

THE CONGRESSIONAL LABOR AGENDA: NATIONAL EMERGENCY STRIKES AND OTHER PROBLEMS IN SEARCH OF SOLUTION

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This is a time of ferment in the thinking of lawyers, politicians, businessmen, union leaders, and academicians concerning our national labor law and policy. There is an incipient awareness of some need for positive changes in the Taft-Hartley Act—for amendments that would balance the scales of equity in the dealings of labor and management, without impeding the development of the labor-union movement.¹ On the other hand, the federal government's present administration of the adjudicative machinery established to ensure harmony in labor-management relations has, at least in the eyes of many, not only lost its hoped-for salutary impact but, perhaps, any efficacy whatsoever.² The consequence of these contemporary developments is a state of disquietude in the labor-relations field. Conceivably, it presages a broad-based effort to alter the status quo in labor-management affairs.

It is surely a truism to declare that most Americans are relatively unaware of the substantive content of our national labor laws. Lawyers are often little better off. For the most part they know that the original Wagner Act,³ enacted over the opposition of many businessmen,⁴ gave official government sanction to the principle of collective bargaining, created a National Labor Relations Board, and outlawed certain objectionable practices of both employers and labor unions. Further, they have some familiarity with the Taft-Hartley amendments,⁵

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¹ See "New federal strike-settlement agency is proposed at Arden House conference," BNA Daily Labor Report, Oct. 28, 1966, pp. 8-9; "UAW wants new deal on T-H stop-strike orders," BNA Daily Labor Report, Oct. 20, 1966, pp. 4-5; "Labor Laws: Time for a change . . . ?" Business Week, Dec. 3, 1966, p. 91; "What a new anti-strike law will be like," U.S. News & World Report, Nov. 28, 1966, pp. 80-81.

² See 112 Cong. Rec. 22355-61 (daily ed. Sept. 20, 1966) (Ripon Society Paper); "Final report of the ad hoc committee to study national emergency disputes," A.B.A. Labor Law Book, Aug. 1966, pp. 318-88; "President of airline involved in 1966 strike suggests changes in labor law," BNA Daily Labor Report, Dec. 6, 1966, pp. 11-12; "Is the labor board biased?" U.S. News & World Report, Nov. 28, 1966, pp. 72-80; The Kiplinger Washington Letter, Nov. 11, 1966, p. 1.

³ Ch. 372, 49 Stat. 449 (1935) (amended by 61 Stat. 136 (1947), as amended, 29 U.S.C. §§ 151-68 (1964)).

⁴ Booker & Coe, *The NLRB and Its Critics*, 17 Lab. L.J. 522, 523 (1966).

⁵ Labor Management Relations Act, ch. 120, 61 Stat. 136 (1947) (amended by 73 Stat. 519 (1959), 29 U.S.C. §§ 141-87 (1964)).

championed by industry as a necessary reform in the late 1940's⁶ and damned by union leaders for a decade after as anti-labor legislation.⁷ Few, if any, have stopped to ponder the studied silence of those who once cried so loudly for Taft-Hartley repeal, but who later largely abandoned such tactics as a result of the Supreme Court's 1959 decision in *San Diego Bldg. Trades Council v. Garmon*,⁸ which interpreted the existing law as giving the NLRB almost exclusive jurisdiction in labor matters vis-à-vis the states. Nor have casual observers in this field given much consideration to the basic democratic reforms embodied in the 1959 Landrum-Griffin Act amendments,⁹ which for a time elicited the same pained reaction from labor's side.¹⁰ But unquestionably more and more lawyers, as well as members of the informed public, have begun to question the efficacy of all the various federal labor statutes to meaningfully deal with the serious problems forcing themselves on public attention in a period of unparalleled national economic expansion.¹¹

I. NATIONAL EMERGENCY STRIKES

Some of the developments in the labor-management area which are forcing a rethinking as to the adequacy of present statutory regulation can be simply listed. In early 1966, a twelve-day strike virtually eliminated the economic life of the nation's largest city, New York, when the Transport Workers and Transit Union defied a court order and refused to return to work until they had reached agreement on a contract providing for a fifteen per cent wage increase. Later on in the spring, the AFL-CIO Machinists Union struck five major American airlines after rejecting the recommendations of a Presidential Emergency Board established under the provisions of the Railway Labor Act. When the President himself intervened to force a tentative settlement, it was quickly rejected at the hands of the adamant "rank and file," and the dispute went on for six weeks before it ended in a

⁶ See Developments in the Law—The Taft-Hartley Act, 64 Harv. L. Rev. 781 (1951); Note, 99 U. Pa. L. Rev. 641 (1951).

⁷ See, e.g., Spielman, *The Taft-Hartley Law: Its Effect on the Growth of the Labor Movement*, 13 Lab. L.J. 287 (1962).

⁸ 359 U.S. 236 (1959). The Court said, in part, that "when an activity is arguably subject to § 7 or § 8 of the Act, the States as well as the federal courts must defer to the exclusive competence of the National Labor Relations Board if the danger of state interference with national policy is to be averted." *Id.* at 245. This holding effectively preempted the great majority of labor-management cases to the exclusive area of NLRB "competence" and jurisdiction.

⁹ Labor-Management Reporting and Disclosure Act of 1959, 73 Stat. 519 (codified in scattered sections of 29 U.S.C.).

¹⁰ See Aaron, *The Labor-Management Reporting and Disclosure Act of 1959*, 73 Harv. L. Rev. 851 (1960).

¹¹ The American Bar Association's special committee charged with recommending solutions to national emergency strikes in the field of transportation is one of many manifestations of such concern.

guidepost-smashing settlement which included three five-per-cent pay increases, greater fringe benefits, and a cost-of-living escalator clause. The plight of millions of stranded travelers moved Senator Morse (D-Ore.) to say that "voluntary cooperation has been a key element in maintaining our price-cost stability, and effectively so when everyone accepts his responsibility. But if a small group pulls a holdup on the entire Nation, the rules of the game are destroyed."¹²

Nor are these isolated cases. As this article goes to press, a railroad strike has just been postponed by a special congressional resolution, a strike of network television performers and a lockout by most of the Nation's truckers have just ended, and the President has invoked the Taft-Hartley Law to enjoin a strike at a Connecticut defense plant.

Perhaps major inconveniences, such as transportation disputes that bottle up a major urban area or effectively shut down much of the country's national and international air travel, are the inevitable, unpleasant side effects of a freely functioning collective-bargaining system. But, since the federal government has already greatly involved itself in this area, it is certainly arguable that it is the government's duty, as an "honest broker," to provide a more adequate means than presently exists for equitably settling labor-management disputes without serious injury to the public or to the national interest. For, admitting the need to preserve as far as possible labor's basic economic weapon—the right to strike—and admitting the all but total disinclination by all parties to resort to compulsory arbitration, there yet unquestionably appears to be little alternative to limiting the one or adopting the other unless some better solution is found for the problem of strikes disruptive of the public interest.

As if reflecting a consensus in favor of some statutory revision, President Johnson, in his 1966 State of the Union message, asked Congress to consider legislation to deal with strikes "which threaten irreparable damage to the national interest."¹³ But with the uncertainties of an election year apparently weighing heavily with the President, no concrete proposals were forthcoming from the White House.¹⁴

President Johnson's request did however, trigger the introduction of a large number of bills in both Houses of the 89th Congress;¹⁵

¹² 112 Cong. Rec. 16506 (daily ed. July 27, 1966).

