation of the Board’s deferral policy. In place of the guidelines supplied by the facts of *Collyer*, the Board has declared that the “crucial determinant” in every case is the reasonableness of the assumption that the arbitration process will fully resolve the underlying dispute in a manner consistent with Spielberg.\(^{15}\) In support of its conclusion that the foregoing assumption was reasonable in *National Radio*, the Board noted three factors: (1) the substantial harmony of interest between the employee and his representative; (2) the long and productive bargaining relationship between the parties; and (3) the absence of a history of union animus or a pattern of action subversive of section 7 rights.\(^{16}\) In subsequent Survey year cases the Board has considered these and other factors in a case-by-case determination of the reasonableness of the probability that arbitration will fully resolve the dispute in a manner consistent with Spielberg.

Substantial harmony of interest between the employee and his representative is a controlling factor in the determination of whether deference is appropriate. In *Kansas Meat Packers Union*,\(^{17}\) the Board refused to defer a section 8(a)(3) charge to arbitration because there was an apparent conflict between the interests of the employees on one hand, and the interests of both the employer and the union on the other. The dispute arose out of the discipline and subsequent discharge of two employees who were aggressive in pressing grievances against both the employer and the union. The discharges occurred shortly after both employees submitted written revocations of their dues check-off authorizations. In refusing to defer, the Board emphasized two factors: (1) the antagonism between the discriminatees and both parties to the collective bargaining agreement; and (2) the discrimi-
natees' resultant election to refrain from seeking redress through the contractual grievance procedures. 18 The significance of the first factor was recognized by the Board in National Radio when it attributed the reasonableness of its assumption that arbitration would resolve the dispute in a manner consistent with Spielberg in part to the likelihood that a substantial harmony of interest between the employee and his representative would obtain in every such case. 19 However, it is submitted that although the second factor emphasized by the Board may constitute a circumstance supporting a refusal to defer, its absence could not be determinative since an award rendered in an arbitral proceeding wherein all of the arbitrators are likely to be predisposed against the grievant does not satisfy the Spielberg criterion of a fair and regular proceeding 20 and, therefore, deferral would be inappropriate under National Radio even if the grievants had invoked contractual grievance procedures in addition to the Board's unfair labor practice procedures.

In another Survey year case the Board refused to defer to contractual grievance procedures where overriding considerations of federal policy militated against deferral. In Joseph T. Ryerson & Sons, Inc., 21 it was alleged that the employer violated section 8(a)(1) 22 by threatening an employee who was a union official with reprisal for participation in grievance procedures. The Board held that deference was inappropriate, distinguishing National Radio on two grounds: (1) it did not appear that the conduct which was the subject of the charge in Ryerson, an asserted threat unaccompanied by other discipline or a change in employment status, could form the basis of a grievance cognizable under the contract; and (2) there was no showing of the authority of the arbitrator under the contract to remedy company interference with the performance of grievance functions by a grievance committeeman. 23 Recognizing that it was departing from the normal practice of leaving issues of arbitrability for resolution by the arbitrator, the Board characterized the charge in question as one which "strikes at the foundation of that grievance and arbitration mechanism upon which we have relied in the formulation of our Collyer doctrine." 24 Other Survey year cases in which the Board held that deferral was inappropriate where the dispute was arguably cognizable

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18 80 L.R.R.M. at 1746.
23 81 L.R.R.M. at 1263.
24 Id. at 1263-64.
under the contract indicate that this latter factor—the tendency of the conduct in question to frustrate the grievance procedure—was controlling in Ryerson. Ryerson thus indicates that the reasonable probability test of National Radio requires that deference be refused in any case in which it appears that a party sought to impede utilization of the contractual grievance process.

In Ryerson the Board, making explicit a requirement which would appear to be implicit in the National Radio test of reasonable probability of consistency with Spielberg, explained that it would not abstain from exercising its jurisdiction unless the alternate procedures were "open, in fact, for use by the disputants" as well as fair and regular. Thus, the Board will not defer to arbitration unless it appears either that the issue raised by the unfair labor practice charge will be determined in the arbitration proceeding or that it is likely that resolution of the issues subject to arbitration will dispose of the underlying basis of the unfair labor practice charge, rendering a Board proceeding unnecessary. In George Koch Sons, Inc., a panel of the Board refused to defer a charge that a union had violated section 8(b)(1)(B) of the Act by fining an alleged supervisor for violating union rules. The Board held that it was compelled to take jurisdiction to determine whether the fine was violative of the Act since that issue would not be determined in an arbitral proceeding. In National Biscuit Co., however, the Board deferred a charge that the union had violated section 8(b)(1)(A) of the Act by fining a member even though that charge was not subject to an agreement to arbitrate, since it appeared that the validity of the charge was dependent upon a finding that the union had violated the contract. The Board retained jurisdiction and indicated that if the arbitrator were to find that the union had violated the contract, it would, on request and in its discretion, determine the 8(b)(1)(A) allegation.

In Koch a charge that the union had also violated section 8(b)(1)(B) by striking to compel the employer to make payments of benefits and wages to the same employee in accordance with contract provisions

26 81 L.R.R.M. at 1264.
27 Sheet Metal Workers Local 17 (George Koch Sons, Inc.), 199 N.L.R.B. No. 26, 81 L.R.R.M. 1195 (1972).
29 81 L.R.R.M. at 1198.
30 Teamsters Local 70 (National Biscuit Co.), 198 N.L.R.B. No. 4, 80 L.R.R.M. 1727 (1972).
32 80 L.R.R.M. at 1730 n.8.
covering "foremen" was not deferred, because it did not appear that the arbitrator in determining the contract issue of whether the employee was covered by the contract clause would consider the statutory issue of whether the employee was a supervisor within the definition of the Act. In noting that there was less reason to defer the 8(b) (1)(B) issue because the Board was required to determine a part of the dispute—the propriety of the fine—the Board seemed to imply that had the rest of the dispute been arbitrable, it would have deferred consideration of the 8(b)(1)(B) issue also. In such a case then, it appears that the Board may find that there is a reasonable probability that the dispute will be fully resolved through arbitration and follow the procedure set out in *National Biscuit*.

The General Counsel of the NLRB has issued a memorandum revising the guidelines for the application of *Collyer.* He has indicated that a prima facie warrant for the deferral of a dispute is established by the existence of a contract between the parties which makes binding arbitration encompassing the dispute available to the charging party, provided that the dispute does not concern a special subject matter inappropriate for deferral. Subject matters not appropriate for deferral include disputes over accretion issues, over requests for information relevant to contract negotiation or to the processing of grievances, and over union recognition. The General Counsel has also directed the Regional Offices not to defer charges unless the respondent is willing to submit all aspects of the underlying dispute to arbitration.

The extent to which the *Collyer* doctrine will be successful in

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83 81 L.R.R.M. at 1198.
85 Id. at 37.
86 Id. at 19-25. The General Counsel has also indicated that deferral is not appropriate where the contract provisions conflict with the provisions of the statute. Id. at 25. However, in *Koch*, discussed in text at note 27 supra, upon which the General Counsel relies, the Board does not mention that consideration as a factor in its refusal to defer. Furthermore, in *Ryerson*, discussed in text at note 21 supra, the Board, in spite of the probability that an award pursuant to such a contract term would be repugnant to the Act, suggested that the question of deference predicated on such a provision remains open.
87 81 L.R.R.M. at 1262 n.1.
88 Id. at 15. In Medical Manors, Inc., 199 N.L.R.B. No. 139, 81 L.R.R.M. 1341 (1972), the Board deferred to arbitration even though the employer had engaged in unwarranted "foot dragging" in complying with the contractual grievance procedures. The Board expressed some reluctance, but, noting that the employer was under a court order compelling him to proceed to arbitration, deferred and retained jurisdiction against the contingency of further delay by the employer. 81 L.R.R.M. at 1343 n.2.

This case indicates that willingness on the part of a respondent is not a sine qua non of deferral, but a factor to be considered in determining the reasonableness of the probability that arbitration will operate so as to obviate the need for further action by the Board.
achieving the national labor policy goal of promoting the voluntary settlement of industrial disputes through private contractual procedures is not known. The Board's new deferral policy has been described by Chairman Miller as an experiment to see if labor disputes can be resolved without government intervention. The expansion of Collyer during the Survey year to facts such as those presented in National Radio would appear to be required, then, if the results of this experiment are to be valid. The Board's past practice of encouraging parties to resort to contractual grievance and arbitration procedures while refusing on its own part to entrust disputes to these very processes was not calculated to promote the national goal of industrial self-government.

II. BOARD AND COURT DEVELOPMENT OF ARBITRATION POLICY

A. Jurisdiction of the Arbitrator: Flair

During the Survey year, in Operating Engineers Local 150 v. Flair Builders, Inc., the Supreme Court, with two members dissenting, held that a broad arbitration clause, in which the parties had agreed to arbitrate "any difference," required that the issue of laches be submitted to the arbitrator for decision. The dispute in Flair arose out of a memorandum agreement signed by the parties in 1964 in which the company agreed to be bound by any future master agreement between the union and local contractor associations. In 1966, the union and the contractor associations entered into a new master agreement which provided that "any difference" between the parties not settled within forty-eight hours would be submitted to arbitration. In 1968, the union, on its first visit to Flair since the signing of the memorandum, complained about Flair's wages and about the fact that Flair's four employees were non-union. Flair refused to recognize any obligation to the union and the union sued for specific performance. The district court held that Flair was bound by the memorandum agreement to arbitrate disputes in accordance with the arbitration clause of the master agreement, but, relying on the four-year absence of contact between the union and Flair, the court found that the union was guilty of laches and dismissed the action.

On appeal, the union argued that the question of whether its delay in notifying the company of the existence of a dispute should operate


2 This statement of facts is drawn from the dissenting opinion, id. at 492-94. The district court opinions are unreported.
3 440 F.2d 557, 559, 76 L.R.R.M. 2395, 2597 (7th Cir. 1971).

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to bar its suit to compel arbitration was a question of "procedural timeliness" which the courts were required to leave to an arbitrator's determination pursuant to *John Wiley & Sons, Inc. v. Livingston*, in which the Supreme Court had held that procedural questions growing out of an arbitrable dispute and bearing on its final disposition should be left to the arbitrator. Affirming by a divided vote, the Seventh Circuit distinguished *Wiley* on the ground that it determined only that questions of *intrinsic* untimeliness—those relating to whether the procedural prerequisites to arbitration dictated by the contract had been followed—should be submitted to the arbitration. The instant case, on the other hand, raised a question of *extrinsic* untimeliness, which was not based on a violation of contract procedure and which could, therefore, properly be determined by a court.

On certiorari, the union contended that even if the parties had not agreed to arbitrate the laches issue, *Wiley* required that it be submitted to the arbitrator for decision because it involved a determination of the merits of the dispute and bore directly on its outcome. The Supreme Court, however, did not reach that question, holding that the parties by agreeing to arbitrate "any difference" and by not excepting any disputes or class of disputes from arbitration had, in fact, agreed to arbitrate the issue of laches. The Court reasoned that the words "any dispute" must be given their plain meaning.

In dissent, Justice Powell disagreed with the majority's interpretation of the words which, in his view, referred only to issues concerned with terms and conditions of employment. Justice Powell further protested that the essence of the defense of laches is that the union was precluded from enforcing "any and all provisions of the contract, including the arbitration clause." He evidenced concern that under the holding of the Court a general arbitration clause displaced the jurisdiction of the courts to determine affirmative defenses raised against the enforceability of contracts. The Court's holding, however, is confined to cases where laches is raised as a defense to the arbitrability of particular grievances. The Court cautioned that its holding did not affect the responsibility of the judiciary to determine whether parties are subject to an agreement to arbitrate and the scope of that agreement. Thus, the Court indicated that affirmative defenses raised against the en-

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5 440 F.2d at 560, 76 L.R.R.M. at 2598.
6 406 U.S. at 490-91.
7 Id. at 491.
8 Id. at 495 (dissenting opinion).
9 Id. at 497 (dissenting opinion).
10 Id. at 491-92.
11 Id. at 491.
forceability of the bargaining agreement or of the arbitration clause are to be decided by courts.

The Court's holding is consonant with the nature of section 301 suits as well as with the national labor policy favoring arbitration of labor disputes. Suits under section 301 are suits to enforce contracts, and the role of the judiciary must be confined to determining whether a legally enforceable promise exists and the scope of that promise. Conventional arbitration clauses providing that disputes about the meaning or application of the contract are to be submitted to arbitration are excluded from the Court's holding in Flair. In determining arbitrability under these clauses, which confine the jurisdiction of the arbitrator to the boundaries of the contract, the intrinsic/extrinsic distinction made by the Seventh Circuit in Flair, and which the Supreme Court found irrelevant, could constitute a valid test of arbitrability.

B. Enforcement of Arbitral Awards: Malrite

In a Survey year case, Malrite of Wisconsin, Inc., the Board clarified its position with regard to the enforcement of arbitral awards when it deferred to an award even though the employer refused to comply with it. The Board, with two members dissenting, asserted that when an award meets all of the Spielberg standards, noncompliance with the award should not be a matter of Board concern.

The dispute in Malrite centered on a provision of the bargaining agreement which restricted the use of a job classification combining the separate duties of engineers and announcers. When the employer, without bargaining, expanded the scheduling of engineer-announcers, the controversy was submitted to arbitration in accordance with the contract. The arbitrator determined that the employer had violated the bargaining agreement. When the employer failed to comply with the arbitral award by reinstituting separate engineer and announcer classifications, the union filed a charge alleging that the employer had violated section 8(a)(5) by unilaterally changing the scheduling of the employees in question.

The Board, in explanation of its refusal to act, stated:

In its formulation of the Spielberg standards the Board

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12 29 U.S.C. § 185(a) (1970) provides in part: “Suits for violation of contracts between an employer and a labor organization . . . may be brought in any district court . . . .”
14 In Spielberg Mfg. Co., 112 N.L.R.B. 1080, 36 L.R.R.M. 1152 (1955), the Board held that it will defer to an arbitration award if the proceedings appear to have been fair and regular and the award is not repugnant to the Act.
15 80 L.R.R.M. at 1594.
16 Id. at 1593-94.
did not contemplate its assumption of the functions of a tribunal for the determination of arbitration appeals and the enforcement of arbitration awards. If the Board's deference to arbitration is to be meaningful it must encompass the entire arbitration process, including the enforcement of arbitral awards.\textsuperscript{17}

The Board concluded that the objective of encouraging voluntary settlement of disputes would best be served by requiring the parties to proceed to the usual conclusion of the arbitral process—judicial enforcement—and dismissed the complaint. The Board felt that immediate access to the courts should be preferred over the long administrative route, and announced that this was the course it was "encouraging these and future disputants to follow."\textsuperscript{18}

The result in \textit{Malride} seems to be required by the nature of proceedings to enforce arbitral awards. They are, in essence, suits to enforce the terms of a collective bargaining contract, and section 301 of the NLRA\textsuperscript{19} provides for the bringing of such suits in the courts. Furthermore, the Board correctly recognizes that the result in this case is mandated if its policy of deference to arbitration is to be effective. Otherwise, a party dissatisfied with an arbitral award could secure Board relitigation of the claim simply by refusing to comply with the award.

\textbf{C. Effect of Grievance and Arbitration Awards on Title VII Actions: Rios}

In an innovative decision, the Fifth Circuit in \textit{Rios v. Reynolds Metals Co.}\textsuperscript{20} has adopted a policy of conditional deferral to arbitration awards covering conduct which is also made the basis of a Title VII suit.\textsuperscript{21} The facts in that case present a classic example of the problem raised by the overlapping jurisdiction of the arbitrator under collective bargaining agreements and the federal courts under Title VII. Rios, a Mexican American, was promoted on a trial basis and demoted after only one month. Pursuant to the bargaining agreement between the parties he filed a grievance claiming that the trial period was unreasonable in length. At the arbitration hearing he assigned discrimination on the...
basis of national origin as one of the reasons for his demotion. The arbitrator rejected this contention, ruling that Rios was demoted because he was unable to perform the job satisfactorily. Prior to the arbitration hearing Rios had filed suit under Title VII. Subsequently, when the arbitrator’s decision became known, Reynolds moved for summary judgment contending that Rios was bound by the arbitrator’s determination. The district court granted the motion.22

In an earlier case, Hutchings v. United States Industries, Inc.,23 the Fifth Circuit had held that the doctrines of election of remedies and res judicata did not bar a subsequent suit under Title VII. The court emphasized the differences in function between the judicial and the arbitral processes, both in the scope of their consideration and in remedial power. In that case the court noted that the arbitrator was limited by the contractual rights and remedies and that Congress had made the federal judiciary the “final arbiter” of an individual’s Title VII grievance.24 The court concluded that the power of the federal courts to adjudicate a violation of Title VII was not affected by a prior arbitral proceeding,25 but, in apparent recognition of the detrimental impact of relitigation on the national labor policy favoring arbitration, the court raised the possibility that under certain circumstances not present in Hutchings, deference to prior arbitral awards might be appropriate in Title VII actions.26

In Rios, unlike Hutchings, the bargaining agreement expressly included the employer’s obligation not to discriminate under Title VII. Furthermore, the record showed that the Title VII issue was expressly considered and rejected by the arbitrator.27 Thus, the question left open in Hutchings, that of the propriety of deference, was squarely presented. Persuaded by the analogy to the NLRB’s Spielberg28 doctrine, which establishes that when certain conditions are met the NLRB will, in the exercise of its discretion, defer to contractual arbitration awards and withhold its unfair labor practice procedures, the court held:

[T]he federal district court in the exercise of its power as the final arbiter under Title VII may follow a like procedure of deferral under the following limitations. First, there may be no deference to the decision of the arbitrator unless the contractual right coincides with rights under Title VII. Second, it must be plain that the arbitrator’s decision is in no way viola-

22 467 F.2d at 56, 5 FEP Cases at 2.
23 428 F.2d 303, 2 FEP Cases 725 (5th Cir. 1970).
24 Id. at 311-14, 2 FEP Cases at 731-33.
25 Id. at 313, 2 FEP Cases at 732.
26 Id. at 314 n.10, 2 FEP Cases at 733 n.10.
27 467 F.2d at 55-56, 5 FEP Cases at 2.
tive of the private rights guaranteed by Title VII, nor of the public policy which inheres in Title VII.\textsuperscript{29}

The court also required that before deferring the district court be satisfied that (1) the factual issues before it are identical to those decided by the arbitration; (2) the arbitrator had power under the collective agreement to decide the ultimate issue of discrimination; (3) the evidence presented at the arbitral hearing dealt adequately with all factual issues presented to the court; (4) the arbitration proceeding was fair and regular and free of procedural infirmities. The burden of establishing satisfaction of these conditions was placed on the respondent.\textsuperscript{30}

In adopting the policy of conditional deferral, the Fifth Circuit has demonstrated an awareness of the need for accommodation of the policy to eliminate discriminatory employment practices with the policy to encourage the voluntary settlement of industrial disputes through contractual grievance and arbitration procedures. \textit{Rios} represents an attempt to avoid complete relitigation of issues decided by an arbitrator, a practice which does violence to the essence of arbitration, namely, that it lead to a final and binding resolution of the dispute. At the same time it ensures that final determination of statutory rights will not be committed to the virtually unreviewable discretion of the arbitrator in contravention of the congressional intent expressed in Title VII to commit that responsibility to the federal judiciary. It is to be hoped that federal courts faced with the problem of concurrent jurisdiction will give serious consideration to adopting the Fifth Circuit's solution in \textit{Rios} as a matter of uniform federal policy.

### III. Board-Court Procedure: \textit{Savair}

A case decided this Survey year posed an important procedural question concerning the extent of Board discretion. The substantive issue from which the question emerged concerned the effect to be given to a union's waiver of initiation fees contingent upon whether it won an election. In 1954, the Board in \textit{Lobue Brothers}\textsuperscript{1} took the view that such union behavior was coercive, and invalidated the subsequent election. Eleven years later the Sixth Circuit, without specifically designating the issue either as calling for deference to Board expertise or as a subject for independent court decision, found this view persuasive and embodied it in court law in \textit{NLRB v. Gilmore Industries, Inc.}\textsuperscript{2} In 1967, however, the Board reconsidered its \textit{Lobue

\textsuperscript{29} 467 F.2d at 58, 5 FEP Cases at 4.
\textsuperscript{30} Id.