¹³ 112 Cong. Rec. — (daily ed. Jan. 12, 1966).

¹⁴ One Congressman, at the height of the airlines strike, summed up the President's role by saying that "he has done nothing and there is no indication that he will do anything." 112 Cong. Rec. 16440 (daily ed. July 27, 1966) (remarks of Congressman Gurney).

¹⁵ E.g., Senator Smathers' bill, S. 2891, and Senator Griffin's bill, S. 3631, creating a Labor Court; Senator Javits' bill, S. 2797, providing for seizure of struck companies; Senator McClellan's bill, S. 10, subjecting unions to the antitrust laws; Senator

but the most concrete result of this activity was a single, spasmodic effort to reach a solution to a particularly pressing dispute. This effort occurred when Congress reluctantly came within inches of adopting a resolution that would have forced the striking airline machinists back to work for a period of up to 180 days.¹⁶ When this piecemeal method of providing strike legislation received heavy criticism, no further efforts were made during the session to extend Congress' one effort by coming up with a measure applicable to all circumstances. Then, in late November, the President made it known that he had created a task force to study the problem, and that additional studies by both the Labor and Justice Departments had also been undertaken.¹⁷ Shortly thereafter, the Department of Commerce announced plans to study the impact of certain work stoppages on various population groups.¹⁸ Paradoxically, the President's State of the Union address the following month completely omitted any mention of national emergency strikes, leaving the problem, it would seem, squarely in the lap of Congress.¹⁹

Congress has faced the problem before. One solution which was enacted was the "cooling off" period and the mediation provisions of the Taft-Hartley Act.²⁰ It is now twenty years since these provisions were adopted. Section 10 of the Railway Labor Act,²¹ enacted in 1926, also provides for a "cooling off" period and for the creation of an Emergency Board to deal with transportation disputes which threaten to interrupt interstate commerce so as to deprive any section of the country of essential service. This public remedy has been available twice as long as the comparable Taft-Hartley sections. Few would contend that either of these provisions has been completely effective in dealing with the type of strike situation they aim at correcting. Nor is this so remarkable. Obviously, significant changes in the industrial development of the nation have occurred since 1926, or even 1947. Approximately seventy billion dollars is now spent annually on national defense production. The demand for essential services in a growing urban society has mushroomed. Whole industries often bargain as a single unit with a large coalition of labor unions. Where

Lausche's bill, S. 3587, providing for compulsory arbitration in essential industries. See also H.R. 333, 89th Cong., 1st Sess. (1965) (proposal to outlaw joint bargaining).

¹⁶ S.J. Res. 186, 89th Cong., 2d Sess. (1966). Settlement of the strike occurred as the bill was favorably reported by the House Commerce Committee, after having been passed by the Senate on August 4, 1966. Many Committee members were reportedly fearful that such an ad hoc congressional approach to serious strikes would set a precedent and encourage unions and management in other industries to turn to the government to resolve all disputes. BNA Daily Labor Report, Aug. 12, 1966, p. 1.

¹⁷ BNA Daily Labor Report, Nov. 30, 1966, p. AA-1; N.Y. Times, Nov. 30, 1966, p. 1.

¹⁸ BNA Daily Labor Report, Dec. 1, 1966, p. 7.

¹⁹ See 113 Cong. Rec. H-25 (daily ed. Jan. 10, 1967).

²⁰ 61 Stat. 152 (1947), as amended, 29 U.S.C. §§ 171-82 (1964).

²¹ 44 Stat. 586 (1926), as amended, 45 U.S.C. § 160 (1964).

once many strikes could be largely tolerated or ignored, nearly all industrial warfare is today considered by most of the public not only a wasteful vestige of the past but, in many cases, a collective injustice to the increasingly large number of Americans affected. Unfortunately, no clear-cut remedy recommends itself.

Suggested solutions run the gamut from compulsory plant seizure, to arbitration, to revision of the antitrust laws.²² In the face of such a variety of remedies, none of which is completely acceptable to both management and labor, there is an understandable hesitancy in submitting yet another proposal that will only arguably help settle the vexing dilemma of national emergency strikes. But, as it seems probable that congressional inaction on the subject cannot long be assumed, perhaps a concrete suggestion on which both sides, and certainly the public, might grudgingly agree would be in order.

There is no question but that an antitrust approach is antediluvian, and that its more sophisticated offshoots, involving the limitation of combinations of employers or employees for bargaining purposes to a particular percentage, unit, company, or industry, are artificial barriers that not only may be structurally wrong for a particular type of industrial production, but would be anathematized by the unions—and rightly so. Likewise, efforts to legitimize resort to plant seizure intrude the government squarely into the collective-bargaining picture, and, regardless of the counter-arguments—that collection of union dues or preservation of the status quo would have some impact on unions as well as on management—there is little question that government operation of a business must of necessity force an employer to eventually accede to very nearly all union demands in order to get his property back. Surely this functional crudity is an equal to the antitrust concept in its one-sided approach to the problem.

Union supporters, with few exceptions, would favor seizure as a political remedy, much as they applauded the action of President Truman in the "steel seizure" episode of 1952.²³ Management adherents, while approving generally of the antitrust approach, would obviously resist the granting of seizure powers to the President. Coming one step closer to middle-ground solutions, both sides would and do oppose any form of compulsory arbitration. The argument has been frequently made,²⁴ but is nonetheless true, that if this power of compulsion resides in the President, or a board appointed by him, whatever incentive either side has to reach agreement will be taken

²² See note 15 *supra*.

²³ See the United Steelworkers' *amicus curiae* brief filed by Arthur Goldberg in *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 59 (1952).

²⁴ See, e.g., Gregory, *Labor and the Law* 386 (1946).

away, and in its place will be substituted an unvarying reliance on the centralized authority. Labor and management would not be responsible for the resulting contract; would be free to criticize the agreement; might, perhaps, fail to honor it; and the collective-bargaining process would begin a sharp decline. At the same time, governmental involvement in industrial affairs would sharply increase with the establishment of this unhappy precedent. The solution of compulsory arbitration by governmental panel or official, therefore, leaves much to be desired. Since free collective bargaining is the cornerstone of labor-management relations and the ideal defended by many over a long period of years, it would seem appropriate to avoid resort to outside contract dictation by third parties if any other method of solving emergency disputes is available.

Thus, coming one step closer to a viable compromise solution, one confronts President Kennedy's suggestion that the chief executive be given an "arsenal of weapons" to deal with national emergency strikes, and that among these would be the power of fact-finding commissions to make recommendations and the option to use injunctions.²⁵ Here, it is submitted, Congress and the commentators are closest to the area of reality—not only in regard to what would be politically acceptable to both sides, but also as to what might work better than the existing statutory provisions. At present, under Taft-Hartley, the President, if he determines that a threatened or actual strike imperils the national health or safety, may appoint a fact-finding board to investigate the issues and submit a written report without recommendations, which is then publicized.²⁶ He may next authorize the Attorney General to seek an eighty-day injunction against the strike. The granting of such an order lies within the discretion of the court as to whether the actual or threatened dispute poses a grave danger to the nation's well-being.²⁷ During the injunction period, the parties are directed to resume bargaining negotiations, and the operation of the business continues. At the expiration of sixty days, if the dispute remains unsettled, the same board of inquiry reports to the President the current position of the parties and the efforts that have been made to settle the issues, including the employer's last offer.²⁸ Within fifteen days, a secret ballot of the employees is taken on this last offer. Within the final five days after the vote is taken, the results are certified to the Attorney General, and he then moves to

²⁵ These recommendations were first made during the now famous Kennedy-Nixon debates in the fall of 1960.

²⁶ LMRA § 206, 61 Stat. 155 (1947), 29 U.S.C. § 176 (1964).

²⁷ LMRA § 208, 61 Stat. 155 (1947), as amended, 29 U.S.C. § 178 (1964).

²⁸ LMRA § 209, 61 Stat. 155 (1947), 29 U.S.C. § 179 (1964).

dissolve the injunction.²⁹ The parties are back to their initial adverse positions, and a serious strike may take place.

Although the President may report to Congress on the nature of the dispute, including the contentions of the respective sides and his recommendations for settlement, such a step ordinarily will have little effect. As evidenced by the congressional handling of last year's airline strike—where, incidentally, an emergency board created under the Railway Labor Act had initially made sensible recommendations that were for the most part ignored³⁰—the deliberate manner common to a legislative body is ill suited to the settlement of emergency disputes. Congress might better provide extra authority to the President when faced by automatic dissolution of the district court's order at the expiration of an eighty-day period. In place of the presently controlling directives of Sections 209 and 210 of the Taft-Hartley Act, power should be given the President to petition for an extension of the injunction for thirty days, during which time detailed recommendations would be made by the emergency board as to the most equitable terms on which agreement might be reached. If one side or the other refused at the end of the 110 days to abide by the Board's recommendations for settlement, the President would then be empowered, at his discretion and after weighing the needs of the country and the wisdom of allowing unregulated economic warfare to proceed, to either petition that the injunction be continued until settlement, or to direct that the Attorney General move to dissolve the existing order. Similar changes would also be made in Section 10 of the Railway Labor Act to make the two laws identical in their treatment of emergency work stoppages.

These amendments, it is submitted, would place additional pressure on the parties to the dispute to settle—especially when the President, and through him the public, is in a position to evaluate which side, according to the neutral board of inquiry, was recalcitrant in agreeing to reasonable terms. They would also allow the President to act against the side that engages in foot dragging—by dissolving the injunction and allowing the union to strike if its economically justified claims are not met, or by enjoining the strike until agreement is reached if the merits of the argument favor the employer's final offer. Judicial review would, of course, be preserved to check any excessive presidential application of the ultimate injunction remedy—a remedy that would presumably be resorted to only in national-interest disputes of a particularly serious nature.

In addition to these increases in the President's power to control

²⁹ LMRA § 210, 61 Stat. 156 (1947), 29 U.S.C. § 180 (1964).

³⁰ See BNA Daily Labor Report, Aug. 3, 1966, § B.

disruptive labor disputes, there should be an extension in the basic coverage of federal antistrike legislation to control disputes which, although localized to specific state or urban areas, may nonetheless represent emergencies of the most serious sort. One need but recall the New York subway strike of 1966, or the more recent Wilmington, Delaware half-year public transportation tie-up, to sense the gravity of certain labor problems to local communities. A new section 211 should be added to the Taft-Hartley Act which would allow the President, at the written request of the chief executive officer of a state or municipality beset by a labor crisis that threatened local health, safety, or basic public services, to invoke the provisions outlined in amended sections 206-10.³¹

Admittedly, such a change further impinges on, and regrettably so, an already weakened assumption that state and local authorities are best able to handle local problems. But with the rise of a strong national labor policy, as evidenced by the preemptive thrust of *Garmon*, and with the growing importance of localized strikes that ultimately involve a number of political jurisdictions and their people, a strong argument is already present for extending this federal remedy to an obvious need. And since the always interested, frequently involved, third party in every significant labor dispute—the public—would be represented in any appeal to the President by its principal locally elected official, the democratic control inherent in the power of the vote would be, in all likelihood, a sufficient check on over-hasty requests by local mayors or governors for federal intervention. In addition, Congress might easily make clear that this procedure ought to be used only under circumstances where no other course of action would suffice. With this limitation clearly before them, American cities, states, and the nation as a whole, might avoid the dangers of inflicting paralyzing injury on themselves as a result of blind deference to the principle of untrammelled collective bargaining. If the supremacy of the public's interest, superior to that of either disputant, is kept firmly in mind, then the suggested changes in the national-emergency procedures would appear to be well justified.³²

³¹ A plan to have Congress control local labor disputes does, of course, raise serious constitutional questions. It would appear, however, that even localized disputes might have such a significant effect on interstate commerce that Congress could regulate them if it chose to do so. Cf. *Heart of Atlanta Motel v. United States*, 379 U.S. 241 (1964); *Wickard v. Filburn*, 317 U.S. 111 (1942).

³² One very sound way to approach a solution to the emergency-strike problem would be the method embodied in a proposal by Senator Robert Griffin (R-Mich.), introduced in July 1966, which would have created a joint congressional committee to:
 . . . study and investigate the entire field of industry wide and regional collective bargaining procedures and practices between employers and labor organizations, and combinations or groups thereof, and problems relating thereto, including but not limited to

II. AUTHORIZATION CARDS AND REFUSAL TO BARGAIN

The most immediate and often-raised complaint concerning the National Labor Relations Act, or, more precisely, its present interpretation by the Labor Board, involves the status of union authorization cards.³³ In 1947, Congress amended section 9 of the act to provide that:

(c)(1) Whenever a petition shall have been filed, in accordance with such regulations as may be prescribed by the Board—

. . . .
(B) by an employer, alleging that one or more individuals or labor organizations have presented to him a claim to be recognized as the representative defined in section 9(a);

the Board shall investigate such petition and if it has reasonable cause to believe that a question of representation affecting commerce exists shall provide for an appropriate hearing upon

(1) the ways and means by which the collective bargaining process might be improved, altered, revised, or supplemented so as to avoid or minimize strikes and lockouts which affect an entire industry or region, or a substantial part thereof;

(2) the concentration of economic and other power under the control of business organizations and labor organizations, and groups thereof, and such practices or policies, if any, which tend to concentrate or monopolize power affecting the collective bargaining process, and the relationship of such factors to strikes and lockouts affecting an entire industry or region, or a substantial portion thereof;

(3) the effectiveness and usefulness of various forms of mediation, conciliation, arbitration, and other possible procedures and methods for aiding or supplementing the collective bargaining process;

(4) the administration, operation and possible need for revision of existing Federal laws which in any way concern collective bargaining, strikes, or lockouts affecting an entire industry or region, or substantial portion thereof;

(5) such other problems and subjects which relate in any way to collective bargaining, strikes or lockouts as the joint committee deems appropriate.

S.J. Res. 174, 89th Cong., 2d Sess. (1966).

Clearly, this legislative formula portends the best chance for successful amendment of Taft-Hartley of any legislative scheme so far brought forward. The idea of a broad-based study of the problems inherent in modern collective bargaining, with a view to revising the existing statutes and thereby hopefully avoiding major strikes and lockouts, although discussed and applauded by some commentators, has never been given the congressional authorization it deserves. Senator Griffin's proposal establishes a forum where union and management spokesmen, as well as other qualified experts, might make various positions clear and indicate, by way of a balanced presentation, their suggestions for proposed reform. Public officials, such as mayors and representatives of civic associations, might also testify. Thus, an extensive, unbiased study of the public's interest as affected by specific industry labor-management activities might be accomplished without the pressure to deal immediately with a pending national strike. Such a reflective appraisal by Congress is long overdue.