\textsuperscript{1} 109 N.L.R.B. 1182, 34 L.R.R.M. 1528 (1954).
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reasoning in *DIT-MCO, Inc.* The Board, after reassessing *Lobue*, concluded that the case was grounded in illogic. If the union lost the election, the Board reasoned in *DIT-MCO*, the employees would have to pay neither an initiation fee nor dues, whereas a union victory would lead to an eventual duty to pay dues regardless of waiver of the initial fee. Thus, a promise to waive the initiation fee could hardly coerce employees to vote for the union; the only logical conclusion to be drawn from union victory subsequent to such a promise would be that the employees had wanted the union regardless of the waiver. Based on this reasoning, the Board overruled *Lobue* and established the new rule that a waiver of initiation fees, contingent upon the results of an election, is not coercive and therefore does not constitute a basis for setting aside an election. The Eighth Circuit upheld the Board’s position, as did the Ninth.

The issue came before the Sixth Circuit again, in *NLRB v. Savair Manufacturing Co.* The facts in *Savair* were similar to those in *Lobue, Gilmore,* and *DIT-MCO*: the union, with an election pending, promised to waive, in the event of union victory, initiation fees for all employees who had signed authorization cards. The Board, following *DIT-MCO*, found nothing objectionable in this promise and ordered the employer to bargain with the union. The Sixth Circuit adhered to its decision in *Gilmore*, refused to adopt the Board’s *DIT-MCO* reasoning, and censured the Board for having assumed that the Board’s overruling of *Lobue* simultaneously overruled *Gilmore*, in which *Lobue* was adopted by the court. The court distinguished its decision from those of the Eighth and Ninth Circuits, stating that in neither of those circuits was the court asked to overrule its own previous decision.

The *Savair* decision creates a division among the circuits regarding the effect that a union’s pre-election promise to waive initiation fees will have upon the election and the employer’s subsequent duty to bargain. Even more significantly, however, it raises the question: does the Board have discretion to change its stand and, in so doing, implicitly to overrule such court cases as have adopted the earlier rule which the Board seeks to render obsolete? The Sixth Circuit contends that the Board’s assumption of a positive answer to this question exhibits a misunderstanding of the relationship between the Board and the

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4 163 N.L.R.B. at 1022, 64 L.R.R.M. at 1478.
5 *Id.*
0 NLRB v. *DIT-MCO, Inc.*, 428 F.2d 775, 74 L.R.R.M. 2664 (8th Cir. 1970).
10 “[W]e conclude that the Board abused its discretion in declining to follow the Gilmore decision.” 82 L.R.R.M. at 2087.
11 Between the Board’s decision in *Lobue* and its overruling of *Lobue* in *DIT-MCO*, two other circuits passed on the issue of pre-election waiver of union initiation fees.

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courts. It is submitted that the misunderstanding is the Sixth Circuit's. The Board was created by Congress especially to administer the NLRA. The election procedure, in particular, is part and parcel of the Act, and is under the aegis of the Board—a fact recognized by the Supreme Court. Through close, constant and exclusive dealings with labor problems, the NLRB has formed a fund of experience and expertise upon which to draw in such situations. The entire congressional purpose in establishing a specialized administrative agency such as the Board is contravened if the courts do not defer to that agency's expertise.

Such tension between the Board and the court, if left unresolved, cannot but have a negative effect upon labor relations. With two contradictory rules in force, a union wishing to waive initiation fees will not know whether such action is lawful; nor, if a union proceeds with such an offer and wins the election, will an employer be able to ascertain whether it has a duty to bargain. What is more, with a division among the circuits as well as between the Board and court, the outcome

The First Circuit, in NLRB v. Gorbea, Perez & Morrell, 328 F.2d 679, 55 L.R.R.M. 2586 (1st Cir. 1964), held that a union's announcement that employees who joined the union immediately would have their initiation fees waived, while those who waited until after a contract had been signed would have to pay, constituted misrepresentation and sufficed to end the employer's obligation to bargain with the union. The Board had previously distinguished the Gorbea facts from those in Lobue on the grounds that the union's offer of waiver was contingent not upon an election, but upon the signing of a contract, and had held the behavior therefore unobjectionable. Gorbea, Perez & Morrell, 142 N.L.R.B. No. 55, 53 L.R.R.M. 1048 (1963). The Second Circuit, in Clothing Workers v. NLRB, 345 F.2d 264, 59 L.R.R.M. 2228 (2d Cir. 1965), found that although the union's offer to waive initiation fees might have induced employees to sign authorization cards, the union's action was nevertheless unobjectionable. The possibility of influence was outweighed by the possibility that, absent such a sweetener from the union, employees genuinely and independently in sympathy with the union might be reluctant to pledge financial allegiance to a union that had done nothing tangible for them. The Second Circuit thus saw the waiver offer not as undue coercion, but as a justifiable manifestation of the union's good faith. Neither the First nor the Second Circuit has met the issue since DIT-MCO.

12 82 L.R.R.M. at 2086.
15 "We have held in a number of cases that Congress granted the Board a wide discretion to ensure the fair and free choice of bargaining representatives." NLRB v. Wyman-Gordon Co., 394 U.S. 759, 767 (1969).
16 It is further submitted that in this instance, the Board's position on the merits is correct. The overruling of Lobue was not a matter of caprice, but was effected because the Board found a flaw in its purported logic and did not intend to let illogic remain a rule. The steps in the Board's reasoning were carefully traced in the DIT-MCO case. Any illogic alleged against Lobue applies automatically to Gilmore as well. The Board demonstrated that a union's offer to waive initiation fees contingent upon union victory in an election, although arguably appearing to be coercion, could not be coercive in fact. Yet, in Savair, the Sixth Circuit does not answer any of the charges against the Lobue/Gilmore reasoning; rather, it merely reasserts the Lobue/Gilmore rationale and states that it has no intention of altering its view. 82 L.R.R.M. at 2086. This smacks more of wounded pride than of logical reasoning, and leaves the Sixth Circuit defending an empty formality.
in a given case will depend upon the location of the employer's place of business, a highly undesirable outcome. Uncertainty and confusion rank high among the evils sought to be avoided by Congress in enacting the NLRA. Therefore, it is to be hoped that the Sixth Circuit will abandon its position or, failing that, that the Supreme Court will address itself to this double difference—that between the circuits, and that between Board and court—and provide both a clear direction for unions and employers to follow in future initiation fee-waiver cases, and a clear hierarchy of authority to be observed in Board-court relations.

IV. REPRESENTATIONAL AND ORGANIZATIONAL ACTIVITY

A. Consolidation of Units through Unit Clarification: Libbey-Owens-Ford

In United Glass & Ceramic Workers v. NLRB (Libbey-Owens-Ford Co.), the Third Circuit sustained the Board’s authority to merge existing bargaining units in a unit clarification proceeding. The court also upheld the Board’s authority to conduct an election in a unit clarification proceeding, rejecting the contention that the Board has no authority to conduct an election in the absence of a section 9(c) question of representation. The court limited the propriety of such an election to cases in which the Board had made a prior determination that two or more units were equally appropriate. The Board has indicated, however, that it will not exercise this court-sanctioned authority, and that the Libbey-Owens-Ford case may well stand alone.

The dispute in Libbey-Owens-Ford originated when the union petitioned the Board for unit clarification in order to effect the inclusion of two additional plants in a multiplant unit composed of eight other plants owned by the company. The union was the bargaining representative for

17 "The public has been treated more than once to unseemly races to court by opposing counsel seeking review by the 'right' circuit in an important case." Bok, Reflections on the Distinctive Character of American Labor Laws, 84 Harv. L. Rev. 1394, 1456 (1971).

18 After the completion of this Comment, the Supreme Court granted certiorari in Savair, 41 U.S.L.W. 3589 (U.S. May 8, 1973).


2 29 U.S.C. § 159(c) (1970) provides that the Board shall direct an election by secret ballot when it finds that a question of representation exists. Thus, a § 9(c) question of representation is one which leads to a representation election in which employees choose whether and by whom they wish to be represented.

8 See Libbey-Owens-Ford Co., 189 N.L.R.B. No. 139, 76 L.R.R.M. 1806, 1807 (1971) (concurring opinion), where Chairman Miller pointed to the fact that the Board has consistently refused to follow the Libbey-Owens-Ford doctrine, even in cases virtually indistinguishable. Furthermore, the views of the members of the present Board preclude application of that doctrine. See text at note 16 infra.
employees at all ten plants. In *Libbey-Owens-Ford Glass Co.*, the Board in an unprecedented ruling ordered an election among employees at the two separate plants to determine whether they desired to merge with the multiplant unit. The employees favored the multiplant unit, and when the company refused to bargain with one of the single-plant units as part of the multiplant unit, the union brought an unfair labor practice charge under section 8(a)(5) of the NLRA. The Board dismissed the charge. Members Fanning and Jenkins adhered to the view they expressed in their dissent to the original Board decision in the case; they felt that the Board lacked statutory authority to merge units in a unit clarification proceeding. Chairman Miller concurred in the result on the ground that, as a matter of policy, combination of existing appropriate units should be accomplished consensually through the bargaining process, although he agreed with dissenting Members Brown and Kennedy that the Board has the statutory authority to merge separate units in a clarification proceeding.

On appeal, the union challenged the dismissal of its section 8(a)(5) charge, thus placing before the court the issue of the validity of the underlying unit determination. The company argued that the unit determination procedure employed by the Board was invalid for two reasons: (1) the Board lacks statutory authority to use the unit clarification procedure to consolidate existing bargaining units; and (2) the Board lacks the authority to conduct an election in the absence of a section 9(c) question of representation. The court disagreed. It held that the existence of a dispute about the scope of a unit was a representational issue under section 9(b) and therefore was a sufficient basis for invoking the Board's clarification procedure even in the absence of a question of representation under section 9(c). The court based its holding on the broad grant of authority contained in section 9(b) which empowers the Board to determine the appropriate unit.

The court also rejected the company's second contention, noting that employees' views are relevant in determining the appropriateness of a bargaining unit; the court held that the Board's broad investigatory

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5 29 U.S.C. § 158(a)(5) (1970) makes it an unfair labor practice for an employer to refuse to bargain collectively with the representative of his employees.
8 76 L.R.R.M. at 1807.
9 463 F.2d at 35, 80 L.R.R.M. at 2884.
10 29 U.S.C. § 159(b) (1970) provides: "The Board shall decide in each case whether . . . the unit appropriate for the purposes of collective bargaining shall be the employer unit, craft unit, plant unit, or subdivision thereof . . . ."
11 463 F.2d at 36, 80 L.R.R.M. at 2885.
powers impliedly authorized it to conduct an election as a practical way of determining employee views. The court, however, declared that such an election is only proper when the Board has already made a finding that two or more units are equally appropriate. Because a majority of the Board in dismissing the section 8(a)(5) charge had expressed no opinion as to the appropriateness of the two units, the court remanded the cases for that determination.

The Board, on remand, accepted the court’s opinion as the law of the case and reaffirmed its finding that single-plant and multiplant units constituted equally appropriate units for bargaining. A bargaining order was issued, based upon a finding that the company had violated section 8(a)(5). Chairman Miller dissented. He adhered to his view that the consolidation of existing appropriate units should be accomplished through the collective bargaining process. Furthermore, he questioned the statutory foundation for the finding of an 8(a)(5) violation when the party is complying with the statutory mandate which, in Chairman Miller’s view, only requires that it bargain in an appropriate unit.

The Libbey-Owens-Ford decision is not likely to be repeated. It is evident that this Board will not utilize the unit clarification procedure in future cases to consolidate existing bargaining units; Members Jenkins and Fanning believe that the Board lacks the power to do so, and Chairman Miller that it is inappropriate as a matter of policy.

The significance of the case may lie in the questions that it raises rather than in its value as precedent. Although the court held that the Board has the power in the absence of a section 9(c) question of representation to consolidate existing units through the unit clarification procedure and to conduct an election, it does not appear to have dealt adequately with the difficult questions presented by the case. In effect, the court held that section 9(b) is not restricted by section 9(c)(5) to cases involving a question concerning representation. The court, however, failed to give adequate consideration to

12 Id. at 37, 80 L.R.R.M. at 2885. 29 U.S.C. § 161 (1970) gives the Board the right to issue subpoenas requiring attendance at a hearing. The court reasoned that since under § 11 the Board could in the exercise of its investigatory power require the presence of the affected employees at a hearing to determine their sentiment, an election was only a practical means for the Board to determine employee sentiment. 463 F.2d at 37 n.19, 80 L.R.R.M. at 2885-86 n.19.
13 463 F.2d at 37-38, 80 L.R.R.M. at 2886.
15 82 L.R.R.M. at 1419 (dissenting opinion).
17 The argument is that § 9(c)(5), which provides that in determining the appropriateness of a unit the extent of organization shall not be controlling, transforms the remainder of § 9(c) into a limitation on § 9(b). See Members Fanning and Jenkins' dis-
this issue, apparently assuming, contrary to the view of Members Fanning and Jenkins, that the Board's power is not so restricted. The court also failed to deal adequately with the issue of the Board's power to conduct an election absent a section 9(c) question of representation. The fact that the Act clearly contemplates only one kind of election was not treated by the court, and the court did not recognize the problems of reconciling this new kind of election with provisions of the Act making the occurrence of "an election" an operative event. It is highly unlikely that this Board will apply Libbey-Owens-Ford in future cases. Rather, in light of the views of Members Fanning and Jenkins and Chairman Miller, it is apparent that the Board will leave questions regarding the consolidation of existing bargaining units for resolution at the bargaining table.

B. NLRB Development of Gissel

In NLRB v. Gissel Packing Co., the Supreme Court left undetermined whether it would be appropriate to find a section 8(a)(5) violation and issue a bargaining order in cases where the employer has knowledge, independent of authorization cards, that the union has a valid majority and refuses to recognize the union but refrains from committing independent unfair labor practices. When the Board was faced with that issue in Wilder Manufacturing Co., it adhered to what was described in Gissel as its "current practice" and issued a bargaining order. The Board concluded that the employer knew the union represented a majority because the union had authorization cards from 11 of the 18 employees in the unit, because the 11 employees participated in a recognitional strike and because one of its officers remarked to another that the union had "10 of the 11" employees in the unit. Nevertheless, the Board did not terminate inquiry with its finding that the employer possessed independent knowledge of the union's majority status. The Board further examined the evidence and relied on the employer's "lack of willingness" to utilize the

18 For example, § 9(c)(3) provides in part: "No election shall be directed in any bargaining unit . . . within which in the preceding twelve-month period, a valid election shall have been held. . . ." 29 U.S.C. § 159(c)(3) (1970).
21 395 U.S. at 601 n.18.
22 395 U.S. at 601 n.18.
23 395 U.S. at 601 n.18.
tion procedures as evidenced by the fact that it neither filed for an election nor urged the union to petition for certification.\textsuperscript{24} Wilder thus established that an employer faced with convincing evidence of a union's majority status from sources independent of authorization cards would be subject to a bargaining order unless it took affirmative action to bring into play the Board's election machinery.\textsuperscript{26}

Apparently uneasy with the subjectivity of the independent knowledge test applied in Wilder, the Board in a later case, Summer & Co. (Linden Lumber),\textsuperscript{28} announced that it was reassessing that test. It specifically questioned the wisdom of attempting to divine, in retrospect, the state of employer (1) knowledge and (2) intent at the time it refused to accede to a demand for recognition.\textsuperscript{27} In Linden Lumber, the union requested recognition after obtaining cards from all twelve employees in the unit. The employer refused recognition, claiming that the union did not represent a majority. At a pre-hearing conference the employer attempted to introduce evidence of supervisory taint;\textsuperscript{20} when provoked by the hearing officer's rightful refusal to hear that evidence, it declared that it would not bargain even if the union won a Board election. Subsequently, the employer indicated that if the union submitted a new petition supported by a showing of support of 30% of the employees, the company would agree to a consent election. However, when the union produced a statement of support signed by nine employees, the employer again refused recognition. A majority of the employees struck in support of the demand for recognition.\textsuperscript{29}

A bare majority of the Board refused to grant a bargaining order. The majority declared that an employer should not be found in violation of section 8(a)(5) solely on the basis of its refusal to accept evidence of majority status other than the results of a Board election unless, as in Snow & Sons,\textsuperscript{10} it had agreed with the union upon an alternate means of determining majority status.\textsuperscript{31} The policy to be served, according to the Board, is that of encouraging voluntarism while ensuring that the preferred route of a secret election is available to those who do not find any alternate route more acceptable.\textsuperscript{32} Wilder

\textsuperscript{24} 75 L.R.R.M. at 1024-25.
\textsuperscript{28} 190 N.L.R.B. No. 116, 77 L.R.R.M. 1305 (1971).
\textsuperscript{27} 77 L.R.R.M. at 1309.
\textsuperscript{26} The employer argued that because the union has been organized by supervisors, it would be unlawful for the company to recognize it. Id. at 1306.
\textsuperscript{20} Id. at 1306-07.
\textsuperscript{10} 134 N.L.R.B. 709, 49 L.R.R.M. 1228 (1961).
\textsuperscript{31} 77 L.R.R.M. at 1309. The Board reads Snow narrowly. In that case the Board issued a bargaining order on the basis of a finding that the employer had no reasonable doubt as to the union's majority status. 134 N.L.R.B. at 710-11, 49 L.R.R.M. at 1229.
\textsuperscript{32} 77 L.R.R.M. at 1309.
was distinguished on the basis of the lack of willingness on the part of the employer in that case to utilize the Board's election machinery. However, given the employer's announcement in *Linden Lumber* that the company would refuse to abide by the results if an election were conducted, the basis for this distinction would appear to be nonexistent.

Members Fanning and Brown dissented in *Linden Lumber*. They stated that the majority approach was contrary to the principle that an employer may not avoid or delay its statutory obligation to bargain where there is no real dispute that a union represents a majority of its employees; they declared that the majority in effect overruled *Wilder*, which had not turned on an agreement to determine the union's status by an alternate route but rather on substantial evidence demonstrating knowledge of the union's majority status together with a lack of evidence indicating willingness to utilize the election machinery.

During the current Survey year, the Board reaffirmed the *Linden Lumber* rule that absent independent unfair labor practices a bargaining order will not issue unless the employer and the union have agreed on an alternate means of resolving the issue of majority status. The Board also recognized an additional circumstance in which a bargaining order will issue. In *Nation-Wide Plastics Co.* and *Sullivan Electric Co.*, the Board issued bargaining orders to remedy situations in which an employer refused recognition after determining by means of a personal poll of the employees that the union had majority status.

In both *Nation-Wide Plastics* and *Sullivan Electric*, the union presented the employer with authorization cards from a majority of employees and demanded recognition. Subsequently, the employers conducted a poll of the employees which showed that a majority of the employees supported the union's demand for recognition; nevertheless, each employer continued to refuse to bargain with the union. In *Nation-Wide Plastics* the Board declared that neither *Linden Lumber* nor *Gissel* was applicable. The Board noted that there could be only one lawful purpose for such a poll in the face of a union organizational campaign and only one lawful response once the employees have thereby made their preference for a union known. The Board pointed out that the employees had indicated their preference for a union under conditions much less favorable than those which would prevail at a Board election and that the employer, who could have insisted upon a Board

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83 Id.
84 Id. at 1311-12 (dissenting opinion).
86 199 N.L.R.B. No. 97, 81 L.R.R.M. 1313 (1972).
87 81 L.R.R.M. at 1037-38; 81 L.R.R.M. at 1313.
88 81 L.R.R.M. at 1038.
election, had chosen this route. The Board concluded that no legitimate interest under the Act would be served by withholding a bargaining order in these circumstances.\textsuperscript{89}

In \textit{Sullivan Electric} the administrative law judge relied upon \textit{Wilder} and found that the employer knew that the union had majority status and thus violated section 8(a)(5) by refusing to bargain. A majority of the Board pointed out that the principles underlying \textit{Wilder} had been re-examined in \textit{Linden Lumber}; however, citing \textit{Nation-Wide Plastics} and \textit{Snow & Sons} it held that the facts of this case gave rise to a bargaining obligation.\textsuperscript{40} Member Fanning concurred on the basis of his dissenting opinion in \textit{Linden Lumber} and on the basis of \textit{Nation-Wide Plastics}.\textsuperscript{41} Member Kennedy, who had not participated in \textit{Nation-Wide Plastics}, dissented. He criticized the majority's reliance upon \textit{Snow & Sons}, stating that the case was not relevant to \textit{Sullivan Electric} because in \textit{Sullivan Electric} the employer and the union had never agreed on a means for resolving the issue of majority status. Therefore, he would conclude that \textit{Linden Lumber} controlled and that the complaint should be dismissed. He further argued that bargaining orders are not appropriate absent a finding of an unfair labor practice which cannot be erased by traditional remedies.\textsuperscript{42}

During the current Survey year, the Board, for the purpose of ensuring continuity in its decisions, reconsidered \textit{Wilder}. The Board concluded that the effect of \textit{Linden Lumber} was to overrule its \textit{Wilder} decision.\textsuperscript{43} The majority stated:

\begin{quote}
[B]oth here and in Linden, we have answered the questions left open by the Supreme Court in Gissel and refused to enter a bargaining order on the basis of cards or other circumstantial evidence of majority status, where there has been no voluntary agreement on a means of resolving majority status and when the road to a free and fair election has not been impeded by unlawful employer conduct.\textsuperscript{44}
\end{quote}

The majority noted that the record was devoid of any evidence that the employer attempted as in \textit{Nation-Wide Plastics} or agreed as in \textit{Snow & Sons} to determine majority status by any means other than a Board election. The majority concluded that in the absence of independent unfair labor practices, the employer had not violated section 8(a)(5).\textsuperscript{45}

\begin{itemize}
\item \textsuperscript{89} Id. at 1038-39.
\item \textsuperscript{40} 81 L.R.R.M. at 1314-15 & n.1.
\item \textsuperscript{41} Id. at 1314 n.1.
\item \textsuperscript{42} Id. at 1315 (dissenting opinion).
\item \textsuperscript{43} \textit{Wilder Mfg. Co.}, 198 N.L.R.B. No. 123, 81 L.R.R.M. 1039, 1040 (1972).
\item \textsuperscript{44} 81 L.R.R.M. at 1041.
\item \textsuperscript{45} Id. at 1040.
\end{itemize}
The complaint was dismissed. Member Fanning dissented, as in *Linden Lumber*, on the ground that in the absence of a bona fide dispute as to the existence of the requisite majority of eligible employees, an employer's denial of recognition violates section 8(a)(5). In his opinion the signing of authorization cards by a majority of employees, together with their participation in a picket line and strike and the employer's concession that the union had majority status, compelled a finding that the employer had knowledge of the union's majority status and that the employer had, therefore, violated section 8(a)(5) by refusing recognition.

It would appear that the unanswered question of *Gissel* has now received a firm, if not unanimous, answer by the Board. A majority, Chairman Miller and Members Penello and Jenkins, agree that an employer may, in the face of a union demand for recognition, insist that a question concerning representation be resolved by a Board election, absent agreement upon another method of determining the union's majority status or a unilateral poll of a majority of the eligible employees. The majority thus focuses on the employer's right to an election. It does not dispute Member Fanning's contention that absent a real dispute as to the existence of the requisite majority support for the union, the employer has an obligation to bargain. However, as the Board announced in *Linden Lumber*, it has abandoned any attempt to ascertain the subjective state of an employer's knowledge. Instead, it has given the employer the benefit of a presumption of ignorance which can only be rebutted by a showing that he reneged on an agreement to determine the union's majority status through an alternate method or that he took a poll which revealed to him that the union did have majority status. This rule expressed and applied during the Survey year in *Nation-Wide Plastics*, *Wilder* and *Sullivan Electric* has the advantage of administrative simplicity. Furthermore, it is designed to achieve the announced Board policy of encouraging the principle of voluntarism while keeping open the preferred route of a Board election. Unlike the rule advocated by Member Fanning, it is not subject to the criticism that it encourages industrial unrest by treating recognitional striking and picketing by a majority of eligible employees as evidence of employer knowledge of union majority status.

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46 Id. at 1041-42 (dissenting opinion).
47 The poll must establish that the union has majority status. In *R & M Electric Supply Co.*, 200 N.L.R.B. No. 59, 81 L.R.R.M. 1553 (1972), decided during the Survey year, Members Miller and Jenkins held that the employer's interrogation of only two out of nine employees did not rise to the level of a poll which revealed majority status. Member Fanning dissented.
48 Member Kennedy can be expected to vote with the majority in all but cases in which a bargaining order is issued on the basis of an employer's unilateral poll of a majority of the employees. See text at note 42 supra.
V. Unfair Labor Practices

A. The Duty to Bargain


Section 8(a)(5) of the NLRA\(^1\) provides that it is an unfair labor practice for an employer to refuse to bargain collectively with the representative of its employees. Section 8(d)\(^2\) outlines the bargaining obligation. That section requires the employer to bargain in "good faith" with respect to "wages, hours, and other terms and conditions of employment..."\(^3\) A ruling on the merits of a bad faith bargaining charge is often difficult in that it ultimately "involves a finding of motive or state of mind which can only be inferred from circumstantial evidence."\(^4\) In cases where there has not been an outright refusal to bargain on demand, the question may become

whether it is to be inferred from the totality of the employer's conduct that he went through the motions of negotiation as an elaborate pretense with no sincere desire to reach an agreement if possible, or that it bargained in good faith but was unable to arrive at an acceptable agreement with the union.\(^5\)

In dealing with charges of "surface bargaining"—negotiation without the intention of entering into an agreement—the Board must exercise restraint in examining an employer's proposals, since it "may not, either directly or indirectly, compel concessions or otherwise sit in judgment upon the substantive terms of collective bargaining agreements."\(^6\) However, the Board is not precluded from examining employer proposals in an attempt to determine the existence of good faith:

[w]hile the Board cannot force an employer to make a "concession" on any specific issue or to adopt any particular position, the employer is obliged to make some reasonable effort in some direction to compose his differences with the union.

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\(^1\) Section 8(a)(5) provides that it is an unfair labor practice for an employer "to refuse to bargain collectively with the representatives of his employees, subject to the provisions of section 159(a) ..." 29 U.S.C. § 158(a)(5) (1970).

\(^2\) Section 8(d) defines the bargaining obligation as "the performance of the mutual obligation of the employer and the representative of the employees to meet at reasonable times and confer in good faith with respect to wages, hours, and other terms and conditions of employment ..." 29 U.S.C. § 158(d) (1970).


\(^4\) Id. at 134, 32 L.R.R.M. at 2227 (emphasis added).

\(^5\) Borg-Warner Controls, a Division of Borg-Warner Corp., 198 N.L.R.B. No. 93, 80 L.R.R.M. 1790 (1972).

if § 8(a)(5) is to be read as imposing any substantial obligation at all. 8

The illusive nature of the good faith obligation has been underscored during the Survey year by the split decisions of two Board panels in surface bargaining cases. In Borg-Warner Controls, a Division of Borg-Warner Corp., a Board panel, with Chairman Miller dissenting, found an 8(a)(5) violation because of the employer's inflexible attitude on substantive contract terms and on the procedure of the negotiation meetings. The panel majority found that the employer's initial proposals were substantially the same as the existing terms and conditions of employment, although some proposals involved a reduction of employee benefits. 9 The employer never altered any of its original proposals as to economic issues. 10 After twenty negotiation meetings spanning eight months, no agreement was reached on any of the major economic or non-economic issues. Turning to the employer's attitude on the procedural aspects of bargaining, the majority found that the employer refused to consider alternatives to its determinations as to the frequency and timing of meetings. The employer further refused to release employees, without compensation, for negotiations during working hours and refused to make its negotiators available during working hours. 11

In finding that the employer engaged in surface bargaining in violation of 8(a)(5), the majority relied on the totality of the employer's conduct, which "demonstrated an unyielding rigidity during negotiations which made collective bargaining a futility." 12 The majority indicated that the issue was not whether the employer made enough concessions, although the majority did state that the employer's position on economic issues "was generally lacking in concessions of value and is strongly suggestive of an intention on its part to engage

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10 80 L.R.R.M. at 1791. The proposals involving reduction included those "related to vacation pay, holiday pay, merit increases, rest periods, report pay, sick leave pay, and the grievance procedure." Id.
11 Id. at 1792.
12 The Board also considered, as background information, the employer's denial to the union of access to its plant for the purpose of securing information on job classifications, although the Board was precluded from basing an unfair labor practice finding on this conduct since it did not occur during the six month limitation period of § 10(b) of the NLRA. The Board's power to issue unfair labor practice complaints is limited by a proviso to § 10(b), which states, in relevant part, "[t]hat no complaint shall issue based upon any unfair labor practice occurring more than six months prior to the filing of the charge with the Board and the service of a copy thereof upon the person against whom such charge is made . . . ." 29 U.S.C. § 160(b) (1970).
13 80 L.R.R.M. at 1794.
in sterile discussions, accompanied by illusory and meaningless con-
cessions, without real intention of engaging in the type of bargaining
that could lead to the execution of a labor contract.' In his dissent,
Chairman Miller maintained that the Board was exceeding its statu-
tory authority and was, in effect, forcing the employer to make con-
cessions. He pointed out that there was no evidence of "union animus
or hostility to the bargaining process," and that the majority's finding
of an 8(a) (5) violation was "predicated upon . . . [the employer's]
lawfully held positions with respect to certain procedural matters and
its failure to make economic concessions." The majority's ruling in
Borg-Warner is indicative of the Board's continued readiness to find
that a party, in spite of its willingness to meet and discuss proposals, has engaged in surface bargaining. Although Chairman Miller in his dissent spoke of the need for "caution" in finding surface bargaining absent specific acts violative of 8(a) (5), his position would appear to preclude surface bargaining rulings in many instances by virtually prohibiting an examination of the employer's proposals. It is submitted that the panel majority exercised the necessary "caution" as to the employer's proposals and properly based its finding on the totality of the employer's conduct. The Survey year saw another Board panel, with Chairman Miller once again dissenting, find that an employer had engaged in surface bargaining in Wal-Lite Division of United States Gypsum Co. The charged party was a successor employer which had acquired an existing plant and had voluntarily adopted the collective bargaining contract between the predecessor employer, Wallace Manufacturing Co., and the union. Seven months before new contract negotiations began, the employer's labor relations manager indicated to union leaders that he planned to "break [the Union]" and that the employer would never sign a new contract with certain of the clauses of the Wallace contract. The union admitted that the Wallace contract "had led to inefficient and uneconomical operations." The parties held a total of five bargaining sessions. At the first

15 Id.
16 Id.
17 Id.
18 82 L.R.R.M. at 1064 (1972).
19 For discussion of developments in the area of successorship, see text at notes 85-112 infra.
20 82 L.R.R.M. at 1065. The clauses included an arbitration provision, a clause prohibiting foremen from doing rank-and-file work, a penalty clause, a seniority provision and a safety committee clause. Section 10(b) precluded the Board's finding an unfair labor practice on the basis of these statements. See note 12 supra.
21 82 L.R.R.M. at 1069 (dissenting opinion).
session the employer submitted terms for a new contract which were modeled on a contract between the union and the employer at another plant and which vastly reduced many of the Wallace contract's employee benefits. At the second session the union submitted virtual renewal of the Wallace contract as a counterproposal. Following the second session the employer sent its employees letters in which it stated its intention not to yield in the event of a strike and implied that the union was stalling the negotiations. At the third and fourth sessions the parties discussed each other's proposals and disagreed as to whether the Wallace contract should form the basis of a new contract. The employer devoted the fifth and final session to the submission, on a "final," "[t]ake it or leave it" basis, of its original proposal modified to include terms which provided increased economic benefits. Although economic matters had not been previously discussed, the employer stated that further bargaining would be "futile"; the employer did, however, willingly meet with the union during the ensuing strike.

The majority of the Board panel, in finding a surface bargaining violation, relied upon various factors which, "although insufficient if standing alone or considered in isolation to support a refusal-to-bargain violation, in their totality demonstrate[d] ... [the employer's] lack of good faith." The majority pointed to the limited authority of the employer's chief negotiator as one factor. Also considered significant was the fact that the employer's take it or leave it proposal "so substantially slashed existing employee benefits that [the employer] could not reasonably have expected the Union to acquiesce." Another factor viewed as indicative of bad faith was the employer's presentation of its final offer "before there had been any genuine attempt through bargaining to narrow the differences in the parties' positions." Finally, the labor relations manager's warning to the union was viewed as the display of a "cavalier attitude" and the employer's letters were interpreted as an attempt "to denigrate the Union in the employees' eyes ...." The majority concluded that the employer lacked "serious intent to adjust differences and to reach an acceptable common ground."

Chairman Miller dissented, pointing to the employer's willingness to explain its proposals and discuss the union's counterproposals. He

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22 Id. at 1065, 1068.
23 Id. at 1066, 1070.
24 Id. at 1066.
25 Id. at 1067.
26 Id.
27 Id. at 1067-68.
28 Id. at 1068.
argued that the union's position—demanding that the Wallace terms be retained—was "as fixed and predetermined" as the employer's.\textsuperscript{29} The employer's voluntary assumption of the Wallace contract during the transition period after its acquisition of the Wallace plant should, according to the dissent, have been treated as "strong affirmative evidence of good faith . . . ."\textsuperscript{30} Chairman Miller also questioned the majority's dismissal of the employer's proposals as predictably unacceptable to the union. He pointed out that the proposals were based on another contract between the same parties, that the union had admitted that the Wallace contract it was attempting to maintain had created inefficiencies, and that the employer's economic terms involved increased employee benefits.\textsuperscript{31}

The panel's decision in \textit{United States Gypsum} appears to create the possibility of a broadening of the definition of surface bargaining. One indication of this broadening is the fact that the proposal as to which the employer "could not reasonably have expected the Union to acquiesce"\textsuperscript{32} was actually based on terms the union had found acceptable at another plant. The majority states that the presentation of a predictably unacceptable offer may be a factor indicative of bad faith, but the two cases cited by the majority in support of the use of this factor involved employer proposals which, unlike the proposals in the instant case, offered the unions almost nothing of value.\textsuperscript{33} While reliance on this factor may have been misplaced, it is nonetheless submitted that the totality of the factors considered by the majority supports the finding of an 8(a)(5) violation. It is further submitted that Chairman Miller's suggestion that the employer's assumption of the Wallace contract is strong evidence of good faith may be faulted for ignoring the realities of the employer's situation. Although the Supreme Court held during the Survey year that a successor employer need not adhere to the terms of its predecessor's collective bargaining

\textsuperscript{29} Id. at 1068-70.
\textsuperscript{30} Id. at 1069.
\textsuperscript{31} Id. Chairman Miller also took the position that the employer's letters were privileged expressions, that the statements about breaking the union were unimportant since the manager involved did not personally participate in the bargaining, and that there was "no clear evidence" that the employer's chief spokesman had "unduly limited" authority. Id. at 1069-70.
\textsuperscript{32} Id. at 1067.
\textsuperscript{33} In the first case cited by the majority, NLRB v. Reed & Prince Mfg. Co., 205 F.2d 131, 139, 32 L.R.R.M. 2225, 2233 (1st Cir. 1953), the employer's proposed contract contained only two provisions, a recognition clause and a work hours clause; it bypassed all the major items the union had proposed for inclusion. In the second case cited, Mississippi Wood Preserving Co., 173 N.L.R.B. 1370, 1378, 70 L.R.R.M. 1021 (1968), the Board termed predictably unacceptable an employer's proposal which had no economic terms and which included a clause giving the employer exclusive authority over many areas normally subject to the collective bargaining process.
agreement, the legal obligations of a successor employer were unsettled at the time the employer in the instant case adopted its predecessor's contract. Moreover, this same employer had been required by the Fifth Circuit to adhere to a predecessor's contract in a different case three years prior to its adoption of the Wallace contract. However, it is submitted that in future cases where a successor has, in a true spirit of voluntary cooperation, assumed its predecessor's contract, the Board should follow Chairman Miller's suggestion that such conduct is strong evidence of good faith towards the bargaining rights of employees.

2. Employer Withdrawal from Multi-Employer Unit

A number of cases decided during the Survey year illustrate the circumstances under which an employer may withdraw from a multi-employer unit and indicate a willingness on the part of the appellate courts to reject the Board's application of the rules it has developed in this area. Although multi-employer units can only be established with the consent of all parties, the Board prevents a union or an employer, as a measure of "momentary expedience" or "strategy in bargaining," from withdrawing in a manner which would have an "unstabilizing and disrupting effect of multiemployer collective bargaining."

In Retail Associates, Inc. the Board indicated that, prior to the date set for the start of contract negotiations, withdrawal would be allowed upon adequate written notice. However, once negotiations were in progress withdrawal would not be allowed, absent unusual circumstances, unless there was mutual consent. In the case of a withdrawal during negotiations by an employer, a union's conduct can create the implication of consent or acquiescence towards the employer's actions. The existence of an impasse in the negotiations has also been considered an important factor, although it is unclear whether an impasse constitutes an excuse for withdrawal or is merely evidence of "unusual circumstances."

In I.C. Refrigeration Service, Inc., a Survey year case, the Board majority refused to find violations of section 8(a)(1) and (5) where,

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57 Id.
60 200 N.L.R.B. No. 107, 81 L.R.R.M. 1529 (1972).
61 Section 8(a)(1) provides that it shall be an unfair labor practice for an employer
after the union and the employer association concluded an agreement, four employers withdrew from the association and refused to execute the contract. Using the union's willingness to engage in individual bargaining as a prime indicator of consent or acquiescence, the majority found acquiescence because the union, in an attempt to settle its 8(a)(1) and (5) charges, presented the four employers with proposals different from those offered the association, and considered the employers' counterproposals. Member Fanning dissented on the ground that conduct during settlement discussions could not be used as evidence of acquiescence.

The Eighth Circuit in *Fairmont Foods Co. v. NLRB* found that the existence of an impasse and of union acquiescence made an employer's withdrawal permissible. The Board had held that the employer, Fairmont Foods Co. [Fairmont], violated 8(a)(1) and (5) by refusing to execute a contract which the employer association and the union had agreed upon after Fairmont withdrew from the association. The Board majority found that since attempts to reach an agreement had not ended at the time of the withdrawal, despite the existence of a strike, there was no impasse. Further, the majority implied that an impasse alone would not excuse the withdrawal. The union's failure to protest at the time of the withdrawal was not found to be sufficient evidence of acquiescence. In a dissenting opinion, Chairman Miller found it "incongruous" that Fairmont was found guilty of bad faith bargaining when its withdrawal, which freed the association from its veto over contract terms, enabled the union and the association to move closer to agreement.

The Eighth Circuit denied enforcement to the Board's order. The court found that there had been an impasse, noting that the association and the union had rejected each other's final offer and that the union had resorted to individual bargaining with three other members of the employer association. Without mentioning the contrary implication in the Board's opinion, the court held that an impasse excuses with-

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42 81 L.R.R.M. at 1533 & n.12.
43 Id.
44 471 F.2d 1170, 82 L.R.R.M. 2017 (8th Cir. 1972).
46 80 L.R.R.M. at 1175.
47 Id. at 1175-76.

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drawal from a multi-employer bargaining unit. The court agreed that the union’s failure to protest Fairmont’s withdrawal was not determinative, but it considered this silence to be one factor which, when taken with the union’s willingness to meet separately and discuss “economic issues” with Fairmont and its conclusion of interim agreements with other employers, constituted acquiescence excusing the withdrawal.

In another Survey year decision, a finding by the Board that there was no acquiescence was upheld, but the Board’s refusal to find an impasse was rejected. In a 1971 decision, *Hi-Way Billboards, Inc.*, the Board found that there was no impasse in spite of the fact that negotiations with the employer association had broken off and that the union had gone on strike. Great reliance was placed on an admission by the employer’s negotiator that agreement had been close. The Board also found that the union’s willingness to “study” the employer’s counterproposals and its acceptance of the “ostensible withdrawal” of two other members of the association after their agreement to be bound by any contract made with the association did not constitute individual bargaining or acquiescence.