³³ See, e.g., Lewis, *The NLRB Again Stretches Joy Silk's Tenuous Fabric*, 18 Lab. L.J. 222 (1967).

due notice. Such hearing may be conducted by an officer or employee of the regional office, who shall not make any recommendations with respect thereto. *If the Board finds upon the record of such hearing that such a question of representation exists, it shall direct an election by secret ballot and shall certify the results thereof.* (Emphasis added.)

Since Congress specified no other way of obtaining bargaining status, the method of determining the presence or absence of a union majority in a particular unit thus appeared to be clearly demarcated. Then, in *Joy Silk Mills, Inc.*,³⁴ the Board directed an employer who had purposely set out to destroy a union's majority status to bargain with the union as majority representative, regardless of the union's subsequent loss of that majority. The principle enunciated seemed to be that an employer might not always insist on a Board election as the exclusive basis of determining a question of representation when he had no good-faith doubt of the union's majority in an appropriate bargaining unit. It appeared clearly unreasonable to allow an employer to refuse to bargain with a union without an election when the employer himself rejected the principle of collective bargaining and desired only to gain time within which to undermine the union and dissipate its majority. Thereafter, the Board and the courts generally found a section 8(a)(5) violation (refusal to bargain), and included a bargaining order as an appropriate remedy, when an employer refused to recognize a union with a majority of cards and subsequently engaged in section 8(a)(1) or 8(a)(3) violations.³⁵

From this position, the Board has taken the far-from-inevitable step of holding that employer bad faith can exist, and therefore that an 8(a)(5) refusal-to-bargain finding should lie, when no independent unfair labor practices have been committed. In *Snow v. NLRB*,³⁶ the union obtained a card majority and asked for recognition. The employer agreed to abide by a card check conducted by a minister, but when the count indicated a union majority, the employer, unconvinced, demanded an election. The justification for the bargaining order is not so clear here as in *Joy Silk Mills*, but a bad-faith fact situation still seems to exist.³⁷ However, not every unit presenting a majority of signed cards to an employer represents at that time 51% of a company's employees.

³⁴ 85 N.L.R.B. 1263 (1949), enforced, 185 F.2d 732 (D.C. Cir. 1950), cert. denied, 341 U.S. 914 (1951).

³⁵ See *Allegheny Pepsi-Cola Bottling Co. v. NLRB*, 312 F.2d 529 (3d Cir. 1962); *NLRB v. Wheeling Pipe Line, Inc.*, 229 F.2d 391 (8th Cir. 1956); *NLRB v. Pyne Moulding Corp.*, 226 F.2d 818 (2d Cir. 1955); *NLRB v. Geigy Co.*, 221 F.2d 553 (9th Cir. 1954).

³⁶ 308 F.2d 687 (9th Cir. 1962), enforcing 134 N.L.R.B. 709 (1961).

³⁷ See also *NLRB v. Kellogg's Inc.*, 347 F.2d 219 (9th Cir. 1965); *NLRB v. Hyde*, 339 F.2d 568 (9th Cir. 1964); *NLRB v. George Groh & Sons*, 329 F.2d 265 (10th Cir. 1964); *Jem Mfg. Inc.*, 156 N.L.R.B. No. 62, 61 L.R.R.M. 1074 (1966).

And it is in this area, with card checks as a substitute for an election, that the NLRB in the past few years has worked out a rationale of somewhat dubious merit. One commentator has viewed the development this way:

The political climate changed; so did the composition of the Board. Unfortunately, as the composition of the Board changed, so did its interpretation of the law. Under its current rule, as set forth in *Cumberland Shoe Corp.*,^[38] the Board will count cards signed by an employee even though it was procured through the misrepresentation that the card would be used to obtain an election, or even though the card states in bold type "I want an election now."^[39]

The Board under *Cumberland*, now holds that there is but one misrepresentation that will invalidate a card: a statement by a union organizer that the *only* purpose of the card is to obtain an election.⁴⁰

A management attorney has stated that "the Board treats authorization cards as a 'yes' vote in a secret ballot election. They are not the same. . . ."⁴¹ This would rather clearly appear to be the case. While union organizers cannot demand recognition on the basis of cards which do nothing more than request an election,⁴² they can and do include this request on cards that also designate the union as bargaining agent for the person signing them. Frequently, the signer may not realize this aspect of his authorization. Thus the "dual purpose" card is used to show a majority and to *avoid* an election, when its purpose, in the mind of the worker signing the card, may have been to *obtain* an election. This state of mind on the part of employees is considered irrelevant by the present Board.⁴³ But the duality of function these cards serve indicates the inappropriateness of such a rule. As the First Circuit said recently, "An employee might sign such a card in order to be a good fellow, or because it was hard to resist . . . an appeal, but secretly plan to vote against the union. Such a card might be signed more readily than an unconditional request for membership."⁴⁴ Aside from the contradictory motives given by the court for signing a card, employees may be unclear of purpose,⁴⁵ unable to read,⁴⁶ or may in

³⁸ 144 N.L.R.B. 1268 (1963).

³⁹ S.N.C. Mfg. Co., 147 N.L.R.B. 809 (1964) (footnote from quotation).

⁴⁰ Lewis, *The Use and Abuse of Authorization Cards in Determining Union Majority*, 16 Lab. L.J. 434, 437 (1965).

⁴¹ BNA Daily Labor Report, Dec. 14, 1966, p. 3.

⁴² *Morris & Associates*, 138 N.L.R.B. 1160, 1164-65 (1962); *Bannon Mills, Inc.*, 146 N.L.R.B. 611, 612 (1964) (dictum).

⁴³ *Aero Corp.*, 149 N.L.R.B. 1283, 1290 (1964).

⁴⁴ *NLRB v. Freeport Marble & Tile Co.*, 367 F.2d 371, 372 (1st Cir. 1966).

⁴⁵ See *Jas. E. Matthews & Co. v. NLRB*, 354 F.2d 432, 437 (8th Cir. 1965).

⁴⁶ See *id.* at 436.

fact have their signatures forged.⁴⁷ With misrepresentation of a card's function frequently occurring, the courts have generally refused to accept the Board's "only purpose" rule, which practically equates use of cards with a secret election, and have found cards inconclusive as to union authorization.⁴⁸

Another valid objection to reliance on cards as an indicator of the union's majority status is that often those who have signed are outside what might be considered an appropriate bargaining unit. Not uncommonly, the Board defines a unit for bargaining that later fails to measure up to more objective standards of appropriateness.⁴⁹ The Fourth Circuit recently commented on the inadequacy of the NLRB's use of an employee list which included a category of worker that the union itself conceded ought not to be included in the unit:

Actually, an employer commits an unfair labor practice if he recognizes a minority union. . . . In the instant case there was no proof that the union ever obtained the required majority status [A] concession, this time by the General Counsel, makes this fact crystal clear. While the General Counsel introduced evidence of majority support for the union in the company's total work force . . . , *he conceded that the company's payroll on that date included an undetermined number of "drifters" whose exclusion from the bargaining unit was established in the representation case.*⁵⁰ (Emphasis in original.)

In *NLRB v. Purity Food Stores, Inc.*,⁵¹ the First Circuit not only disagreed with the Board's unit determination, but even cast doubt on the integrity of the fact-finding process used:

As we have said, . . . if its summary was thought to be, as it was said to be, a statement of "the relevant facts," it certainly was not. If it was a singling out of those particular facts which, in the Board's opinion, justified treating the Peabody store as a single unit, some of them were so expressed, or limited, as to give the wrong impression . . . ; some of them were at least materially incomplete . . . ; and some almost totally insignificant. . . . Furthermore, to isolate some facts and omit others, some of them at least comparable, and some

⁴⁷ See "The Union Cards Were Phony," Nations Business, March 1966, p. 100.

⁴⁸ See *Amalgamated Clothing Workers v. NLRB*, 365 F.2d 898, 907-08 (D.C. Cir. 1966); *NLRB v. Peterson Bros.*, 342 F.2d 221, 224 (5th Cir. 1965).

⁴⁹ See generally Rains, *Determination of the Appropriate Bargaining Unit by the NLRB: A Lack of Objectivity Perceived*, 8 B.C. Ind. & Com. L. Rev. 175 (1967).

⁵⁰ *Maphis Chapman Corp. v. NLRB*, 368 F.2d 298, 302 (4th Cir. 1966).

⁵¹ 354 F.2d 926 (1st Cir. 1965).

of seemingly much greater importance than some mentioned, is, per se, a failure to view even the recited facts in context.⁵²

To the skeptical, the Board would still appear to be somewhat unreconstructed. In *Quality Mkts., Inc.*,⁵³ the examiner had fashioned an extremely favorable remedy for a union attempting to organize an employer found guilty of violating section 8(a)(1). But because the union never obtained a majority of cards, there was no finding of a violation of section 8(a)(5). The Board, however, cut the size of the unit and then counted cards the trial examiner had rejected. It thus arrived at a majority and proceeded to hold that the company's refusal to recognize the union was not based on a good-faith doubt of this majority. The Board ordered the company to bargain with the union—even though its own trial examiner had exhibited the same doubts as the company. Then, as if to substantiate the view that it felt that an employer could not be correct in denying the appropriateness of a bargaining unit, the Board indicated in another case last year that a good-faith doubt as to the appropriateness of a unit would not constitute an independent defense to a refusal-to-bargain charge.⁵⁴

What, then, can a doubting employer who seeks an election do to establish good faith? The answer is not simple. The Board has travelled a long way from *Joy Silk Mills*. It is true that in *John P. Serpa, Inc.*⁵⁵ the Board held that, in a refusal-to-bargain case based on the showing of authorization cards, the General Counsel had the burden of proving not only that a majority of employees in the appropriate unit had signed cards designating the union as bargaining representative, but also that the employer in bad faith had declined to recognize and bargain with the union. But the Board has inferred bad faith from an employer's incomplete response in the face of a union demand for recognition,⁵⁶ from an attempt by an employer to determine if the union did in fact possess a majority by interrogating his employees in violation of section 8(a)(1),⁵⁷ and from an employer's commencement and later dis-

⁵² Id. at 930-31.

⁵³ 160 N.L.R.B. No. 1, 62 L.R.R.M. 1582 (1966).

⁵⁴ Oklahoma Sheraton Corp., 156 N.L.R.B. No. 69, 61 L.R.R.M. 1116 (1966) (semble). Cf. H. & W. Constr. Co., 161 N.L.R.B. No. 77, 63 L.R.R.M. 1346 (1966) (Good-faith doubt that LMRA is applicable to him does not excuse employer's refusal to bargain.).

⁵⁵ 155 N.L.R.B. No. 12, 60 L.R.R.M. 1235 (1965). Accord, Ben Duthler, Inc., 157 N.L.R.B. No. 3, 61 L.R.R.M. 1305 (1966). But cf. U.S. Gypsum Co., 157 N.L.R.B. No. 60, 61 L.R.R.M. 1384 (1966) (Burden is on employer to show belief in lack of majority if union has once been certified.).

⁵⁶ Henry Spen & Co., 150 N.L.R.B. 138 (1964). See *Jas. E. Matthews & Co. v. NLRB*, supra note 45, at 439.

⁵⁷ *Johnnie's Poultry Co.*, 146 N.L.R.B. 770, 774 (1964), enforcement denied, 344 F.2d 617 (8th Cir. 1965). The courts have attempted to establish criteria for judging the coerciveness of employer interrogations. Factors to be considered include the labor-relations history, the nature of the information sought, the identity of the questioner,

continuance of negotiations (due to conflicting advice of counsel).⁵⁸ On the other hand, the Board found no violation when the employer simply refused to look at the cards,⁵⁹ or rejected cards signed by a majority without giving any reason except his desire for an election.⁶⁰

It is likely that with some skillful reasoning, these apparently inconsistent rulings can be harmonized.⁶¹ But a very real doubt persists as to whether the Board's policy of inferring bad faith from the legal activities of employers can ever be called correct. It is submitted that it is both incorrect and inequitable—especially to the small employer not blessed with retained counsel guiding him through the labyrinth of NLRB good-faith requirements. A solution must be found which will safeguard the employees' right to organize and to bargain collectively and, at the same time, permit even small employers to act with reasonable assurance that they will not become involved in unfair-labor-practice proceedings. This is particularly important in view of recent developments which indicate that refusal-to-bargain charges involving authorization cards will arise more and more frequently.

It had long been the law that when a union believed an employer was acting in bad faith by refusing to bargain despite a showing of authorization cards, it could either file an 8(a)(5) charge or proceed to an election to determine its majority.⁶² In accordance with its present short-cut approach in the representation-case area, the NLRB held in 1964 that a union which proceeds to an election is not precluded, should it lose, from thereafter filing a charge based on an employer's allegedly unlawful failure to acknowledge that the union held a majority of cards prior to the election.⁶³ With such an attractive opportunity, any union would be foolish, regardless of its actual number

the place and method of interrogation, and the truthfulness of the reply. *NLRB v. Comco*, 340 F.2d 803, 804 (5th Cir. 1965); *Bourne v. NLRB*, 332 F.2d 47, 48 (2d Cir. 1964). The Board may conform to this procedure. See *Cannon Elec. Co.*, 151 N.L.R.B. 1465, 1470-71 (1965).

⁵⁸ *Jem Mfg. Co.*, supra note 37.

⁵⁹ *Strydel, Inc.*, 156 N.L.R.B. No. 114, 61 L.R.R.M. 1230 (1966).

⁶⁰ *Aaron Bros.*, 158 N.L.R.B. No. 108, 62 L.R.R.M. 1160 (1966). The concurring opinions of Board members Jenkins and Zagoria indicate how muddled the waters have become and how complicated is the present body of NLRB-made law.

⁶¹ See, e.g., 1965-1966 Annual Survey of Labor Relations Law, 7 B.C. Ind. & Com. L. Rev. 909, 941 (1966).

⁶² *Benjamin Aiello*, 110 N.L.R.B. 1365 (1954).

⁶³ *Bernel Foam Prods. Co.*, 146 N.L.R.B. 1277 (1964). Accord, *Irving Air Chute Co.*, 149 N.L.R.B. 627 (1964). The Board will also order bargaining as a remedy for other unfair labor practices, if it is clear that the union represented a majority of employees when they occurred and that the majority has been dissipated. See *Better Val-U Stores*, 161 N.L.R.B. No. 71, 63 L.R.R.M. 1326 (1966); *Northwest Eng'r Co.*, 158 N.L.R.B. No. 48, 62 L.R.R.M. 1089 (1966). For the next inevitable step, see the trial examiner's report in *Zinkes Foods, Inc.*, NLRB Case No. 30-CA-372, made public Dec. 18, 1966.

of adherents, not to file a charge of employer bad faith after losing an election.