The Fifth Circuit, in *NLRB v. Hi-Way Billboards, Inc.*, affirmed on the acquiescence issue but held that there had been an impasse. The fact that the association’s last offer, which the union had termed an “ultimatum,” had been rejected by the union, when coupled with the strike and a pessimistic assessment of the situation by a federal mediator, required the finding of an impasse in spite of the “isolated” evidence of the negotiator’s admission. After deciding that there had been an impasse, the court stated that it was “without an opinion as to the legal consequence of that fact,” and remanded to the Board so that it might “be given the first opportunity to decide whether an impasse such as found here excuses” the withdrawal.

The decisions of the Board and the courts in *I.C. Refrigeration, Fairmont Foods* and *Hi-Way Billboards* show that the standards for determining whether an acquiescence by the union or an impasse in negotiations exists have not been clearly defined. Individual bargaining, either with the withdrawing employer or with other individual members of the employer association, is clearly the prime indicator of acquiescence. The *I.C. Refrigeration* union’s willingness to offer the

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48 471 F.2d at 1172, 82 L.R.R.M. at 2018.
49 Id. at 1173-74, 82 L.R.R.M. at 2019-20.
51 77 L.R.R.M. at 1463.
52 — F.2d —, 82 L.R.R.M. 2527 (5th Cir. 1973).
54 Id. at 2532.
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withdrawing employer terms not included in its agreement with the employer association may reasonably be viewed as conduct inconsistent with the employer's continued membership in the association. However, the union's willingness to discuss "economic issues" in *Fairmont Foods*—a willingness apparently unaccompanied by the presentation of new terms to the employer—is difficult to distinguish from the readiness of the *Hi-Way Billboards* union to study new proposals. The Eighth Circuit in *Fairmont Foods* felt that by discussing economic issues, even in a context devoid of concrete proposals, "the Union did more than simply demand that Fairmont sign the agreement executed with the Association, all that would have been required had the Union felt Fairmont was still a member of the Association." This analysis of the Eighth Circuit can be applied with equal force to the union's agreement to study new proposals in *Hi-Way Billboards*. It is submitted that in evaluating that union's conduct, emphasis should be placed on the test apparently relied upon by the Board—whether or not the union has made offers to the withdrawing employer which differ from those presented to the employer association. Such a test would allow for greater certainty and consistency in this area.

The Survey year cases also fail to provide clear standards for determining the existence of an impasse. The Board has indicated that:

> [w]hether a bargaining impasse exists is a matter of judgment. The bargaining history, the good faith of the parties in negotiations, the length of the negotiations, the importance of the issue or issues as to which there is disagreement, the contemporaneous understanding of the parties as to the state of negotiations are all relevant factors to be considered in deciding whether an impasse in bargaining existed.

While a certain amount of flexibility in weighing these factors is desirable, it is submitted that there is merit in the Fifth Circuit's criticism of the Board's reliance in *Hi-Way Billboards* on an isolated statement by a negotiator.

The contrast between the *Fairmont Foods* court's holding that an impasse always excuses a withdrawal and the inability of the *Hi-Way Billboards* court to determine the legal effect of an impasse

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55 471 F.2d at 1174, 82 L.R.R.M. at 2020.

56 On the subject of a union's negotiations with individual employers other than the withdrawing employer, the description in the Board's opinion of the agreements reached in *Hi-Way Billboards* may not be detailed enough for comparison to the interim agreements in *Fairmont Foods*, but it is questionable whether the distinction between the two situations is sufficient to explain the opposite results reached by the Fifth and Eighth Circuits.

graphically illustrates the present confusion over this issue. Although the Board at times has, as the Eighth Circuit recognized in *Fairmont Foods*, indicated that impasse constitutes an excuse, it at other times it has implied that impasse alone does not excuse withdrawal. It is submitted that a genuine impasse reached through good faith bargaining creates a situation in which the policy justification for restrictions on the right of withdrawal has little application. In situations in which there is no prospect of reaching an agreement through multi-employer bargaining, withdrawal by a union or an employer could only have a beneficial, rather than a disruptive or unstabilizing effect, on the bargaining process. The *Fairmont Foods* case illustrates this point, since there the withdrawal made it possible to end the impasse. For this reason, it is submitted that a genuine impasse should always be treated as an excuse for withdrawal.

Another interesting aspect of the problem of withdrawal from multi-employer units was raised in *NLRB v. Field & Sons, Inc.* There the First Circuit was faced with a situation in which a small employer withdrew from an employer association during a strike which culminated in the voluntary resignation of all the employer's union employees. Although the court denied enforcement to the Board's order against the employer on other grounds, it strongly implied by way of dictum that a party to a multi-employer bargaining unit should have the right to resign at any time during the course of the negotiations, despite the lack of either acquiescence or impasse. The court implied that, rather than maintain a rigid rule against withdrawal, the Board should allow withdrawal, absent some showing of bad faith or "adverse effect upon the bargaining process." The court indicated that the Board's rigid restrictions appeared to be inconsistent with the Board's posture in *NLRB v. Textile Workers Local 1029 (Granite State)*, where it maintained that a union member should be free to withdraw from a union during a strike and return to work. The court stated that "[i]f an employee who has agreed to a strike can withdraw, we do not see why an undertaking to engage in multi-employer bargaining is an irrevocable agreement under all circumstances."

It is submitted that while the two situations outlined by the court

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61 — F.2d —, 80 L.R.R.M. 2534 (1st Cir. 1972).
62 80 L.R.R.M. at 2535.
63 446 F.2d 369, 77 L.R.R.M. 2711 (1st Cir. 1971). For a discussion of the issues raised in this case, see text at pp. 1224-27 infra.
64 80 L.R.R.M. at 2536.
are similar in terms of abstract rights, there are special problems presented by the employer's withdrawal which are not presented in the case of a resigning employee. It is doubtful whether the good faith and adverse effect tests proposed by the court would work as effectively as the Board's Retail Associates rules in preventing the utilization of withdrawal as a bargaining stratagem. It is submitted that the Retail Associates rules should be retained to provide better protection for multi-employer bargaining, which, as the Supreme Court has recognized, is "a vital factor in the effectuation of the national policy of promoting labor peace through strengthened collective bargaining . . . ."

3. Employer's Decision to Sell Facility: General Motors

In UAW v. NLRB (General Motors Corp.), a Survey year decision, the District of Columbia Circuit upheld a Board determination that an employer's decision to sell part of its enterprise was not a mandatory subject of bargaining. In delineating the nature of the bargaining duty in the area of managerial decisions, a balance must be struck between the interests of the employees on the one hand and the "'right of an employer to run his business'" on the other. As to all managerial decisions of this nature, the Board and the courts are agreed that the employer has a duty to bargain about the effects of the decision. There has, however, been conflict and uncertainty over the extent of the duty to bargain about the managerial decisions themselves. In developing the bargaining duty, the Board and the courts have utilized the Supreme Court's ruling in Fibreboard Paper Products Corp. v. NLRB that an employer must bargain regarding its decision to subcontract work performed by its own employees. The Court had emphasized in Fibreboard that its decision was limited to the particular facts and should not be applied to all subcontracting decisions.

65 NLRB v. Truck Drivers Local 449, 353 U.S. 87, 95 (1957).
69 See, e.g., the cases listed in General Motors Corp., 191 N.L.R.B. No. 149, 77 L.R.R.M. 1537, 1540 n.9 (1971).
72 Id. at 215.
tracting decision would not constitute a significant abridgement of the employer's freedom to manage its business, the Court noted that there had been no alteration of the company's basic operation or investment of capital and that the employer had "merely replaced existing employees with those of an independent contractor to do the same work under similar conditions of employment." 78

In General Motors Corp. 74 the Board was faced for the first time with the issue of whether the bargaining duty extends to decisions to sell part of the employer's business. The Board held that the employer's transfer of its facilities to a franchisee was a sale of business; the decision to sell was beyond the mandatory bargaining duty since, unlike the Fibreboard subcontracting decision, it involved "the very core of entrepreneurial control." 76 The Board did not examine any special needs of the particular employer and rested its finding of the preeminence of employer over employee interests on the general needs of secrecy and of the freedom to make managerial decisions quickly and decisively, as well as the likelihood that the employees and their representatives would be unfamiliar with the "determinative financial and operational considerations" behind a decision to sell. 77 Members Fanning and Brown dissented on the ground that the employer's transfer was the equivalent of the Fibreboard subcontracting situation and that, therefore, the employer was bound to bargain about the decision. 78

The District of Columbia Circuit affirmed in a two-to-one split decision. The court stated that there were two independent situations in which the courts require bargaining prior to the managerial decision. It found that bargaining is required only when "the decision appears to be primarily designed to avoid the bargaining agreement with the union or . . . [if the decision . . . [did not result] in the termination of a substantial portion or a distinct line of the employer's business . . . [nor in] a major change in the nature of its operations . . . ." 79

78 Id. at 213.
74 191 N.L.R.B. No. 149, 77 L.R.R.M. 1537 (1971). The Board majority also found that the employer had fulfilled its duty to bargain over the effects of its decision to sell.
76 The dissent by Chief Judge Bazelon at the Court of Appeals level noted that the sale established "a close symbiotic relationship" between the employer and its new franchisee and that the employer could terminate the franchisee's sublease of the employer's facilities at will. UAW v. NLRB, 470 F.2d 422, 428 n.13, 81 L.R.R.M. 2439, 2444 n.13 (1972) (dissenting opinion). However, the majority of the court found that the employer and its franchisee had treated the transaction as a sale and further found that the transaction simply conformed to the employer's nationwide policy of converting its retail outlets to independent franchises or dealerships. Id. at 425, 81 L.R.R.M. at 2442.
77 77 L.R.R.M. at 1539.
78 Id. at 1540-43.
79 470 F.2d at 424, 81 L.R.R.M. at 2441.
The court found that there was no duty to bargain over the decision, since there was "no claim . . . of anti-union bias" and since the employer's decision was "at the core of entrepreneurial control." Chief Judge Bazelon dissented, arguing that the Board had created a "blanket exemption" from the bargaining duty for every employer transaction which would constitute a "sale" under property law. He indicated that the Board's rule would be an invitation to employers to circumvent the bargaining duty imposed by Fibreboard by making subcontracts appear to be sales. He stated that a case-by-case balancing of employer and employee interests was needed to determine the extent of the bargaining duty in every case, regardless of whether the employer "is negotiating a subcontract, a sale, or a franchise.

It would appear that Judge Bazelon is correct in his characterization of the approach of the Board and court majorities as creating a "blanket exemption" in cases involving sales of businesses, since the employer interests granted preeminence by the Board—the need for secrecy and for the ability to act quickly—are extremely general in nature. However, it is submitted that the Board and the District of Columbia Circuit have, by creating such an exemption, properly limited the scope of the bargaining duty mandated in section 8(d). If the description of the mandatory subjects in that section—"wages, hours, and other terms and conditions of employment"—is to be viewed as imposing any limits on the scope of the duty to bargain, then an employer's decision to sell part of its business must be left as an area of managerial discretion. Although the danger of circumvention of Fibreboard is present in some cases, it may be more apparent than real. This danger is lessened by the Board's willingness to examine the employer's conduct, regardless of characterization as a sale, when there is a claim of anti-union animus. The danger may also be lessened by the Board's power to require an employer to bargain about the effects of a decision to sell in a way that will involve bargaining over some aspects of the decision itself.

4. **Successor Employer: Burns**

This Survey year saw an attempt on the part of the Supreme Court to resolve an issue that has been hanging in the balance for eight years. The Supreme Court held in *NLRB v. Burns International Security*
that a successor employer has a duty only to bargain with the representative of its predecessor's employees; no duty exists to adhere to the terms of the predecessor's collective bargaining agreement.

Prior to 1964, successor employers were not obliged to honor the substantive terms of their predecessors’ collective bargaining agreements. John Wiley & Sons, Inc. v. Livingston, however, unsettled any assumption that this would always be the case. Wiley was a section 301 suit to compel arbitration brought against an employer who took over a company by merger. The Court held that the arbitration clause of the predecessor's collective bargaining contract was binding on the successor despite both the expiration of the agreement and the disappearance of the predecessor through merger. The Court reasoned that a collective bargaining agreement is in a category of its own and is not to be governed by conventional contract theory.

Since arbitration occupies a central role in national labor policy, one obvious alternative is to read Wiley narrowly as applying only to arbitration clauses. Despite this obvious interpretation a number of court and board cases saw Wiley as inviting full survival of the substantive terms of a collective bargaining agreement in the successorship situation. The Burns decision marks an end to such extrapolation.

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86 406 U.S. at 281-91. The vote was 5-4, with the Chief Justice and Justices Brennan and Powell joining in Justice Rehnquist's dissent.
89 376 U.S. at 548-50.
90 Id. at 549.
91 E.g., Wackenhut Corp. v. United Plant Guard Workers, 332 F.2d 954, 56 L.R.R.M. 2466 (9th Cir. 1964) (successor employer which purchased the assets of a limited partnership was bound by the predecessor's collective bargaining agreement); United Steelworkers v. Reliance Universal, Inc., 335 F.2d 891, 56 L.R.R.M. 2721 (3d Cir. 1964) (limiting holding to successor's duty to arbitrate, but leaving the possibility of full contract survival open by giving the collective bargaining agreement special status as other than a conventional contract); United States Gypsum Co. v. United Steelworkers, 384 F.2d 38, 66 L.R.R.M. 2232 (5th Cir. 1967) (successor bound by the arbitration provisions of its predecessor's collective bargaining agreement despite the union's loss of majority status and decertification).
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from Wiley. Dismissing Wiley as pertaining solely to the discrete area of arbitration, the Supreme Court instead based its decision on H.K. Porter Co. v. NLRB. Porter held that the Board lacks the power to order an employer to grant a dues check-off provision to a union with which it had refused to bargain. To substantiate its holding, the Porter Court relied upon section 8(d) of the NLRA which provides that the obligation to bargain collectively "does not compel either party to agree to a proposal or require the making of a concession." Porter involved an original employer rather than a successor, and the creation of a substantive contract term rather than survival of a contract already in existence; thus, it is as factually distinguishable from the Burns situation as is the section 301 suit to compel arbitration in Wiley.

Just as it can be seen that neither Wiley nor Porter is factually applicable to Burns, so it emerges that section 8(d) cannot be unequivocally relied upon as mandating the Court's Burns holding, for, in addition to the freedom of contract language relied upon by the Court, 8(d) also speaks to the issue of sanctity of the collective bargaining process. This sanctity of the bargaining process would support an extrapolation, particularly in view of the importance of collective bargaining to the proper functioning of the NLRA, that the agreement which is the culmination of such bargaining should survive a change of employers. Wiley and Porter are not on point; the statute is ambiguous. The Court's dismissal of Wiley and espousal of Porter thus indicates that underlying Burns was a policy decision to support freedom of contract, with the concomitant freedom of a prospective successor to fix the terms on which to run an assumed business, at the expense of sanctity of the collective bargaining agreement with its concomitant employee security.

93 406 U.S. at 286. 94 397 U.S. 99 (1970). 95 29 U.S.C. § 158(d) (1970). 96 Section 8(d) provides, with certain stated exceptions, that "where there is in effect a collective-bargaining contract covering employees in an industry affecting commerce, the duty to bargain collectively shall also mean that no party to such contract shall terminate or modify such contract . . . ." 29 U.S.C. § 158(d) (1970) (emphasis added). 97 Extrapolation is necessary in that § 8(d), which technically only binds parties (of which the successor would not be one), does not speak to the successorship situation or to the question of contract survival within that situation. Nevertheless, such an extrapolation from the wording of § 8(d) is not far-fetched. See Note, 14 B.C. Ind. & Com. L. Rev. 193, 200-01 (1972). 98 The majority finds contract survival a greater threat to the employer than lack of contract survival would be to the employee: [H]olding either the union or the new employer bound to the substantive terms of an old collective-bargaining contract may result in serious inequities. A potential employer may be willing to take over a moribund business only if he can
Albeit Burns clearly holds that a successor need not honor the substantive terms of his predecessor's contract, the case may not prove dispositive of the ambiguities in the successorship area. Two potential loopholes are evident. First, the majority's declaration that "[r]esolution turns to a great extent on the precise facts involved here" opens the way for decisions in which Burns is easily distinguished. This is so because Burns obviously involves a unique set of facts: it is a successorship situation in which there has been no sale, merger, or transfer of assets. Second, the Burns opinion includes dictum which imports ambiguity into the holding:

Although a successor employer is ordinarily free to set initial terms on which it will hire the employees of a predecessor, there will be instances in which it is perfectly clear that the new employer plans to retain all of the employees in the unit and in which it will be appropriate to have him initially consult with the employees' bargaining representative before he fixes terms.

There are several problems in interpreting this dictum. An initial question is, how clear is "perfectly clear"? Delineation of some standard of clarity obviously presents a major problem. Assuming it is "perfectly clear" that the employees will be retained, the scope of the successor's duty to "consult" with the employees' representative is unclear. If the successor must bargain to impasse, the procedure could be an extended one that might outlast the term of the collective bargaining agreement. Thus, under an interpretation requiring bargaining to impasse, the dictum could allow in through the back door the very contract survival that Burns purports to bar at the front.

Assuming that mere "consultation" as opposed to impasse bargaining is required before changes may be made, or that unilateral

make changes in corporate structure, composition of the labor force, work location, task assignment, and nature of supervision. Saddling such an employer with the terms and conditions of employment contained in the old collective-bargaining contract may make these changes impossible and may discourage and inhibit the transfer of capital.

406 U.S. at 287-88. The majority goes on to show that nonsurvival can also be beneficial to the union:

On the other hand, a union may have made concessions to a small or failing employer that it would be unwilling to make to a large or economically successful firm. The congressional policy manifest in the Act is to enable the parties to negotiate for any protection either deems appropriate, but to allow the balance of bargaining advantage to be set by economic power realities.

Id. at 274.
100 Id. at 286.
101 Id. at 294-95.
changes may be effectuated upon impasse, this dictum also invites speculation concerning whether, once changes are permissible, the successor may institute any unilateral changes it desires, or whether there will be some changes which will be foreclosed. And, if "consultation" rather than bargaining to impasse is to be the requirement, how much discussion will be seen to comprise "consultation"?

During the Survey year, both the courts and the Board have interpreted Burns. In NLRB v. Wayne Convalescent Center, the Sixth Circuit held that the Board erred in finding a section 8(a)(5) violation based upon a successor employer's unilateral changes in vacation pay, sick pay and overtime rates without consulting or negotiating with the predecessor's employees' representative. The holder of a mortgage on the Clark Convalescent Home foreclosed and formed the Wayne Convalescent Center. This successor maintained substantially the same operations, patients, and personnel. Nevertheless, the court found it not "perfectly clear" that the successor intended to retain all of its predecessor's employees, since a plan to convert the institution from a nursing home to a bed-and-board facility was under consideration at the time at which the unilateral changes were made. "There was no indication that the successor considered the change at great length or with any degree of seriousness, or that it ever in fact occurred. Thus it can be inferred that the Sixth Circuit demands little to remove a situation from the scope of the "perfectly clear" dictum in Burns. Furthermore, the very fact that the Sixth Circuit felt compelled to establish the Wayne situation as being outside this dictum indicates the potential of this loophole in the Burns holding. Since the court found the Burns dictum inapplicable, it made no determination as to the extent to which the successor might have to bargain before effecting changes and whether, for that matter, the dictum might imply that unilateral changes could not be made at all.