Clearly, reliance on good faith, bad faith, shifting burdens of proof and changing interpretations of the law are less than satisfactory approaches to the important question of whether or not a union should represent a group of employees. The paramount consideration should rather be the freely expressed desire of these employees, independent of coercion from employer, union, or partisan NLRB zeal. To achieve this end, Congress ought to amend the present law by making explicit that a union shall be certified as collective-bargaining representative only after an NLRB election, unless the employer refuses to bargain with a union which possesses a majority of cards and then engages in a course of violations tending to undermine the uncoerced majority of the union. Such an approach would hopefully preserve the sensible protection inherent in *Joy Silk Mills* without sanctioning either the present extensive use of cards as a substitute for secret elections or the speculative rationalizing of the Board.⁶⁴

III. FREEDOM OF SPEECH

A topic that may become a matrix of expanding significance in the years to come deals with the area of free speech. Prior to passage of the Taft-Hartley amendments in 1947, management statements to employees, especially during organizing campaigns or contract negotiations, were highly suspect in the eyes of the NLRB. The Board even went to the extent of finding that speeches to employees by their employer about union membership were *always* coercive if delivered

⁶⁴ Sen. Javits (R-N.Y.) introduced a bill (S. 3452) last year which would protect an employer from unfair-labor-practice charges based on a showing of cards if he complied with the following proviso which was to be added to § 9(c):

(6) In any case in which it is alleged in a petition filed by an employer pursuant to paragraph (1)(B) [of § 9(c)] that a labor organization seeking recognition as the representative of the employees of such employer has presented valid cards or other unimpeached evidence purporting to show that a majority of employees in an appropriate bargaining unit desires to be represented by such labor organization, it shall be the duty of the Board, if it determines that in all other respects a question of representation affecting commerce exists, to forthwith, without regard to the provisions of paragraph (1), direct the holding of such an election in such unit as the Board finds to be appropriate and to certify the results thereof. The consideration of the petition and the holding of the election, in any case, shall not be delayed by reason of the pendency of an unfair labor practice charge based upon the refusal of the employer to bargain collectively with the labor organization, and no such unfair labor practice charge based upon a refusal to bargain prior to the election shall thereafter be considered unless the Board determines that the labor organization had once been authorized to represent a majority of the employees in the bargaining unit, but that as a result of a course of conduct by the employer in violation of section 8(a) (other than unfair labor practices under section 8(a)(5)), such labor organization is no longer authorized to represent such majority

in the plant during working hours.⁶⁵ Perhaps such an agency posture was historically necessary, or at least excusable, as an aid to struggling unions attempting to gain a foothold in the American worker's consciousness. But in 1947, apparently deciding that the time had come to balance the scales a bit, Congress provided in Section 8(c) of the Taft-Hartley Act that:

The expressing of any views, argument, or opinion, or the dissemination thereof, whether in written, printed, graphic, or visual form, shall not constitute or be evidence of an unfair labor practice under any of the provisions of this Act, if such expression contains no threat of reprisal or force or promise of benefit.

It would appear that, after twenty years, it is again time to take a look at this frequently forgotten section to determine if additional balancing may be required.

A. Board Erosion of the Law

Several aspects of the Board's enforcement of the free-speech proviso have detracted from its effectiveness. Although the Board did, in response to the new statute, quickly overrule its prohibition of speeches to employees during working hours,⁶⁶ it even more quickly asserted that the proviso did not apply in representation cases.⁶⁷ An election may be set aside because of wholly noncoercive speeches, even if the employer does nothing more than say that union representation will not benefit his employees.⁶⁸ As one writer has commented, "The new Board test seems to be that if any of his [the employer's] communications influence the employees against the union, their total impact on the results of the election may exceed permissible campaigning."⁶⁹

A second factor which has diminished the effectiveness of the free-speech proviso is the Board's propensity to find coercion in a great variety of employer activities. Of course, it is obvious that it is the Board's duty to evaluate the facts, and that subtle and hidden threats may be just as effective as overt and obvious ones, but consider, in the light of the preceding discussion of authorization cards and their unreliability, a recent case. A company official had addressed employees at a regularly held cafeteria meeting and informed them that two professional Teamster Union organizers had come to the plant, that employees might be asked to sign authorization cards, that the company

⁶⁵ Clark Bros., 70 N.L.R.B. 802 (1946).

⁶⁶ Babcock & Wilcox Co., 77 N.L.R.B. 577 (1948).

⁶⁷ General Shoe Corp., 77 N.L.R.B. 124 (1948).

⁶⁸ See Trane Co., 137 N.L.R.B. 1506 (1962).

⁶⁹ Cook, Labor, *The Baltimore Magazine*, Sept. 1966, p. 52.

had received reports of union harassment to obtain signatures, and that further efforts at coercion by the union should be promptly reported. The company official went on to warn: "Be careful about what you sign—don't sign anything unless you know what you are signing and what it might mean to you, your family, or your fellow employees." The talk concluded, "Remember—you do not have to and should not sign a card under any circumstances, unless you want the union to be your agent." The NLRB held on these facts that the employer had threatened his employees and thus violated section 8(a)(1).⁷⁰ The Seventh Circuit, not surprisingly, reversed.⁷¹

A third factor is the Board's imposition of additional burdens on employers who exercise their free-speech rights. Despite the proviso, the Board held, shortly after the adoption of the Taft-Hartley Act, that a noncoercive speech during working hours was an unfair labor practice if the employer refused to grant a union equal time and facilities for a reply.⁷² In 1953, this procedure was refined to allow employer speeches without providing the union a forum if the employer did not have either a broad no-solicitation rule forbidding all union solicitation on the premises or a rule excessively restrictive for the character of the business.⁷³ This seemed a sensible compromise and one aimed at providing an opportunity for both sides to communicate with employees, without forcing all employers to periodically turn over their property and employees' time to the use of the organizing union. The Supreme Court's view appears to be somewhat more inclined to allow broad company no-solicitation rules.⁷⁴ However, in recent years the Board has again attempted to utilize these rules as a wedge for providing organizing unions the right of on-premises response to all employer speeches.⁷⁵

Finally, the most disturbing agency practice relates to the Board's holding that noncoercive statements of employers trying to explain, publicize, and convince employees of the soundness of the company's position during bargaining negotiations, are an indication of management bad faith. The classic case in this instance is *General Elec. Co.*⁷⁶ Briefly, the case involved communications to employees that were critical of the union's response to the company's contract offers. The Board

⁷⁰ *Sparton Mfg. Co.*, 150 N.L.R.B. 948 (1965).

⁷¹ 355 F.2d 523 (7th Cir. 1966).

⁷² *Bonwit Teller, Inc.*, 96 N.L.R.B. 608 (1951), enforcement denied, 197 F.2d 640 (2d Cir. 1952), cert. denied, 345 U.S. 905 (1953).

⁷³ *Livingston Shirt Corp.*, 107 N.L.R.B. 400 (1953).

⁷⁴ See *NLRB v. United Steelworkers*, 357 U.S. 357 (1958).

⁷⁵ See *May Dep't Stores*, 136 N.L.R.B. 797 (1962), enforcement denied, 316 F.2d 797 (6th Cir. 1963). But see *Montgomery Ward & Co. v. NLRB*, 339 F.2d 889 (6th Cir. 1965). Compare *Excelsior Underwear, Inc.*, 156 N.L.R.B. No. 111, 61 L.R.R.M. 1217 (1966).