The Seventh Circuit encountered Burns in NLRB v. Bachrodt Chevrolet Co. One employer (Bachrodt) succeeded another (Zimmerman) through purchase of assets. Zimmerman's employees had an unexpired collective bargaining agreement of which Bachrodt was informed before the transfer of title. Zimmerman's employees received

102 465 F.2d 1039, 81 L.R.R.M. 2129 (6th Cir. 1972).
103 Id. at 1042-43, 81 L.R.R.M. at 2131.
104 Id. at 1042 n.6, 81 L.R.R.M. at 2131 n.6.
105 See F.2d —, 81 L.R.R.M. 2244 (7th Cir. 1972), vacated, 41 U.S.L.W. 3526 (U.S. April 3, 1973). The case was remanded to the Seventh Circuit with instructions to remand to the Board in light of Burns. This remand does not alter the validity of the Seventh Circuit's interpretation of Burns, since the remand is based on the underlying conviction that the Board, rather than the court, should have had the first chance to reconsider Bachrodt in light of Burns.
job applications from Bachrodt; on the day that Bachrodt began operating, all but two of them reported for work. On that same day, Bachrodt, having refused to meet with the union, unilaterally changed a number of the working conditions. The Board ordered Bachrodt, as successor, to honor Zimmerman's contract with the union. Between the Board's decision and the consideration of the case by the Seventh Circuit, the Burns decision issued. Implementing Burns, the Seventh Circuit held that Bachrodt was under no obligation to honor the contract of its predecessor. The Bachrodt court did not view the "perfectly clear" language in Burns as derogating from the Burns holding. Instead, this dictum was interpreted as meaning only that, when it is perfectly clear that all former employees will be retained, the successor employer must bargain to impasse with the union before instituting unilateral changes. The dissent saw in the majority's holding a danger of contract survival being tacitly effected while overtly rejected, in the situation in which the impasse date might arrive after the date of contract expiration. Furthermore, the dissent pointed out, the majority's requirement of bargaining to impasse as a condition precedent to unilateral changes failed to take cognizance of the import of the Burns holding. The Burns holding relies heavily on the policy of encouraging the transfer of capital by allowing prospective purchasers to make their own novel decisions as to how they might run the business. To the extent that the date on which they may so innovate is postponed, the policy basis of Burns is undermined—perhaps fatally.

In sum, the Sixth Circuit concentrated on the words "perfectly clear" and avoided wrestling with the dictum by merely stating that the "perfectly clear" situation did not apply to the case at hand. The Seventh Circuit concentrated on the extent to which the successor must bargain with the union assuming that the "perfectly clear" criteria have been met.

The Board has also recognized the "perfectly clear" dictum as a possible exception to the Burns holding. However, the Board, by a
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circuitous route, has restricted the dictum so narrowly as to almost reinforce the absolute ban on contract survival implied by the strict holding of Burns.

In *S-H Food Service, Inc.*110 the Board was faced with a successor-ship situation in which it was markedly evident that almost all employees would be retained and that work would continue substantially unaltered. If the situation described in the *Burns* dictum had any application at all, it applied here. In this instance, however, the predecessor had a collective bargaining agreement which included an insurance clause, and in fact did provide insurance for his employees. As part of its cessation of operations, the insurance coverage was cancelled. The Board stated its interpretation of *Burns*:

We . . . interpret the law to be that a successor may not unilaterally institute changes in existing terms and conditions of employment, and that 'existing terms' must refer to those of the predecessor in situations where substantially the entire employee complement is taken over by a successor without hiatus and with no change in operation.111

Drawing an extremely meticulous distinction between “contract clause” and “term or condition of employment,” the Board then went on to hold that the contract provision for insurance, *qua* contract provision, did not have to be upheld. The predecessor having himself cancelled the insurance; it was no longer an operative term or condition of employment at the time of the takeover.112 This seems to leave to the predecessor the decision as to whether provisions of its collective bargaining contract will survive a change in employers. The Board sees the *Burns* “perfectly clear” dictum as barring the automatic survival of a provision included in the agreement unless that term is also being presently effected as a condition of employment. A predecessor's decision to cancel or not to cancel a condition of employment provided in its collective bargaining agreement simultaneously sets the parame-

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111 Id. at 1182.
112 Id. An interesting question arises as to the status of the predecessor upon cancellation of the insurance coverage. The *S-H Food Service* opinion is silent as to its fate, but it is at least arguable that its action was itself an unfair labor practice. If so, there is some authority for the proposition that a successor might have to remedy the unfair labor practices of its predecessor. See *Perma Vinyl Corp.*, 164 N.L.R.B. 968, 65 L.R.R.M. 1168 (1967), enforced sub nom. United States Pipe & Foundry Co. v. NLRB, 398 F.2d 544, 68 L.R.R.M. 2913 (5th Cir. 1968). If such practice is not an unfair labor practice, the question then arises: might not the cancellation of benefits become a condition precedent in merger and purchase offers? Certainly this is a result greatly to be avoided.
It is submitted that both the Seventh Circuit in *Bachrodt* and the Board in *S-H Food Service* have given *Burns* strained interpretations. The dissent in *Bachrodt* isolated clearly the problems inherent in the majority's "bargain to impasse and then make unilateral changes" interpretation: it allows for effective contract survival if the impasse date is long in coming, and substantially undermines the policy basis of *Burns*, i.e., greatest possible flexibility to the enterprising successor. The Board's *S-H Food Service* interpretation is more unwieldy still. Rather than consider contract survival entirely foreclosed by *Burns*, the Board first makes a somewhat specious distinction between a contract term and a contract term being presently effected as a condition of employment, and then proceeds to make survival of the term contingent upon this distinction—leaving, in the process, much power in the hands of the predecessor. And yet, although its method is forced and circuitous, the Board arrives at a conclusion more consistent with the *Burns* holding than is the Seventh Circuit's. Perhaps the Sixth Circuit in *Wayne*, shying away from the dictum in *Burns* and adhering to the narrow holding of that case, has given *Burns* the most reasonable interpretation. It is arguably a safer route to focus in on the ambiguous words "perfectly clear," decide (as did the Sixth Circuit in *Wayne*) that the situation at hand is something less than "perfectly clear," and revert to the Supreme Court's holding that a successor is under no duty to honor the substantive terms of its predecessor's bargaining contract. On the other hand, the weakness inherent in this approach will be exposed the first time the Sixth Circuit is faced with a successor-ship situation in which nothing has changed but the name of the employer. At such a point, the court will have the choice of either grappling with the difficulties of the *Burns* dictum or overtly stating its intention to adhere to the *Burns* holding and ignore the dictum altogether. An approach which did not overtly state such an intent might torture *Burns* rather than interpret it.

It is submitted that the Board and courts, when dealing with the contract survival area, would be well advised to face the *Burns* dictum as precisely that—mere dictum—and avoid the pitfalls of forced reasoning and specious distinctions by adhering to the strict holding of *Burns*. It is further submitted that the Supreme Court should avail itself of the next feasible opportunity to reassert its mandate that successors not be required to uphold predecessors' collective bargaining agreements, and should do so in an opinion free of potentially confusing dicta.
B. Employer Discrimination

1. Solicitation/Distribution Rules

Decisions by the Board and the courts during the Survey year pointed up the difficulties involved in balancing the parties' interests in formulating standards for no-solicitation and no-distribution rules. In NLRB v. Babcock & Wilcox Co.,\(^1\) decided in 1956, the Supreme Court established a fundamental distinction between the standards applicable to non-employee union organizers and those applicable to employees. The Court ruled that an employer may forbid non-employees from solicitation for a union and distribution of union literature on its property, provided that the union organizers may reach the employees by reasonable efforts through other available channels and that the employer does not discriminate against the union by allowing other solicitation or distribution on the premises.\(^2\) Concerning rules applicable to employees, the Board, since its 1962 Stoddard-Quirk Manufacturing Co.\(^3\) decision, has maintained that employers' rules prohibiting employee organizers from distribution or solicitation during non-working time in nonworking areas are presumptively invalid.

a. Central Hardware—In Central Hardware Co. v. NLRB\(^4\) the Supreme Court reaffirmed the viability of the balancing of interests mandated in Babcock & Wilcox and limited the scope of the test it had developed in Food Employees Local 590 v. Logan Valley Plaza, Inc.\(^5\) The employer's rule in Central Hardware prohibited non-employee union organizers from contacting employees on any part of its property, including parking lots which were maintained by the employer adjacent to its store and which were generally open to the public. The Board\(^6\) and the Eighth Circuit\(^7\) found a violation of section 8(a)(1),\(^8\) relying on Logan Valley, in which the Supreme Court held non-employee picketing in a shopping center to be constitutionally protected activity on the ground that the center, though private property, was open generally to the public and, thus, took on some of the attributes of public property for First Amendment purposes.\(^9\)

The Central Hardware Court ruled that Babcock & Wilcox, rather

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\(^1\) 351 U.S. 105 (1956).
\(^2\) Id. at 112.
\(^5\) 391 U.S. 308 (1968).
\(^7\) 439 F.2d 1321, 76 L.R.R.M. 2873 (8th Cir. 1971).
\(^8\) Section 8(a)(1) provides that it shall be an unfair labor practice for an employer to interfere with, restrain or coerce employees in the exercise of the rights guaranteed in § 7. 29 U.S.C. § 158(a)(1) (1970).
\(^9\) 391 U.S. at 319-20.
than Logan Valley, was controlling. The Logan Valley doctrine was limited to cases, such as those involving large shopping complexes, where the employer's property "assume[s] to some significant degree the functional attributes of public property devoted to public use."10 The Court emphasized that while freedom of communication is important to the free exercise of organization rights, intrusion on the employer's property rights can only be allowed if "the inaccessibility of employees makes ineffective the reasonable attempts by non-employees to communicate with them through the usual channels . . . ."11 Since the Eighth Circuit had not considered the case in light of the Babcock & Wilcox principle of accommodation between organization and property rights, the case was remanded.12

The significance of the Supreme Court's decision in Central Hardware lies in its refusal to bypass Babcock & Wilcox's stringent requirements for union intrusion on property rights and its refusal to broaden the scope of the Logan Valley concept of quasi-public property to include, in effect, "every retail and service establishment in the country, regardless of size or location."13 It is submitted that, in view of the fact that the accommodation of rights approach has not created an unreasonable impediment to employee exercise of the right of self-organization, the Court correctly reaffirmed the need for the balanced, case-by-case approach which Babcock & Wilcox initiated.

b. New Pines, Dexter Thread—Two decisions handed down after the Central Hardware ruling—one by the Second Circuit, the other by the Board—illustrate the difficulties encountered by non-employee organizers in meeting the Babcock & Wilcox tests. In 1971 the Board in New Pines, Inc.14 found a section 8(a)(1) violation where employees residing in the employer's resort hotel were inaccessible, in spite of "strenuous [union] efforts at communication," due to the employer's ban on non-employee solicitation and distribution.15 The Second Circuit denied enforcement, stating that the union's "minimal" and "lackadaisical" effort during the first half of its organizing drive fell far short of the "'reasonable' attempts to communicate with the employees,"16

10 407 U.S. at 547.
12 The Eighth Circuit, on remand, denied enforcement to the Board's order. 468 F.2d 252, 81 L.R.R.M. 2468 (1972). The court noted the absence of evidence of union attempts to utilize such means of communication with employees as "letter, newspaper or radio advertising or . . . invitations to union meetings," and it indicated that "'[t]he burden was not on the Company to show that conventional means of communication and access were open, but the contrary burden rests with the General Counsel.'" Id. at 255-56, 81 L.R.R.M. at 2470-71.
15 77 L.R.R.M. at 1545.
required by Babcock & Wilcox. During the first half of the union drive, the organizer made little effort to contact the employees even though at least 80 percent of the work force lived off the hotel premises and, thus, was unaffected by the solicitation-distribution ban. Unfortunately for the union, its intensification of efforts coincided with a seasonal shift in employee residences which brought 40 to 50 percent of the work force onto the restricted premises. The court rejected the Board's focus on the union's "strenuous" efforts during the last half of its drive. The court apparently felt that a union's failure to exploit all available avenues of communication during one portion of its drive is not necessarily rectified by greatly intensified later efforts, since the existence of "reasonable attempts" is to be determined on the basis of "the whole organizing period." In Dexter Thread Mills, Inc., the Board, faced with a fact situation similar to that in Central Hardware, refused to find that an employer violated 8(a)(1) by banning non-employee solicitation and distribution in the parking lot adjacent to its retail store. Noting that the Central Hardware Court held that Logan Valley "did not apply to single-store cases," the Board applied the balancing of interests test established in Babcock & Wilcox. The Board found that, as an alternative to soliciting in the employer's parking lot, the union organizers could have obtained a list of employee names and addresses indirectly by copying the license numbers of cars entering and leaving the lot during changes in employee shifts. Use of this list to implement "direct home contact" with the employees, when combined with "greater utilization of sympathetic employees," might have provided "reasonable, albeit perhaps more expensive and less convenient, means of reaching employees . . . ."

The attitude of the Second Circuit in New Pines and of the Board in Dexter Thread illustrates the importance of Central Hardware, since both decisions stress the Babcock & Wilcox test of the availability of alternative means of communication with employees. The decisions suggest that union organizers may be required to actually explore, through "reasonable" efforts, every possible alternate method of reaching the employees, regardless of the relative expense and inconvenience of these methods, before the union will be allowed to intrude upon an employer's property rights. The Second Circuit's New Pines decision also

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17 Id.
19 81 L.R.R.M. at 1294. For discussion of Babcock & Wilcox, see text at notes 1-2 supra.
20 Id. at 1295.
suggests that a union’s failure to exploit transitory opportunities for employee contact might negative its otherwise “reasonable” efforts at communication.

c. McDonnell Douglas—Another Survey year case involved an employer rule which treated employees who were not on their working shifts as though they were non-employees. In McDonnell Douglas Corp. v. NLRB, the employer, an aircraft manufacturer which was required by the government to maintain an elaborate security system, promulgated a rule forbidding non-employees from distributing literature or soliciting on company premises, including parking lots, at any time. An addendum to the rule stated that employees were allowed on company premises only during their working hours and a reasonable period before and after those hours; at other times they were to be treated as non-employees. A panel of the Board, by a two-to-one majority, found the rule violative of section 8(a)(1), since the employer provided insufficient justification for the rule’s vagueness and its equation of employees and non-employees. The Eighth Circuit denied enforcement and remanded for further consideration.

The court did not question the propriety of the Board’s maintaining, as it has since its Stoddard-Quirk Manufacturing Co. decision, that a rule forbidding employee solicitation and distribution in non-working areas during non-working time is presumptively invalid. However, the court held that

when, in attempting to rebut that presumption, an employer makes a creditable showing of special, justifying circumstances, as was done in this case, the Board in weighing that evidence must responsibly and in a meaningful way consider the importance of the proffered justification and thereby determine whether the actual impact of the contested rule upon § 7 rights mandates the invalidation of the rule.

In focusing on the asserted vagueness of the words “reasonable time” in the employer’s rule, the Board, according to the court, avoided an evaluation of the employer’s security justification for the rule and “rendered only lip service to the balancing of interests test.” The court indicated that the Board should have considered the alternative means which were available to the employee organizers of communicating with their fellow employees. It further suggested that an off-duty em-

\[\text{References:}\]

21 472 F.2d 539, 82 L.R.R.M. 2393 (8th Cir. 1973).
22 Id. at 542, 82 L.R.R.M. 2395.
25 472 F.2d at 545-46, 82 L.R.R.M. at 2397.
26 Id. at 547, 82 L.R.R.M. at 2398.
ployee might have "attained a status as to § 7 rights somewhere between that of an employee and that of a non-employee."\(^{27}\)

The appellate court's decision is significant in that it provides for a balancing of interests test, similar to that devised in *Babcock & Wilcox* for non-employee organizers, for off-duty employees. Once the employer makes a "creditable showing of special, justifying circumstances," the court suggests that consideration should be given to alternative means of communicating with the employees. Although such an approach might represent a weakening of the presumptive invalidity of prohibitions on solicitation and distribution in non-working areas during non-working times, it is submitted that the flexibility of this approach would allow the Board to take fully into account all significant aspects of particular solicitation-distribution cases. However, it is further submitted that, in light of the favored position of employee organizers, the stringent requirements placed on the non-employee union organizers in such cases as *New Pines* and *Dexter Thread* should not be applied to off-duty employees. In particular, the considerations of relative convenience and expense, which were found irrelevant in the case of non-employee organizers in *Dexter Thread*, should be given substantial weight in evaluating the impact of solicitation-distribution rules on the section 7 rights of employee organizers.

2. **Race and Sex Discrimination**: Jubilee

The Board, in *Jubilee Manufacturing Co.*,\(^{28}\) a Survey year decision, ruled that discrimination based on race or sex is not per se violative of the NLRA. This ruling stands in sharp conflict with the 1967 decision in *Packinghouse Workers v. NLRB (Farmers' Cooperative Compress)*.\(^{29}\) In that decision, the District of Columbia Circuit ruled that an employer's racial discrimination necessarily constitutes a violation of section 8(a)(1). The court noted that an 8(a)(1) finding must rest on conduct which "interferes with or restrains discriminated employees from exercising their statutory right to act concertedly . . . ."\(^{30}\)

The court then stated that employer discrimination on the basis of race or national origin sets up an unjustified clash of interests between groups of employees and induces employee apathy or docility which inhibits employees from asserting rights. It was held that "the confluence of these two factors sufficiently deters the exercise of Section 7 rights as to violate Section 8(a)(1)."\(^{31}\)

\(^{27}\) Id., 82 L.R.R.M. at 2399.
\(^{30}\) Id. at 1135, 70 L.R.R.M. at 2494.
\(^{31}\) Id., 70 L.R.R.M. at 2493 (emphasis in the original).
In *Jubilee* the Board for the first time made explicit its rejection of the court’s rationale. The union charged that the employer had discriminated in favor of its male employees in setting its wage rates and that the employer had thereby violated section 8(a)(1) and (3). However, the Board did not resolve the issue of whether there had, in fact, been discrimination, since it ruled that discrimination based on race, color, religion, sex, or national origin, standing alone, which is all that is alleged herein, is not “inherently destructive” of employees’ Section 7 rights and therefore is not violative of Section 8(a)(1) and (3) of the Act. There must be actual evidence, as opposed to speculation, of a nexus between the alleged discriminatory conduct and the interference with, or restraint of, employees in the exercise of those rights protected by the Act.

The Board found it was “by no means inevitable” that employer discrimination would set one group of employees against the other; it was noted that the opposite effect was possible—employee groups might coalesce and become militant, rather than docile, in the face of discrimination. The Board majority cautioned that it was not concluding that race or sex discrimination “is necessarily or always beyond the reach” of section 8(a)(1) and (3), but only that the finding of a violation of the NLRA would depend upon a showing of “the necessary direct relationship” between the alleged discrimination and promotion of collective bargaining, protection of section 7 rights and free rep-

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33 The union had also charged that the employer violated section 8(a)(5) by insisting to the point of impasse on the contractual provision which, according to the union’s allegations, enabled the employer to practice discrimination. 82 L.R.R.M. at 1484. However, the Board majority found that the employer had not been responsible for the impasse. Id. at 1485.

34 A three-member majority of the Board indicated that it had “serious doubts” about the administrative law judge’s finding of nondiscrimination. Id. at 1484. Of the employer’s five job classifications, all the jobs in the three lowest-paying groups were filled by women, the fourth group was exclusively male, and the fifth and highest was filled by both men and women, although the men in the fifth group were paid higher wages than the women in the same group with greater seniority. Id. at 1486 (dissenting opinion). Member Fanning concluded that the evidence did not warrant a finding of sex discrimination; he did not reach the issue of whether such discrimination should constitute a per se violation. Id. at 1485-86 (concurring opinion). Member Jenkins concluded that the evidence established “at least a prima facie case of sex discrimination.” Id. at 1487 (dissenting opinion).

35 Id. at 1484.

36 Id. For a detailed criticism of this point by Member Jenkins, see *Farmers’ Cooperative Compress*, 194 N.L.R.B. No. 3, 78 L.R.R.M. 1465, 1473 (1971) (dissenting opinion).
In a lengthy dissent, Member Jenkins maintained that race or sex discrimination is “inherently destructive” of section 7 rights and argued that the victims of discrimination need not present specific evidence of interference with those rights.88

It would appear that the Board’s characterization of race and sex discrimination as potential rather than per se unfair labor practices will enable the Board to deal with such discrimination on a practical, case-by-case basis. The Board can develop a presumptive rule similar in its effect to the approach of the court in Farmers’ Cooperative Compress, although the Board has made it clear that it has no present inclination towards such a presumptive rule. The Board’s approach in Jubilee also has the advantage of enabling the Board to avoid becoming a forum for all charges of racial discrimination when, in some instances, utilization of a Title VII forum might be more appropriate, since in such a forum employer discrimination can be challenged regardless of its effect on the right of employees to participate in concerted activities.89

It would also appear that the approach adopted by the majority in Jubilee is more consistent with the Board’s established per se doctrine than the policy enunciated by Member Jenkins and by the Farmers’ Cooperative Compress court. Traditionally, the Board has required an explicit and necessary causal connection between a violation of statutory rights and activity that it classifies as a per se unfair labor practice. Thus, a per se rule is merely a shorthand method of describing the relation between a certain kind of behavior and the infringement of a right protected by the NLRA. A per se rule may never become a substitute for fulfillment of the requirement of a direct and necessary causal link between the violation and the activity.40 The contrast between the per se rule proposed by Member Jenkins and the per se rule he cited in his dissent as an example of the operation of the per se doctrine—the presumptive invalidity of overly broad employer restrictions on union solicitation—serves to highlight the distinctions between the Board’s traditional approach and Member Jenkins’ proposed approach. The Board did not establish its per se rules in the solicitation area on the basis of speculations about the possible psychological effects of solicitation restrictions; it then codified in 1962 the results of “a mass of Board and court

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87 82 L.R.R.M. at 1484.
88 Id. at 1489-90 (dissenting opinion).
litigation. In contrast to the cautious development of the per se rules in the solicitation area, at the present time the establishment of a per se rule as to race and sex discrimination could only be based upon the unsupported assertions of interference with section 7 rights contained in the only two cases of this nature which have thus far been brought before the Board: Farmers’ Cooperative Compress and Jubilee.

In light of the present lack of evidence which would support a finding that race and sex discrimination are inherently destructive of section 7 rights, it is submitted that the Board’s position in Jubilee is legally correct. However, it must be noted that the union in Jubilee will have the opportunity to seek review of that decision by the Court of Appeals for the District of Columbia. Should that court reverse the Board’s decision, a resolution of the conflict by the Supreme Court may become essential.

C. Union Discrimination

1. The Conflict within Section 8(b)(1)(A): Granite State

During the Survey year a Supreme Court decision revealed further movement toward resolution of a major question inherent in section 8(b)(1)(A). The main clause of 8(b)(1)(A) protects employees in the exercise of the rights guaranteed in section 7. A proviso qualifies the main clause by prohibiting the clause from being applied to “impair the right of a labor organization to prescribe its own rules with respect to the acquisition or retention of membership therein.” The potential for conflict between the protection of section 7 rights and the preservation of union discipline inherent in 8(b)(1)(A) was heightened by the Supreme Court’s decision in NLRB v. Allis-Chalmers Manufacturing

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1 29 U.S.C. § 158(b) (1970) provides in part:
It shall be an unfair labor practice for a labor organization or its agents—
(1) to restrain or coerce (A) employees in the exercise of the rights guaranteed in section 157 of this title: Provided, That this paragraph shall not impair the right of a labor organization to prescribe its own rules with respect to the acquisition or retention of membership therein . . . . Section 7 of the NLRA provides:
Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection, and shall also have the right to refrain from any or all of such activities except to the extent that such right may be affected by an agreement requiring membership in a labor organization as a condition of employment as authorized in section 158(a)(3) of this title.


which utilized the proviso in sanctioning disciplinary rules other than exclusion and admission rules. Since union discipline inevitably represents at least some degree of curtailment of employees' section 7 rights, the problem is to determine what kinds of discipline in what kinds of circumstances can be imposed by a union within the limits of section 8(b)(1)(A).

In NLRB v. Textile Workers Local 1029 (Granite State), the Supreme Court held that, absent restraints on the resignation of members in a union's constitution, bylaws or contract with the employer, a union violates section 8(b)(1)(A) by fining individuals who had resigned from the union before crossing a picket line and returning to work during a lawful strike. The Court in Granite State displayed an attitude more favorable to the individual employee's section 7 rights than to what it termed the union's "pressures for conformity and submission to its regime."

The union commenced a lawful economic strike against the employer after a unanimous strike vote. The entire membership joined the strike and voted, with one dissent, to fine strikebreaking members. Subsequently, thirty-one employees resigned union membership and returned to work. Although the union's constitution did not provide for any restraint on resignation, the union imposed fines on the employees and sought state court enforcement of the fines. The employees charged that these actions violated their section 7 right to refrain from striking and constituted an 8(b)(1)(A) unfair labor practice.

The Board held that the union's imposition and attempted enforcement of fines based on postresignation conduct of members who had resigned constituted a violation of section 8(b)(1)(A). The First

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8 388 U.S. 175 (1967).
5 93 S. Ct. at 387.
6 Id. at 386.
9 The Board followed its 1970 decision in Booster Lodge 405, Machinists, 185 N.L.R.B. No. 23, 75 L.R.R.M. 1004 (1970), enforced, 459 F.2d 1143, 79 L.R.R.M. 2443 (D.C. Cir. 1972), aff'd, 41 U.S.L.W. 4683 (U.S. May 21, 1973), in which it had ruled that discipline could not be imposed on members who resigned before crossing picket lines, but that discipline could be imposed on those who resigned only after crossing the lines. 75 L.R.R.M. at 1006-07. In so deciding, the Board relied on the Supreme Court's statement in Scofield v. NLRB, 394 U.S. 423 (1969), summarizing the standards which must be met by union rules: "[Section] 8(b)(1) leaves a union free to enforce a properly adopted rule which reflects a legitimate union interest, impairs no policy Congress has imbedded in the labor laws, and is reasonably enforced against union members who are free to leave the union and escape the rule." Id. at 430 (emphasis added). The Board thus attempted to resolve an issue which the Supreme Court expressly left open when, in Allis-Chalmers, it first approved union fines against strikebreakers: whether 8(b)(1)(A) prohibits union discipline against employees who have less than full membership in the union, 388 U.S. at 197.
Circuit, in refusing to enforce the Board's order in *Granite State*, reasoned that the Supreme Court's finding in *Allis-Chalmers* that "[t]he power to fine or expel strikebreakers is essential if the union is to be an effective bargaining agent" necessitated approval of the *Granite State* union's fines. The court emphasized that although the employees had resigned before returning to work, they had apparently participated fully in the union's activities at the time the strike commenced. Pointing to the "mutual reliance . . . implicit in all strike votes," the First Circuit ruled that "although § 7 gives an employee the right to refuse to undertake and involve himself in union activities, it does not necessarily give him the right to abandon these activities in midcourse once he has undertaken them voluntarily."

The Supreme Court reversed the appellate decision by an eight-to-one majority, with Justice Blackmun dissenting. The Court apparently did not give as much weight to the special needs of the union in its role as bargaining agent as it had given this factor in *Allis-Chalmers*. Instead, the Court decided "to apply the law which normally is reflected in our free institutions—the right of the individual to join or to resign from associations, as he sees fit ...." The Court noted that its decision did not reach the issues which would be posed in a situation where the contractual relationship between the union and its members attempted to curtail the freedom to resign.

Justice Blackmun, dissenting, contended that the Court had "exalt[ed] the formality of resignation over the substance of the various interests and national labor policies at stake . . . ." He urged that "the three factors of a member's strike vote, his ratification of strikebreaking penalties, and his actual participation in the strike" might point to the existence of "an enforceable, voluntary obligation on the part of an employee to refrain from strikebreaking activity."

The Supreme Court's decision in *Granite State* is significant in that it concludes that, at least absent contractual restrictions, the right to refrain, as protected by section 7, must include the right to resign and that such resignation ends an employee's duty to the union and the union's corresponding right to discipline him. It is submitted that

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10 NLRB v. Textile Workers Local 1029, 446 F.2d 369, 77 L.R.R.M. 2711 (1st Cir. 1971).
11 388 U.S. at 181.
12 446 F.2d at 372, 77 L.R.R.M. at 2714.
13 Id. at 373, 77 L.R.R.M. at 2714.
14 93 S. Ct. at 385.
15 See 388 U.S. at 181.
16 93 S. Ct. at 387.
17 Id.
18 Id. at 389 (dissenting opinion).
19 Id. (dissenting opinion).
20 Id. (dissenting opinion).
there is considerable merit in the dissent's criticism of the majority's reliance on the sole standard of membership. It is difficult to understand why the fining of employees after termination of their membership "results in restraint or coercion under § 8(b)(1)(A), when the imposition of fines for similar conduct by members, and their enforcement in state courts, does not fall within that section's prohibition." Section 7 rights are clearly involved both in the case of employees who resign before crossing a picket line and in the case of those who do not so resign. If the policy favoring union solidarity prevails over the policy of protecting section 7 rights in the latter case, it should be given strong consideration in the former. The bargaining representative's need for solidarity should not, in any event, have been dismissed by the majority as involving merely pressure for "conformity" and "submission" to a "regime." It is further submitted that the Court, if it is in the future called upon to resolve a case which involves facts similar to those in Granite State, but which presents the additional factor of a contractual provision restricting the right of resignation during a strike, should keep strongly in mind that, as the Court recognized in Allis-Chalmers, "[t]he power to fine or expel strikebreakers is essential if the union is to be an effective bargaining agent . . . ."

2. Fines against Supervisors: Illinois Bell Tel.

Although the Supreme Court has acted on numerous occasions to define the limits of a union's ability to fine employees, it has not yet applied the policies it has developed to the area of union fines against supervisors who are union members. When a union fines a supervisor/member, it must do so within the limits of section 8(b)(1)(B), which prohibits restraint or coercion of an employer's selection of its representatives for bargaining or grievance adjustment.

In the Survey year a panel of the District of Columbia Circuit, in IBEW v. NLRB (Illinois Bell Tel. Co.), moved toward a major restriction of union disciplinary powers over supervisors. The court,

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20 Id. (dissenting opinion).
21 Id. at 387.
22 388 U.S. at 181.
24 Supervisors may become union members, but employers cannot be forced to treat supervisor/members as employees for bargaining or other purposes, 29 U.S.C. § 164(a) (1970).
25 Section 8(b)(1)(B) provides that "[i]t shall be an unfair labor practice for a labor organization or its agents—(1) to restrain or coerce . . . (B) an employer in the selection of his representatives for the purposes of collective bargaining or the adjustment of grievances . . . ." 29 U.S.C. § 158(b)(1)(B) (1970).
affirming the Board,27 held that the discipline of supervisors for performing rank-and-file work during a strike constitutes restraint and coercion of an employer in violation of section 8(b)(1)(B). The union had imposed $500 fines on foremen who crossed its picket lines to do rank-and-file work during an economic strike. The employer had indicated to the foremen that it preferred them to work during the strike, although it did not require them to return to work.28

The majority of the court acknowledged that section 8(b)(1)(B) "only proscribes union interference for acts performed by a supervisor relating to his supervisory or managerial duties."29 The court found that in spite of the fact that the actual work performed by the supervisors was "rank-and-file work,"30 their activity was of the type shielded from discipline by section 8(b)(1)(B), since they undertook the work "to enhance the bargaining position of their employer during a dispute between it and the particular union involved."31

In a lengthy dissenting opinion Judge Wright contended that the court's decision could only be explained as an acceptance by the majority of the theory that all union fines of supervisor/members are per se violative of section 8(b)(1)(B).32 Judge Wright noted that the test employed by the majority—whether the supervisors' actions were undertaken in the interests of the employer—would have the effect of prohibiting all discipline against supervisors, since "to the extent that management and union are viewed as adversaries, it is always in management's interests for the supervisors to take actions which weaken the union."33 He further argued that the goal of allowing unions to protect their status as bargaining agents through reasonable discipline of members—a goal recognized by the Supreme Court in NLRB v. Allis-

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28 81 L.R.R.M. at 2258.
29 Id. at 2262-63 n.28.
30 Id. at 2258.
31 Id. at 2265. The majority attempted on two grounds to distinguish the instant case from the Supreme Court's decision in NLRB v. Allis-Chalmers Mfg. Co., 388 U.S. 175 (1967), where the Court sanctioned union discipline against strikebreaking members. The first ground advanced was that Allis-Chalmers involved § 8(b)(1)(A) which, unlike § 8(b)(1)(B), has a proviso protecting the right of unions to prescribe internal disciplinary rules. 81 L.R.R.M. at 2263-64; see 29 U.S.C. § 158(b)(1)(A) (1970). It would appear that this ground is quite weak, since the Court in Allis-Chalmers expressly relied on the "restrain or coerce" language common to both subsections of § 8(b)(1), rather than the § 8(b)(1)(A) proviso. See 388 U.S. at 179. The second ground advanced was that the discipline in the instant case, unlike that in Allis-Chalmers, had an effect on parties external to the relationship between the union and its members. 81 L.R.R.M. at 2264. As Judge Wright pointed out in his dissent, this ground is weak since "the union rule in Allis-Chalmers had, and was intended to have, an external effect on the employer." Id. at 2277 (dissenting opinion).
32 81 L.R.R.M. at 2275.
33 Id. (emphasis in the original).
Chalmers Manufacturing Co. applied with full force to the instant case; he concluded that no justification could be advanced for allowing supervisors to gain all the benefits of union membership without assuming any of the duties of such membership.

It would appear that there is considerable merit in Judge Wright's interpretation and criticism of the Illinois Bell Tel. majority's decision. Although the majority admits that section 8(b)(1)(B) is only applicable when supervisors are disciplined for actions related to managerial functions, the majority's test—whether the actions further the employer's interests—makes meaningless Congress' limitation of section 8(b)(1)(B) to "representatives for the purposes of collective bargaining or the adjustment of grievances." Therefore, it may be concluded that the Illinois Bell Tel. majority has construed too broadly the statutory restrictions on union discipline and, in so doing, has unnecessarily curtailed the right of unions to maintain solidarity through reasonable discipline.

D. Secondary Boycotts

1. Common Situs Picketing

a. The Common Situs—Section 8(b)(4) of the NLRA protects the neutral employer from suffering the effects of labor disputes between other employers and their employees while simultaneously preserving to employees the right to strike against their own employers. The task of effecting this dual goal is complicated in that a lawful primary strike has at least minimal secondary effects, and any attempt to distinguish with certainty between the incidental secondary effects which employees hope will occur only in aid of their primary strike, and those which they desire solely for their effect on the secondary employer, leads into an area of speculation where even sophisticated philosophers and psycholo-

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34 388 U.S. 175 (1967).
35 81 L.R.R.M. at 2278-79.

1 This goal is evinced in the language of § 8(b)(4)(ii)(B), which provides that it shall be an unfair labor practice to threaten, coerce, or restrain any person engaged in commerce or in an industry affecting commerce, where in either case an object thereof is . . . forcing or requiring any person to cease using, selling, handling, transporting or otherwise dealing in the products of any other producer, processor, or manufacturer, or to cease doing business with any other person . . . .

2 "Congress did not seek, by § 8(b)(4), to interfere with the ordinary strike . . . ."

3 "The objectives of any picketing include a desire to influence others from withholding from the employer their services or trade." Electrical Workers Local 761 v. NLRB, 366 U.S. 667, 673 (1961).
gists must fear to tread. The difficulties inherent in the general secondary boycott area are exacerbated when the specific problem involves common situs picketing—the situation in which the employer being lawfully picketed and one or more neutral employers work at the same location. Of necessity, the incidence of secondary effects in this situation is heightened.

In *Sailors Union of the Pacific (Moore Dry Dock)* the Board addressed the problem of common situs picketing. The Board held that common situs picketing is primary provided that it: is strictly limited to times when the situs is being used in common and the primary employer is engaged in its normal business; is limited to the immediate vicinity of the situs; and clearly discloses that the dispute is with the primary employer.

These *Dry Dock* standards are not difficult to apply; the difficult question which has perpetuated the unsettlement in the area of common situs picketing concerns the precise effect of compliance or non-compliance with the standards. The Board believes that compliance or non-compliance with the *Dry Dock* tests is evidence, not conclusive evidence, of the primary or secondary nature of strike activity.

A case decided this Survey year reaffirms the Board's policy of using the *Dry Dock* tests as an important evidentiary tool rather than applying them as an absolute. A dissent, relying heavily on two Supreme Court cases which had put the Board's use of the *Dry Dock* tests into doubt, indicates, however, that the Board is presently divided on appli-

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4 It is, of course, somewhat naive to expect anyone to delineate with precision the philosophical difference between a man's hope and his desire, or the psychological difference between a man's informed wish and his intent. Pushed to the extreme, the whole notion of distinguishing between primary and secondary activity runs up against the premise of the law that a man intends the known and probable consequences of his actions. If this principle were applied in determining section 8(b)(4)(i) and (ii)(B) violations, the Act's attempt to distinguish between primary and secondary activity would abort.


6 The *Dry Dock* standards "are not to be applied on an indiscriminate 'per se' basis, but are to be regarded merely as aids in determining the underlying question of statutory violations." Local 861, IBEW, 135 N.L.R.B. 250, 49 L.R.R.M. 1446 (1962). Deviation from the *Dry Dock* standards does not automatically translate into an unfair labor practice. Local 3, IBEW, 144 N.L.R.B. 1089, 1093, 54 L.R.R.M. 1178, 1180 (1963), although flagrant departure can be the basis for an unfair labor practice charge even if the union's picketing has a clearly primary objective. Plumbing & Pipe Fitting Local 519 v. NLRB, 416 F.2d 1120, 70 L.R.R.M. 3300 (D.C. Cir. 1969). Furthermore, mere compliance with the *Dry Dock* standards will not automatically clothe employees' activity with lawfulness if there are other indicia of the intended secondary nature of that activity. See NLRB v. District Council of Hod Carriers, 389 F.2d 721, 725, 67 L.R.R.M. 2502 (9th Cir. 1968).
In Teamsters Local 126 (Ready Mixed Concrete), the Teamsters, as the result of a feud between one of its officers and the manager of Ready Mixed Concrete, Inc. (RMC) deliberately and admitted8y endeavored to put RMC out of business. As part of this campaign, the Teamsters picketed at construction sites where the company supplied concrete.9 Although it would have been possible to do so, the union did not picket at RMC's headquarters.10

In picketing the delivery sites, the Teamsters adhered to the letter of the Dry Dock standards. On this basis, the Trial Examiner found that the picket was primary, and that no 8(b)(4) violation had occurred. However, a three-to-two majority of the Board held that the union violated section 8(b)(4)(i) and (ii)(B), compliance with the Dry Dock standards notwithstanding. "Moore Dry Dock," the majority stated, "does not establish a formula whereby picketing with a secondary object can be done lawfully. Rather, it simply establishes [an] evidentiary aid for the Board to determine the object of picketing where the other evidence is equivocal. The Board is not bound by the inference of lawfulness from compliance with the Moore Dry Dock standards."11

In Ready Mixed Concrete, a number of circumstances supported the Board's decision that application of Dry Dock so as to exculpate the union from an unfair labor practice charge would be inequitable. The Teamsters' behavior was openly lacking in manifestations of good-faith primary picketing: the vendetta against RMC was admitted; no picketing took place at RMC's home base; picketing was not limited to points of ingress and egress at the construction sites where RMC deliverymen were working, but was carried out along the full frontage of the sites.12 Far from minimizing the effect of its boycott upon the neutral employer, the union, despite all protestations of primary activity, appeared to be making the secondary employer a target. Thus, the decision in Ready Mixed Concrete is a reaffirmation of the Board's intention carefully to balance the equities—including, but not limited to, compliance with the Moore Dry Dock tests—of each individual common situs case, in order best to effectuate the Act's object of simultaneously protecting both the employees' right to strike, and the neutral employer's right to remain unaffected and uninvolved.