⁷⁶ 150 N.L.R.B. 192 (1964).

condemned GE's bargaining technique, sometimes referred to as "Boulwarism," wherein GE, on the basis of its own research and evaluation of union demands, determined what was "right" for its employees and then made a "fair and firm" offer to the union without holding anything back for later trading or compromising. The company also dealt directly with some local unions and was tardy in turning over to the national union some information in its possession. The fascinating part of the case is that the NLRB, in finding the "totality" of the employer's conduct incompatible with the requirements of section 8(a)(5), relied on what it termed a campaign aimed at "disparaging and discrediting the statutory representative in the eyes of its employee constituents. . . ."⁷⁷ No mention was made of the truth or falsity of the employer's statements and, inconceivably, section 8(c) was not once referred to in the entire case. Such not-so-subtle censorship evoked the following comment from one writer:

The true reach of the majority opinion . . . condemns employers who, in engaging in the conduct [under consideration] . . . , create the impression that the employer rather than the union "is the true protector of the employees' interest." So bald and partisan an injunction against free speech by an employer, lest he and his position come to be held by his employees in higher regard than that of the union, has never before been enunciated.⁷⁸

The one-sidedness of the Board's decision becomes apparent if one simply reviews the minutes of the bargaining record and compares the union representatives' conduct and active "disparagement" of the company with the condemned employer conduct. There are, of course, other substantive difficulties with the *General Electric* case,⁷⁹ but the proscribing of employer communications that truthfully castigate the conduct of some union leaders, and urge employees to persuade these leaders to accept a "fair and firm" offer, must rank as a landmark of heavy-handed decision making.⁸⁰ Obviously, every company has a definite interest in its employees' welfare and conditions of employment, if for no other reason than whatever affects them affects the business, for good or ill. Management therefore deems it not only its right, but also its duty, to speak out on all matters affecting its work force. A

⁷⁷ *Id.* at 195. Perhaps the employer's price for freedom of speech is the granting of concessions to the union. The Board's latest pronouncement on the subject would so indicate. *Procter & Gamble Mfg. Co.*, 160 N.L.R.B. No. 36, 62 L.R.R.M. 1617, 1620 (1966).

⁷⁸ *Benetar, GE—Unique Situation or Broad Impact*, 17 Lab. L.J. 160, 163 (1966).

⁷⁹ See *Marcus, The Employer's Duty to Bargain: Counterproposal v. Concession*, 17 Lab. L.J. 541, 556-58 (1966).

⁸⁰ See also *The Stanley Works*, 108 N.L.R.B. 734 (1954).

union's claims and conduct, at the organizing stage or at the bargaining table, often affect the size of the work force and the future of the enterprise. Surely then, employers ought to be allowed broad latitude in comments to employees respecting their representatives' actions. Those who do not view the activities of all unions as beyond honest criticism will consequently find *General Electric* an unhappy portent of future limitations on employer-employee communications.⁸¹

B. Appeals to Racial Consciousness

A technique which has been employed recently by both employers and unions is to appeal to the racial identity and emotions of employees. Such appeals usually are made prior to a representation election, when both sides struggle to convince employees of the benefits of voting "yes" or "no." The present NLRB policy is that "an election will not be set aside if a party limits itself to truthfully setting forth another party's racial attitudes and policies and does not deliberately seek to overstress and exacerbate racial feelings by irrelevant, inflammatory appeals."⁸² For example, in *Sewell Mfg. Co.*,⁸³ the employer appealed to his predominantly white employees to vote against the union because of the union's alleged support of the civil-rights movement. The Board very correctly set the election aside on the grounds that the employer's racial propaganda was intentionally designed to inflame racial hatred and engender a conflict between Negro and white workers. However, in two later cases, *Archer Laundry Co.*⁸⁴ and *Aristocrat Linen Supply Co.*,⁸⁵ the interjection of racial issues into an election campaign involved a predominantly Negro work force and was primarily accomplished by the union. The Board found this conduct permissible as a concerted appeal to racial pride and the desire for economic equality.

This rather unusual quasi-tolerance by the Board, involving a type of conduct that in any other employment context would be highly suspect,⁸⁶ has caused surprisingly little comment. Perhaps this is because the Board has qualified its latitudinarian view of racial appeals

⁸¹ A GE spokesman has remarked that:

underlying the question of employer communication is the basic issue of whether management's relationship to its employees should be carried on exclusively through the union, or whether management has an additional responsibility to present its views directly to employees, once presented to the union. This is no straw man—there is a viewpoint current that the union should handle everything for employees.

N.Y. Times, June 28, 1965, p. 10.

⁸² 30 NLRB Ann. Rep. 52 (1965).

⁸³ 138 N.L.R.B. 66, supplemented, 140 N.L.R.B. 220 (1962).

⁸⁴ 150 N.L.R.B. 1427 (1965).

⁸⁵ 150 N.L.R.B. 1448 (1965).

⁸⁶ Cf. Title VII, Civil Rights Act of 1964, 78 Stat. 253, 42 U.S.C. §§ 2000e to e-15, and Digest of Opinion Letters issued by the Office of the General Counsel, Equal Employment Opportunity Commission (1965-66).

by saying that the burden of proof will rest on the party making use of such arguments to establish that they are truthful and germane, and that if a doubt of the propriety of these appeals still remains, it will be resolved against that party.⁸⁷ But despite the protection afforded by this rule, very real possibilities for abuse remain.

If employees were simply asked to vote for a union because of its pro-civil-rights posture, there might be a basis for excusing such statements as permissible election campaign propaganda. But as inevitably happens, union organizers in attempting to focalize potential employee dissatisfaction, concentrate on the issues that will most likely produce a majority in their favor. Quite clearly, the civil-rights struggle will be of real significance to Negro employees, and, rather than an attempt at mere identification of the union as a proponent of this cause, there will be an effort to picture the employer as an enemy of the race. In *Archer*, for example, union leaflets stated: "Dogs couldn't stop us, police brutality couldn't stop us, fire hoses couldn't stop us," and, in line with a caricature of a fat, bald-headed man carrying a bag of money in one hand, a huge barbed club labelled "boss" in the other, was the legend, "are you going to let your boss stop you?"⁸⁸ Allowing the union to engage in this type of conduct must place the target company or plant, regardless of the enlightened social views held by the management involved, in the position of being anti-Negro.

Thus, notwithstanding the NLRB dichotomy between race hatred and race pride, it may be plausibly asserted that those who hear and read these visceral arguments rarely pause to reflect on such distinctions. Because of the harmful effect on future employer-employee relations, it is submitted that racial arguments should be left out of labor relations entirely.⁸⁹ In a time when equal employment is being championed by business and unions alike, it seems anomalous indeed to allow any one group to utilize vestigial animosities, regardless of the ultimate purpose. One court of appeals has recently declined to follow the Board's lead concerning a union's right to expropriate the enthusiasms of social protest. In *NLRB v. Schapiro & Whitehouse*,

⁸⁷ 28 NLRB Ann. Rep. 58-59 (1963).

⁸⁸ 150 N.L.R.B. at 1435.