Stressing that they did not condone the union's behavior, Members

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8 81 L.R.R.M. at 1465.
9 Id. at 1463.
10 Id. at 1463, 1466.
11 Id. at 1465.
12 Id. at 1466.
Fanning and Jenkins dissented. The majority, the dissenters contended, made a correct factual assessment of the *Ready Mixed Concrete* situation, but came to an erroneous legal conclusion. The Supreme Court's decisions in *Electrical Workers Local 761 (General Electric Co.) v. NLRB*\(^{18}\) and *United Steelworkers (Carrier Corp.) v. NLRB*\(^{14}\) were seen by the dissent as having shifted the stress in analysis of common situs picketing cases. This shift was seen to be from concentration on whether the purpose of the picketing was to appeal to the employees of secondary employers, to focus instead upon the relation of the work tasks performed by the secondary employees to those performed by the primary employees and the nature of the appeal to the secondary employees. In *Ready Mixed Concrete*, there was a direct appeal to secondary employees. However, the work of these employees (receipt and unloading of concrete) was inextricably involved with the everyday functions of RMC, and the appeal to them could arguably have been merely to induce them to respect the union's primary picketing of RMC. From this vantage point, the dissent would view the union's compliance with the *Dry Dock* standards as establishing its activity as a lawful primary picket.\(^{16}\) Equally, from this vantage point, the majority's continued stress upon purpose as the key concept involved in assessment of the common situs boycott situation and concomitant failure to analyze the relationship of the primary and secondary employees in terms of work tasks performed, seems to the dissent to be an abdication of responsible administrative analysis.

The dissent seems to feel that the majority, carried away by offensive elements of the fact situation, made a policy decision and then distorted the law to accommodate it.\(^{19}\) It is submitted that policy decisions are not only appropriate to, but are perhaps at the very heart of, the secondary boycott area, and that the majority's decision was well within the scope of both the statutory and the case law in this area, both of which have been consciously kept flexible.\(^{17}\) The Supreme Court's emphasis in *General Electric* and *Carrier Corp.* upon the type of work being performed was tailored to the reserved-gate situation: *i.e.*, a situation in which an employer has consciously set aside specific gates to be used by specifically designated employees, so that any picketing at such gates will be clearly identifiable as directed toward the employees for whose use the gates were earmarked. *Ready Mixed Concrete*, however, did not involve the reserved-gate situation. Thus, it is difficult to find the majority of the Board in derogation of its decisional duty by

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\(^{14}\) 376 U.S. 492 (1964).

\(^{15}\) 81 L.R.R.M. at 1469.

\(^{16}\) Id. at 1467-68.

\(^{17}\) See discussion in note 6 supra.
virtue of having failed to apply a test which evolved out of the Supreme Court's desire to mitigate the harshness of having the finding of a section 8(b)(4) violation rest solely on the location of picketing.

The *Dry Dock* tests and the *General Electric* shift in emphasis are equally viable interpretations of 8(b)(4), each the result of a good faith effort to import the maximum of order with the minimum of arbitrariness into an area that is of necessity confusing. That the majority is just that—a majority—indicates that for the time being the *Dry Dock* standards will continue to be the Board's guide when assessing the nature of a common situs picket. That two members dissent is an indication that a shift toward emphasis on work task relationship, as developed in *General Electric* and *Carrier Corp.*, is a possibility for the Board in the near future.

b. The One-Product Rule—Another aspect of the common situs problem received attention during the Survey year. The Ninth Circuit enforced the Board's determination that a union violated section 8(b)(4) when it picketed and distributed handbills urging consumers not to buy homes which were the sole product of a secondary employer.18

In 1964, the Supreme Court decided *NLRB v. Fruit Packers Local 760 (Tree Fruits).*19 In this case, the "common situs" was a retail supermarket. The union had a dispute with fruit packers and warehousemen doing business in Washington. As a tactic, the union instituted a consumer boycott against Washington State apples. Consequently, union pickets marched at customer entrances to a store which sold non-union apples, carrying signs which specified that the dispute was not with the supermarket but with the apples being sold in it. Pickets were explicitly instructed not to request any consumers to cease dealing with the store; they were to limit their discouragements strictly to purchase of Washington State apples.20 Noting that "Congress has never adopted a broad condemnation of peaceful picketing"21 the Court distinguished the situation in which consumer picketing is employed to persuade customers to cease all trading with an employer from that in which customers are urged merely to avoid purchase of one of an employer's many wares, and held that the latter was not a secondary boycott within the ban of action 8(b)(4).22 "In [the former type of] case," said the Court, "the union does more than merely follow

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20 Id. at 60-61.
21 Id. at 71.
22 Id. at 71-72.
the struck product; it creates a separate dispute with the secondary employer.23

Hoffman v. Cement Masons Local 33724 also presented a situation in which a union picketed to persuade the public to boycott a product being sold by an employer who was himself not involved with the union. The union struck a general contractor which built homes in a subdivision. These homes were owned and sold by Shuler, a stranger to the dispute between the union and the contractor. The union picketed and distributed handbills at the sole entrance to the construction site. The words "General Contractor" appeared on both the signs and the handbills; so, however, did the words "Please do not purchase these homes."25 The Ninth Circuit enforced the Board's decision that the union's activity at the subdivision constituted a secondary boycott and thus violated section 8(b) (4) (ii) (B) of the NLRA.

In Tree Fruits the Supreme Court made it clear that peaceful picketing to eliminate all commerce with a secondary employer unless it ceases dealing with the struck primary employer is prohibited under the proviso of section 8(b) (4).26 Hoffman is precisely such a case. To request that consumers buy no homes was of necessity to request that they have no dealings with Shuler and thus such request could not but be a secondary boycott.

The Hoffman decision is not a logical candidate for warm reception by construction unions. The holding effectively forecloses picketing in a situation which seems to arise frequently in the construction context;27 the sole product situation arises but sporadically in most other businesses—it is a rare clothing store that sells but one label, a rare grocer who sells only apples. Nevertheless the decision seems fair. Had

23 Id. at 72.
24 — F.2d —, 81 L.R.R.M. 2641 (9th Cir. 1972).
25 81 L.R.R.M. at 2642.
26 377 U.S. at 70-72.
27 Construction unions have been unsuccessful in obtaining special treatment that might obviate perceived harsh treatment under present law. Prior to this decision, the Supreme Court held that a strike to force a general contractor on a construction project to terminate its dealings with a subcontractor who dealt with the striking union was an unfair labor practice under § 8(b)(4)(a). NLRB v. Denver Bldg. & Constr. Trades Council, 341 U.S. 675, 689 (1951). The Fifth Circuit then held that the construction industry was subject, in a situation involving reserved-gate picketing, to the Dry Dock tests. Markwell & Hartz, Inc. v. NLRB, 387 F.2d 79, 83, 66 L.R.R.M. 2712 (5th Cir. 1967). This decision quashed the hopes of construction unions—that the Supreme Court's General Electric holding that reserved-gate picketing was lawful if the subcontractor's employees using that gate were engaged in work necessary to the normal operations of the general contractor might be seen as overruling, sub silentio, the Denver case. Pointing out that "Denver is cited with approval in General Electric," id. at 83, 66 L.R.R.M. at 2715, the court in Markwell & Hartz cited Denver for authority that the subcontractor and the contractor on a construction project are not allied, but are separate business entities, neither of whose functions at the common situs are likely to be part and parcel of the normal operations of the owner. Id.
the minority prevailed, a number of neutral employers would have been enmeshed in quarrels not their own, the very result sought to be avoided by the 8(b)(4) ban on secondary boycotts. However, it can also be seen that a decision such as Hoffman, albeit objectively fair, is perhaps harsh on unions in the construction industry. It is submitted that an objective, equal-treatment-for-all-industries approach in the common situs picketing area is equal more in theory than in practice.

2. Hot Cargo Clauses

The Survey year saw continuation of tension between the Board and the courts in regard to the interpretation of the section 8(e) hot cargo provision and its effect upon the secondary boycott area.

Section 8(e) was adopted to supplement the section 8(b)(4) ban on secondary boycotts. Under section 8(e), contractual agreements not to handle goods of employers not party to the contract are unenforceable; the boycott of a neutral employer that could not, under section 8(b)(4), be accomplished by picketing, also can not be accomplished by contract. The statutory provision itself carves out exceptions for contracts relating to work done at a construction site and for the clothing industry. In 1967, the Supreme Court added another. In National Woodwork Manufacturers Association v. NLRB, the Court held that a contract clause designed to protect or preserve work which was traditionally handled by the union's members violated neither section 8(e) nor section 8(b)(4).

The Woodwork decision marked the beginning of a breach between the Board and the courts that presently shows little sign of healing. Prior to Woodwork, the Board and many of the courts of appeals found hot cargo clauses unlawful, work preservation aspects notwithstanding. Since 1967, the courts have followed Woodwork and have held

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28 IBEW v. NLRB, 181 F.2d 34, 25 L.R.R.M. 2449 (2d Cir. 1950).
29 This section provides, in pertinent part, that
(e) It shall be an unfair labor practice for any labor organization and any employer to enter into any contract or agreement, express or implied, whereby such employer ceases or refrains or agrees to cease or refrain from handling, using, selling, transporting or otherwise dealing in any of the products of any other employer, or to cease doing business with any other person, and any contract or agreement entered into heretofore or hereafter containing such an agreement shall be to such extent unenforceable and void.
30 For an excellent discussion, see the majority opinion in National Woodwork Mfrs. Ass'n v. NLRB, 386 U.S. 612, 619-44 (1967).
31 Id. at 634.
33 386 U.S. 612 (1967).
34 Id. at 644-46. See also the companion case of Insulation Contractors Ass'n v. NLRB, 386 U.S. 664 (1967).
35 See, e.g., Plumbers Local 5 (Arthur Venneri Co.), 137 N.L.R.B. 828, 80

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exempt from section 8(e) sanctions a “hot cargo” clause which has the
demonstrable purpose of preserving for union members work which has
traditionally been theirs. The Board, however, has continued to use its
own “right of control” test, which it had formulated and applied before
Woodwork. This test does not contradict the Woodwork analysis of hot
cargo clauses. Rather, it goes a step beyond Woodwork—which, it is
important to note, specifically left the “right of control” situation an open question. Since 8(e) was enacted to “plug [a] gap” left by 8(b)
(4) and because the Board reasons that “the key consideration in any
determination in this 8(b)(4)(B) area then is whether the pressured
employer is truly the primary with whom the union had its dispute or
whether, in the particular circumstances of the particular case, the
pressure employer was a neutral to the dispute,” the Board looks
first to see if the clause can indeed be termed a work preservation
clause; if so, the Board then inquires whether the pressured primary
employer can award the work. If the employer has no authority to grant
the work, then the Board deduces that the pressure upon such em-
ployer must necessarily have the object of producing a result else-
where; i.e., must be secondary. The “right to control” test is, then,
harsher than the Court’s Woodwork test, for, under the right to control
test, contract clauses which courts of appeals would find to be enforce-
able work preservation clauses may still be found unenforceable as violative of 8(b)(4)(B), if the primary employer does not have the right to control the assignment of the work.

Within the Survey year, the Board manifested its unwillingness to
relinquish the right of control approach, despite the equally tenacious
unwillingness of the circuits, in light of the Woodwork decision, to
use it. However, the Board introduced a potentially conciliatory note
into its adamance, offering the courts a chance to recognize that they

Cir.), cert. denied, 375 U.S. 921 (1963); Longshoremen’s Local 1694, 137 N.L.R.B. 1178,
50 L.R.R.M. 1333 (1962), enforced as modified, 331 F.2d 712, 56 L.R.R.M. 2200 (3d
Cir. 1964); Ohio Valley Carpenters Dist. Council, 144 N.L.R.B. 91, 54 L.R.R.M. 1003
86 See Plumbers Union (Koch Sons, Inc.), 201 N.L.R.B. No. 7, 82 L.R.R.M. 1113,
1118 n.29 (1973), where examples are collected.
87 386 U.S. at 616-17 n.3.
89 82 L.R.R.M. at 1116.
90 See NLRB v. Local 164, 438 F.2d 105, 67 L.R.R.M. 2352 (3d Cir. 1968);
Plumbers Local 636 v. NLRB, 430 F.2d 906, 74 L.R.R.M. 2851 (D.C. Cir. 1970);
American Boiler Mfg. Ass’n v. NLRB, 404 F.2d 556, 69 L.R.R.M. 2858 (8th Cir. 1968).
In Teamsters Local 216 (Bigge Drainage Co.), 198 N.L.R.B. No. 130, 81 L.R.R.M.
1113 (1972), the Board found a § 8(e) violation without having to reach application of
the right of control test. The contract clause referred to work which the unionized sub-
contractor had never performed. Thus, the Board found an unlawful hot cargo agree-
ment directly under Woodwork.

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have not so much opposed the Board as merely “misunderstood” it. In *Plumbers Union (Koch Sons, Inc.)*\(^{41}\) the locals which represented the subcontractor’s employees refused to allow them to install prefabricated pipe manufactured and supplied by the prime contractor because the pipe had not been cut, threaded and fit by union members. As part of its agreement with the prime contractor (Koch), the subcontractor (Phillips) had agreed to install pipe prefabricated at Koch’s plant. The Board had no trouble finding a legitimate work preservation clause and motive.\(^{42}\) Nevertheless, it did not find *Woodwork* controlling. A crucial distinguishing factor existed: the work sought by the union was not within Phillips’ power to award. Therefore, pressure exerted upon Phillips could not have possibly resulted in a direct assignment of the work; what it could do was coerce Phillips into ceasing all dealings with Koch. The Board found this to be a secondary boycott in violation of section 8(b)(4)(ii)(B).\(^{43}\)

Similarly, in *Carpenters Local 742 v. NLRB (J.L. Simmons Co.)*\(^{44}\) the Board, on remand from the District of Columbia Circuit, found an 8(b)(4) violation in a union’s refusal to allow carpenters to install doors ordered from an outside manufacturer. The contract between a hospital and the general contractor specified installation of premachined, plastic-faced doors that would carry a guarantee for the life of the building. The union protested that use of the doors ordered in satisfaction of the contract would deprive the carpenters of on-the-jobsite work usually available to them, and insisted that the prefabricated doors be replaced by unfinished doors that would be fitted and prepared at the jobsite. The Board noted that such doors could not satisfy the contractual requirement in that they would not be plastic-faced. Consequently, use of them would nullify the lifetime guarantee. Therefore, the Board held that the carpenter’s employer was not authorized to assign the work to the carpenters at the jobsite, and that the union-urged refusal to install the prefabricated doors was a secondary boycott.\(^{45}\) The D.C. Circuit, unable to accept what it viewed as an indiscriminate per se application of the right of control test, remanded the case for further consideration.\(^{46}\) The Board reaffirmed its initial order.\(^{47}\) In accordance with the court’s mandate, the Board did not ground its order solely on application of the right of control test. In-

\(^{42}\) 82 L.R.R.M. at 1117.
\(^{43}\) Id. at 1117-19.
\(^{44}\) 201 N.L.R.B. No. 8, 82 L.R.R.M. 1119 (1973).
\(^{47}\) 201 N.L.R.B. No. 8, 82 L.R.R.M. 1119 (1973).
stead, it first applied the right of control test and then reviewed the record to find several points on which it might question the legitimacy of the work preservation nature of the union's demands. It is evident that the Board's deference to the court was merely superficial; the Board in fact again applied its own test, with a desultory nod in the direction of the court's standards.

The profile of hot cargo/secondary boycott cases since the Supreme Court's decision in Woodwork, particularly the J.L. Simmons litigation, leaves little doubt that there is a court-Board dispute regarding section 8(e) as accommodated to the section 8(b)(4) ban on secondary boycotts. It is equally apparent that both sides intend to remain adamant. To complicate the issue, each interpretation seems grounded in a substantial foundation of logic and fairness. The court theory presents an exception to the hot cargo ban which is easily applied and demonstrably consistent with the congressional intention in enacting section 8(e). On the other hand, the reasoning underlying the Board's curtailment of the work preservation exception is difficult to fault: surely an employer cannot be pressured to do what he has neither ability nor authority to do, with any good-faith expectation that such pressure will bring about direct, primary results.

Lest the Board and courts seem to be at a stalemate breakable only by the Supreme Court, it must be noted that the Koch case contains language which supplies the courts with a graceful “out.” The Board prefices a careful discussion of its right of control approach with the declaration:

We have already stated our respectful disagreement with those circuit court decisions [rejecting the Board's approach], but we would be remiss in not admitting that certain of those courts' problems with the Board's approach in this area may well have occurred because of the Board's lack of full explication of its rationale for decision in its more recent decisions.

Whether this apologetia and the attendant explication will precipitate

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48 Evidence as to a primary work preservation objective seems scant. It is doubtful, first of all, whether the objective can fairly be called work "preservation" at all. There is no direct evidence that plastic-clad doors have ever, much less traditionally, been installed in this area by the Respondent's members. All the record shows in this connection is an unsupported assertion by Business Representative Foreman during a discussion that the type of work in issue had once been performed at another facility in the area.

82 L.R.R.M. at 1121.


50 82 L.R.R.M. at 1118.
modification of the court’s view remains to be seen. If it does not, it may be that any further clarification in this area will have to come from Congress or the Supreme Court.

3. Third-Party Standing under Section 303(b): Milner

During the Survey year, the implementation of section 303(b) of the LMRA progressed as the Fifth Circuit decided that the sales representative of a primary employer, having been economically injured by the unlawful secondary strike activities of three unions, had standing to bring an action for damages thereunder.

Section 303(b) provides that “whoever shall be injured in his business or property by reason of any” violation of section 8(b)(4) may bring suit in federal court “and shall recover the damages by him sustained and the cost of the suit.” The statutory language is broad—untenable so, seemed to be the consensus of opinions of the courts, which, assuming that Congress intended some limit on standing to sue under this section, attempted to delineate those limits. The Sixth Circuit, in United Brick Workers v. Deena Artware, held that primary as well as neutral employers can have standing under section 303(b); in UMW v. Osborne Mining Co., another Sixth Circuit decision, it was held that third parties—neither primary nor neutral employers—do not have standing. In Osborne, the plaintiff was a coal sales agency selling on commission under terms of a contract with the primary employer. Although its commissions were arguably reduced by the defendant’s illegal secondary boycott of the company with which it had contracted, the court held that the plaintiff’s damages were incidental, and, therefore, were an insufficient basis for standing under section 303(b).

The harshness of the Osborne holding soon appeared to be balanced by the relative ease with which it could be distinguished. In Gilchrist v. UMW the Sixth Circuit allowed a third party to bring a section 303 action. Here, the third party was an instrumentality under control of the primary employer, a partnership; the court found them to be constructively a single entity, and thus distinguishable from the conventional agency relationship presented in Osborne. The direct result of the Gilchrist decision was to cloud the Sixth Circuit’s interpretation of section 303; although standing could have been based solely

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52 Id.
55 279 F.2d at 729, 46 L.R.R.M. at 2380.
56 303 F.2d 73, 75-76, 50 L.R.R.M. 2198, 2200-01 (6th Cir. 1962).
on the peculiar nature of the partnership-instrumentality relationship, there was also room for argument that the court had based its decision upon the plaintiff-instrumentality's direct, rather than merely incidental, injury. 57 Two subsequent cases—*Wells v. Engineers Local 181* 58 and *Pennsylvania R.R. v. NMU* 59 gave support to the direct injury interpretation, the former granting section 303 standing to individual employees of the primary employer injured by an unlawful secondary boycott, the latter to the railroad which owned premises which were leased by a neutral employer and which formed the site of the secondary activity.

Somewhere between the seemingly all-inclusive language of section 303 (b) itself and the seemingly absolute preclusion of third-party plaintiffs enunciated in *Osborne* there lies a criterion by which some third-party claimants will be granted standing and others will be denied it. The question of what that criterion is has not been decisively answered. An amalgam of the *Gilchrist*, *Wells* and *Pennsylvania R.R.* cases would imply that a third party has section 303 (b) standing if it is the alter ego of either the neutral or the primary employer, has suffered direct property injury from the secondary activity, or both. This year, the Fifth Circuit—which in 1970 adopted the *Gilchrist* "alter-ego" standard in *Abbott v. Plumbers Local 142* 60—added a new test to those just mentioned. The facts in *Milner & Co. v. Local 349, IBEW* 61 were similar to those presented by *Osborne*. Here, the plaintiff had a contract with the primary employer (Southwire) under which it held the exclusive rights to sell Southwire's products within a given district. When, at the urging of the defendant unions, a number of electricians ceased using Southwire wire products, Milner, the sole Southwire representative, lost a number of commissions. Milner sued under section 303 (b) for recovery of the commissions; the district court, finding *Osborne* directly on point, dismissed the case. 62 The Fifth Circuit, making no decision on the merits, reversed and remanded. The court rested its decision on several grounds. One significant basis was the court's assertion that the "Gilchrist line of cases," while setting forth certain circumstances in which a third party might be granted standing under section 303, was not to be taken as limiting the possibilities to these circumstances alone. 63 The court also

58 303 F.2d 73, 75-76, 50 L.R.R.M. 2198, 2200-01 (6th Cir. 1962).
60 429 F.2d 786, 74 L.R.R.M. 2879 (5th Cir. 1970). The facts in *Abbott* were substantially similar to those in *Gilchrist*.
61 — F.2d —, 82 L.R.R.M. 2977 (5th Cir. 1973).
63 82 L.R.R.M. at 2979.
grounded the decision on its assertion that each third-party suit under section 303 necessarily must involve a policy determination as to whether, on the specific facts, the plaintiff ought to recover damages. Here, the court found that policy reasons militated in favor of Milner's being allowed to bring its action. Because of the close financial inter-relationship of Milner and Southwire, not only would any secondary boycott of Southwire stand to injure Milner, but this result would necessarily be foreseeable by the union. This being so, the court reasoned, legitimate union interests would not in any way be endangered by granting standing to Milner. They might be so endangered, however, were section 303(b) relief opened to all persons who suffered any injury whatsoever as a result of a secondary boycott. Thus, the Fifth Circuit added a new test to those emerging from the "Gilchrist line of cases": if the financial fortunes of a third party and the primary employer are closely intertwined, to the extent that a secondary boycott levelled against the latter is substantially certain to injure the former; if such fact must have been reasonably foreseeable by the union, thus giving rise to a fair inference that injury to the third party was in fact contemplated by the union as part of the secondary boycott of the primary employer; and if a grant of standing in all similar situations would not be seen as a threat to legitimate union interests, then the third party has standing to sue for damages under section 303(b).

A concurring opinion in Milner sees the standards for third-party standing under section 303 as unsatisfactorily intangible, and therefore would welcome an emendation—but it sees the majority's attempt as failing to improve on the status quo. "The difficulty is that I am unable to understand what standard is being proposed. The majority opinion mentions 'line of fire,' foreseeability of consequences, and threatening or undermining legitimate union interests. . . . I am unable to perceive with assurance what is the test of § 303(b) liability proposed in the majority opinion." 65

It is submitted that the concurring judge, while perhaps technically correct in his assessment of the majority's test as being no clearer than those already extant, manifests undue optimism in assuming that clear delineation of a single incisive standard is actually a possibility. Both section 303(b) and the Osborne opinion are clear in their mandates, and yet both have, in their respective absoluteness, been rejected—the statute as overly broad (and therefore as not meant by Congress to be interpreted literally), and Osborne as excessively restrictive. The Milner majority was not attempting to supplant the set of circum-

64 Id. at 2980.
65 Id. at 2981 (concurring opinion) (footnotes omitted).
stances, enumerated in the *Gilchrist* line of cases, under which a third party has section 303 standing. Rather, recognizing these cases as stages in an ongoing attempt to find the happy medium between total inclusion and total exclusion of third parties, the majority here added another circumstance to be considered by courts. It is further submitted that, if the circuits continue in such a case-by-case implementation of section 303(b), an equilibrium will be reached: there are a finite number of circumstances under which a party other than the neutral or the primary employer injured through a secondary boycott will bring a section 303(b) action. In the course of the courts' ad hoc treatment, every paradigm will generate its own rule—to be known, if no other way, by the name of the lead case. Successive cases, then, will fall under one of the several rules, and courts will recognize with relative ease a "Milner-type" case, a "Milner-type" case, etc. Thus, later if not sooner, the doubts voiced by the *Milner* concurrer will be put to rest—if not in the most expedient manner, at least arguably in the manner most expedient under the circumstances.

E. Recognitional Picketing: Claremont

Section 7 of the NLRA gives employees the right to engage in concerted activities for the purpose of mutual aid and protection, and section 8(a)(1) makes it an unfair labor practice for an employer to interfere with the exercise of these rights. However, not all group activity on the part of employees is concerted activity within the protection of section 7. In *Claremont Polychemical Corp.*, the majority of a panel of the Board held that employees who participated in picketing for recognition in violation of section 8(b)(7)(B) were engaged in un-

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60 Id. at 2979-80.

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1 29 U.S.C. § 157 (1970) provides in part: "Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection . . . ."

2 29 U.S.C. § 158(a)(1) (1970) provides: "(a) It shall be an unfair labor practice for an employer—(1) to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in section 157 of this title . . . ."

3 196 N.L.R.B. No. 75, 80 L.R.R.M. 1130 (1972). This case involves several distinct issues and holdings. This discussion is limited to the issue of the denial of reinstatement.

   (b) It shall be an unfair labor practice for a labor organization or its agents
   (7) to picket . . . any employer where an object thereof is forcing or requiring an employer to recognize or bargain with a labor organization as the representative of his employees . . . unless such labor organization is currently certified as the representative of such employees:
   (B) where within the preceding twelve months a valid election under section 59(c) of this title has been conducted . . . .
protected activity and, therefore, the employer was justified in refusing to reinstate them, even though at the time of the picketing they were participating in a lawful economic strike and the employer had not hired permanent replacements. Member Fanning dissented. In his view section 8(b)(7)(B) is aimed solely at labor organizations and should not be interpreted as if it carries an employee penalty as well.

The dispute arose out of a campaign by Teamsters Local 707 to organize a unit in which a valid election had been conducted in March 1969, at which time no representative was elected. In October of that year the union requested recognition on the basis of authorization cards which it had obtained from a majority of the employees. When the employer failed to reply the employees struck and picketed with signs stating that the employer "refuses to recognize Local 707." In November the strikers unconditionally offered to return to work, but the employer refused reinstatement. In its complaint the union charged, inter alia, that the employer violated the Act by refusing to reinstate the strikers.

The administrative law judge found that the picketing was at least partially recognitional and, therefore, was a violation of section 8(b)(7)(B) notwithstanding any unfair labor practices which the employer may have committed. Further, he found that the strike was a lawful economic strike, but that those strikers who picketed were engaged in unprotected activity and therefore were not entitled to reinstatement. He based the latter conclusion on a line of cases holding, or incorporating the principle by dicta, that an employee who participates in activity which contravenes the policies of the Act may be held to have forfeited his right to invoke the other provisions of the Act to restore him to his job.

The majority adopted the administrative law judge's conclusions. Member Fanning dissented. He argued that the majority was ignoring and acting inconsistently with section 1310 by interpreting section 8(b)(7)(B) as if it contained a specific provision withdrawing employee status from picketing strikers. Had Congress intended to achieve that result, he stated, it had only to use the same language as was used in

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5 80 L.R.R.M. at 1137.
6 Id. at 1141 (dissenting opinion).
7 This statement of facts is drawn from 80 L.R.R.M. at 1132.
8 Id. at 1135.
9 See cases collected in Id. at 1134-35.
10 29 U.S.C. § 163 (1970) provides: "Nothing in this subchapter, except as specifically provided for herein, shall be construed so as either to interfere with or impede or diminish in any way the right to strike, or to affect the limitations or qualifications on that right."
the last provision of section 8(d), which deprives employees engaging in illegal strikes of their status as employees. The majority, in response, justifiably noted that it held unprotected only the act of picketing and not the strike, as was evidenced by its order requiring that two employees who struck but did not picket be reinstated. In addition, the majority pointed out that the legislative history reveals that, by retaining the limitations or qualifications on the right to strike which existed at the time of its enactment, section 13 has preserved the power of the Board to deny remedies to employees who have engaged in illegal acts, or have struck for illegal objects.

The holding that the Board has the authority to deny a remedy to an employee who engaged in picketing in violation of Section 8(b) (7) (B) is supported by the legislative history. In fact, it appears that the Board has authority to deny a remedy to an employee who has engaged in any activity which constitutes an unfair labor practice or is contrary to the policies of the Act. However, in view of the highly technical nature of many violations and in view of the harshness of the penalty imposed upon the individual worker, it is submitted that this authority should be sparingly exercised. The burden imposed on the individual by forcing him to predict the permissibility of the concerted activity and to risk his job on the correctness of that prediction will inevitably have a chilling effect on the free exercise of section 7 rights. Furthermore, in determining whether a reinstatement order would, in fact, contravene the policies of the Act, the Board should, as Member Fanning suggests, give weight to all the circumstances of the case. In view of the facts in Claremont, involving a technical violation of the Act by employees who were engaged in a lawful strike and the commission of several unfair labor practices by the employer, a reinstatement order would appear to be warranted.

11 29 U.S.C. § 158(d) (1970) provides in part: “Any employee who engages in a strike within the sixty-day period . . . shall lose his status as an employee of the employer engaged in the particular labor dispute, for the purposes of sections 158 to 160 of this title . . . .”
12 80 L.R.R.M. at 1141-42 (dissenting opinion).
13 Id. at 1137.
14 Id. at 1138.
17 See Schatski, Some Observations and Suggestions Concerning a Misnomer—“Protected” Concerted Activities, 47 Tex. L. Rev. 378 (1969), where it is argued that employees should never be terminated for engaging in concerted activity unless they know or should know that their conduct is illegal.
18 80 L.R.R.M. at 1143 (dissenting opinion).
Several cases decided during the Survey year considered the availability of backpay orders against labor organizations. Section 10(c) of the NLRA provides in part: "[B]ack pay may be required of the . . . labor organization . . . responsible for the discrimination . . . ."

Generally, backpay orders have only issued against unions violating section 8(b)(2). In *National Cash Register Co. v. NLRB,* the Sixth Circuit upheld a Board order requiring a union to pay lost wages to employees even though the union had not violated section 8(b)(2), thus expanding the availability of such orders. Subsequently, however, the Board refused to depart from a long-standing rule, and it denied a backpay order against a union where the union’s unfair labor practices interfered with the employees’ ingress to the plant—resulting in lost wages—but did not constitute interference with the tenure or terms of their employment status.

In *National Cash Register,* the union had violated section 8(b)(1)(A) by conditioning the right of employees—union members and non-members alike—to obtain a pass to cross a picket line on the payment of a wage contribution to the union. The employer was also found to have violated section 8(a)(1) by enforcing the unlawful pass requirement because it feared for the safety of employees attempting to cross the picket line without a pass. Because the employer had enforced the pass requirement in the absence of a specific union request, the union was not found to have violated section 8(b)(2). The Board’s order made the employer and union jointly and severally liable for the backpay of employees who missed work because they refused to comply with the unlawful contribution requirement. On appeal the union argued that a backpay order was inappropriate in these circumstances under the Board’s *Colonial Hardware* rule, which precludes the issuance of a backpay order when the union has interfered with

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3 466 F.2d 945, 81 L.R.R.M. 2001 (6th Cir. 1972).
5 *Furniture Workers Local 472 (Colonial Hardware Flooring Co.),* 190 N.L.R.B. No. 117, 77 L.R.R.M. 1342 (1971).
10 Furniture Workers Local 472 (Colonial Hardware Flooring Co.), 84 N.L.R.B. 563, 24 L.R.R.M. 1302 (1949).
the employees' ingress to his job site but has not caused a termination or disruption of his employment status. The Board viewed Colonial Hardware as inapplicable since it was, in fact, the union's coercion that caused the employer to discriminate against employees unable to obtain passes because of their refusal to comply with the unlawful contribution requirement. Noting the Board's broad discretion in fashioning remedies under section 10(c), the Sixth Circuit agreed with the Board that the union had been "in a real sense" responsible for the discrimination, and upheld the backpay order even though there was no section 8(b) violation.° At the Board's request, the court adhered to the distinction drawn by the Colonial Hardware rule and refused backpay orders for wages lost before the employer affirmatively enforced the pass requirement.¹⁰

National Cash Register, then, establishes that a backpay order against a union is appropriate in cases where there is employer discrimination caused by a union which interferes with the employment status of employees. It expands the availability of backpay orders against unions by recognizing that unions have alternate means, equal in potency to use of a specific request or warning, for gaining employer complicity in requiring employees to comply with an unlawful condition for employment. However, National Cash Register leaves unchanged the Colonial Hardware rule. That rule was originally predicated upon a belief that the Board lacked authority to issue backpay orders under section 10(c) in the absence of a showing that the union was responsible for discrimination against an employee that interfered with the employment status of the employee. The theory behind the rule is that an award for interference with ingress to the plant would constitute damages for that interference as contrasted with compensation for interference with the employment status.¹¹ The validity of the rule has not been passed upon;¹² however, its validity is questionable in light of the Board's broad discretion to adopt remedies which will effectuate the policies of the Act and remove the effects of unfair labor practices,¹³ and the Board itself applies the rule as a "matter of policy."¹⁴

Nevertheless, during the Survey year the Board, in a split decision, adhered to Colonial Hardware and refused to grant backpay to

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10 Id. at 967, 81 L.R.R.M. at 2015.
13 The court in National Cash Register questioned the validity of the rule, suggesting that it is inconsistent with the policy of insulating employees' jobs from their organizational rights. 466 F.2d at 965 n.20, 81 L.R.R.M. at 2014 n.20.
employees for wages lost when they missed work because they were fearful for their safety due to picket line violence. In *Lock Joint Pipe & Co.*, the union was found to have violated section 8(b)(1)(A) by engaging in picket line misconduct, including threats of physical injury to non-striking employees. The administrative law judge recommended that the union be required to pay lost wages to employees who missed work because of the union unfair labor practices. The Board refused to issue a backpay order, characterizing it as contrary to precedent under these circumstances. It adhered to the *Colonial Hardware* rule, emphasizing that it considered backpay orders inappropriate in the absence of interference with employment status, because of the existence of adequate remedies to prevent picket line violence and because of its belief that the availability and utilization of backpay orders against unions for picket line misconduct would result in the diminution of the right to strike. Members Miller and Kennedy dissented. They saw no basis for the majority’s fear that backpay orders would impede the right to strike. They focused on the remedial nature of backpay orders, emphasizing their role in removing the effects of the union’s unlawful conduct.

The artificiality of the *Colonial Hardware* distinction between interference with employment status and interference with the right of ingress is illustrated by comparing *Lock Joint Pipe* with *Stuart Wilson, Inc.*, also decided in the Survey year. In *Stuart Wilson* the union violated section 8(b)(1)(A) by threatening non-strikers with violence and section 8(b)(2) by warning the employer’s president of the danger to non-striking workers. The employer’s president sent the non-strikers home because he feared for their safety. A backpay order was issued. In *Lock Joint Pipe*, the majority distinguished *Stuart Wilson* on the basis that the employer in *Stuart Wilson* discriminated against the employees by sending them home.

*National Cash Register* establishes that in *Stuart Wilson* a backpay order would have been appropriate even if the union had not warned the employer of the danger to non-strikers. All that is required for a backpay order is employer action in response to union pressure. Thus, had the employer in *Lock Joint Pipe*, influenced by union misconduct and out of fear for the safety of his employees, advised them not to report to work, they would have received compensation for lost wages.
wages. However, under *National Cash Register* an employer who sends his employees home solely out of concern for their safety violates section 8(a)(1) and may be held jointly and severally liable with the union for lost wages. That court reasoned that such a paternalistic approach—whereby the employer decides for its employees how best to exercise section 7 rights—offends the philosophy embodied in the language of section 7. In the face of such potential liability it is unlikely that even the most concerned employers will advise threatened employees to remain home. It is submitted that the Board should reconsider the rule of *Colonial Hardware*. The employees in *Lock Joint Pipe* lost wages because of union unfair labor practices, and in order to remove the effects of those unfair labor practices, a backpay order was necessary. Ironically, under the *Colonial Hardware* rule employees are in a better position if their section 7 rights are violated by their employer as well as by the union.

VI. STRIKE VIOLENCE AND THE HOBBS ACT: *Enmons*

The Survey year saw the Supreme Court severely restrict the applicability to labor relations of the Hobbs Act, which makes it a federal crime to obstruct interstate commerce by robbery or extortion. In *United States v. Enmons* the Court held that the Hobbs Act does not apply to the use of force or violence to achieve legitimate labor objectives.

The defendants indicted under the Hobbs Act in *Enmons* were members and officials of labor unions who were charged with conspiracy to obstruct commerce by using violence against the plant facilities of an employer to obtain higher wages and other benefits for striking employees. The District Court for the Eastern District of

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21 466 F.2d at 963-64, 81 L.R.R.M. at 2013.
22 The Supreme Court has limited in only one respect the Board's discretion under § 10(c) in fashioning remedies:

The power to command affirmative action is remedial, not punitive, and is to be exercised in aid of the Board's authority to restrain violations and as a means of removing or avoiding the consequences of violation where those consequences are of a kind to thwart the purposes of the Act.

Consolidated Edison Co. v. NLRB, 305 U.S. 197, 236 (1938).


> Whoever in any way or degree obstructs, delays, or affects commerce or the movement of any article or commodity in commerce, by robbery or extortion or attempts or conspires so to do, or commits or threatens physical violence to any person or property in furtherance of a plan or purpose to do anything in violation of this section shall be fined not more than $10,000 or imprisoned not more than twenty years, or both.


Louisiana dismissed the indictment. The district court noted that the Hobbs Act defined the term "'extortion'" as "'the obtaining of property from another, with his consent, induced by wrongful use of actual or threatened force, violence, or fear, or under color of official right.'" The court concluded that "neither the wages of bona-fide employees nor the 'right to negotiate employment contracts—without illegal disruption' constitute 'property' as contemplated by the Hobbs Act."

The Supreme Court affirmed the district court in a six-to-three decision. The Court majority based its decision on four grounds. First, using traditional methods of statutory interpretation, the Court noted that the use of the term "'wrongful'" in the statute's definition of extortion would become redundant unless the term was utilized to limit "'the statute's coverage to those instances where the obtaining of the property would itself be 'wrongful' because the alleged extortionist has no lawful claim to that property.'" Since the obtaining of higher wages was a legitimate rather than "'wrongful'" union objective, the defendants' actions were not covered by the Hobbs Act. The majority also found support for their conclusion in the statute's legislative history and in the absence of any prior cases in the decades since its enactment in which the Hobbs Act was applied to activity in furtherance of a legitimate labor objective.

The Court's final basis for its decision involved its concern over extension of the statute to "'cover all overtly coercive conduct in the course of an economic strike . . . .'" This could produce the result that "'[t]he worker who threw a punch on a picket line, or the striker who deflated the tires on his employer's truck would be subject to a Hobbs Act prosecution and the possibility of 20 years' imprisonment and a $10,000 fine.'" The Court noted that as a criminal statute the Hobbs Act should be strictly construed and that more explicit language than that contained in the statute would be required for the "'unprecedented incursion into the criminal jurisdiction of the States'" of putting "'the Federal Government in the business of policing the orderly conduct of strikes.'"

Justice Douglas, in dissent, took an opposite view of the legislative

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5 335 F. Supp. at 646, 79 L.R.R.M. at 2077.
6 See 2 J. Sutherland, Statutes and Statutory Construction § 4705 (3d ed. 1943).
7 93 S. Ct. at 1009-10.
8 Id. at 1010.
9 Id. at 1010-14.
10 Id. at 1014.
11 Id. at 1015.
12 Id.
13 Id.
history and stated that "using violence to obtain . . . [higher wages] seems plainly within the scope of 'extortion' as used in the Act, just as is the use of violence to exact payment for no work or the use of violence to get a sham substitution for no work." Justice Douglas also apparently felt that, to avoid the "incursion" into state jurisdiction feared by the majority, the statute should be construed so as not to apply to "low-level acts of violence" resulting from bona fide collective bargaining.

The effect of Enmons on lawful economic strikes is clear, since it completely precludes the use of the Hobbs Act to suppress violent conduct resulting from such strikes. However, the Court did not define the scope of the "legitimate union objectives" which bar application of the statute. The Court did indicate that a union's desire for "'wage' payments from employers in return for 'imposed, unwanted, superfluous and fictitious services' of workers" could not be considered a legitimate objective.

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14 Id. at 1018 (dissenting opinion).  
15 Id. at 1019 n.17 (dissenting opinion).  
16 Id. at 1010.  