⁸⁹ A nasty concomitant of allowing a union to utilize race separateness in its dealings with an employer may be seen in the important recent decision, *Local 12, United Rubber Workers v. NLRB*, 368 F.2d 12 (5th Cir. 1966). There the Fifth Circuit condemned a union practice of appealing to the white majority of workers in a plant by under-representing, or not representing at all, Negro employees who constituted a minority of the work force. In *NLRB v. Local 1367, Int'l Longshoremen's Ass'n*, 368 F.2d 1010 (5th Cir. 1966), the same court outlawed a union practice that allocated 25% of the work under a contract to Negro employees and the remaining 75% to whites.

Inc., the Fourth Circuit refused to countenance a union's outright reliance on use of racial feelings as a vehicle for obtaining representation status.⁹⁰ This is surely a preferable approach to that taken by the Board, and one that Congress might well sanction.

C. A Proposal

A suggested "free speech" amendment to the National Labor Relations Act should then, in light of the above developments, rearticulate the goals of the present section 8(c) and read approximately this way:

The expressing of any views, argument, or opinion, or the dissemination thereof, whether in written, printed, graphic or visual form, shall not constitute or be evidence of an unfair labor practice and shall not constitute grounds for, or be relevant in any determination involving representation matters under section 9 or any other provision of this Act, if such expression contains no threat of reprisal or force, or promise of benefit, or reference, either direct or implied, to the race, color, religion, sex or national origin of the employer or employees.

Such a proviso would go far in maintaining a healthy intercourse of arguments and ideas among union, management, and employees. Hopefully, it would also remove any artificial or one-sided barriers to unhindered communications between an employer and his work force, while at the same time preserving safeguards for the union contesting for employee loyalties.

No legislative pronouncement can solve every problem. Because the NLRB interprets and enforces the nation's labor law, its policies and opinions will always be of great importance, and it would be difficult, as well as undesirable, to hold too tight a rein on the Board's actions. The provisions of the present section 8(c) could hardly be clearer, but the Board's interpretations have weakened and, to an extent, evaded them. If Congress now, after some years of experience with the Board's policies, determines that these interpretations must be modified, the way to do so is not to attempt to further clarify what is already crystalline, but to reenact section 8(c)—with the proposed changes—and to ensure that the legislative history of the amendment clearly shows an intent to afford additional protection for the right of free speech. If this message does not reach the Board, it must surely reach the courts.

⁹⁰ 356 F.2d 675, 678-79 (4th Cir. 1966).

IV. ADDITIONAL PROBLEMS

A. *Runaway Shop*

The most significant legal difficulty recently faced by labor unions has been the vexing problem of the "runaway shop." This problem also presents the national labor movement with a very strong case to be made before Congress regarding the need for Taft-Hartley reform. In *Garwin Corp.*,⁹¹ the NLRB found that the employer had, without notice to either union or employees, removed his business operation from New York to Miami for anti-union rather than economic motives. It held that the company had violated sections 8(a)(1), (3), and (5), and ordered, among other things, bargaining with the union as representative of the company's new employees in Florida. The rub was that the Board by its order imposed the union as bargaining agent irrespective of the new employees' wishes, and thus contrary to the rights guaranteed them by section 7. Conversely, however, any other remedy seemed ineffectual. The employer was not about to return to New York, nor the former employees move to Florida, and the back-pay remedy to the latter for loss of earnings was insubstantial. Nonetheless, the Court of Appeals for the District of Columbia Circuit felt constrained to hold that the freedom of choice of the workers in a bargaining unit could not be disregarded in any pragmatic effort to effectively punish the guilty employer.⁹²

Congress might well be persuaded by the equities of the case to specify—perhaps in section 301—an appropriate remedy. This might include damages for the loss represented by past organizational efforts or the costs of any new organizing campaign. Not only should Congress reaffirm a union's status to sue for damages caused by a "runaway" employer's disavowal of the collective-bargaining agreement, but it also would do well to determine: (1) the range of compensatory damages (lost union dues, organizational expenses); (2) their limit (period of the contract, period subsequent to contract's expiration); and (3) the advisability of allowing punitive damages.⁹³

B. *Enforcement of No-Strike Clauses*

If Congress were to look at section 301, it could hardly avoid reviewing the Supreme Court's present interpretation of that section as it applies to judicial enforcement of agreements not to strike. En-

⁹¹ 153 N.L.R.B. 664 (1965).

⁹² Sub nom. *Local 57, ILGWU v. NLRB*, 374 F.2d 295 (D.C. Cir. 1967). Compare *NLRB v. Lewis*, 246 F.2d 886 (9th Cir. 1957), with *NLRB v. Rapid Bindery, Inc.*, 293 F.2d 170 (2d Cir. 1961).

⁹³ See *United Shoe Workers v. Brooks Shoe Mfg. Co.*, 187 F. Supp. 509, 510 (E.D. Pa. 1960), aff'd per curiam as modified sub nom. *Local 127, United Shoe Workers v. Brooks Shoe Mfg. Co.*, 298 F.2d 277 (3d Cir. 1962).

acted in 1947, section 301 was intended by Congress to authorize suits by employers or unions in the federal courts for violations of labor agreements, without regard to the amount in controversy or diversity of citizenship.⁹⁴

In *Textile Workers v. Lincoln Mills*,⁹⁵ the Supreme Court held that section 301 authorized the federal courts to specifically enforce employer agreements to arbitrate disputes. But then, in *Sinclair Ref. Co. v. Atkinson*,⁹⁶ the Court held that the Norris-LaGuardia Act⁹⁷ prohibited granting specific enforcement of a no-strike clause in a labor contract. The NLRB meanwhile had held that a strike in breach of a no-strike clause did not even constitute a refusal to bargain.⁹⁸ Thus, the employer seeking effective redress for union violation of its promise not to strike is left to seek some type of money damages. But, as Mr. Justice Brennan stated in his dissenting opinion in *Sinclair*, "the enjoining of a strike over an arbitrable grievance may be indispensable to the effective enforcement of an arbitration scheme in a collective agreement; thus the power to grant that injunctive remedy may be essential to the uncrippled performance of the Court's function under § 301."⁹⁹ In a footnote, he pointed out that "to hold otherwise would obviously do violence to accepted principles of traditional contract law. Even more in point, a contrary view would be completely at odds with the basic policy of national labor legislation to promote the arbitral process as a substitute for economic warfare."¹⁰⁰

Since 1935, it has been the national labor policy to encourage fidelity to collective agreements by both management and unions, rather than resort to crippling strikes, picketing, or lockouts. The Norris-LaGuardia Act was passed in 1932 and was aimed at the indiscriminate use of injunctions by federal judges in an historical context far removed from that wherein a binding, fairly bargained contract governs the conduct of both parties. For, where the duties and responsibilities of employer and employees are freely agreed to, the use of a strike or lockout is not only inappropriate but extreme. It is an act of massive repudiation of solemn commitments in consideration of which the other party has agreed to be bound. The no-strike clause is often the only meaningful promise made by a union in the entire contract, and, without some means of enforcing it, the employer, who

⁹⁴ See Givens, *Injunctive Enforcement of Arbitration Awards Prohibiting Strikes*, 17 Lab. L.J. 292 (1966); Note, 47 Minn. L. Rev. 643 (1963).

⁹⁵ 353 U.S. 448 (1957).

⁹⁶ 370 U.S. 195 (1962).

⁹⁷ 47 Stat. 70 (1932), as amended, 29 U.S.C. §§ 101-14 (1964).

⁹⁸ *Lumber & Sawmill Workers*, 130 N.L.R.B. 235 (1961), aff'd, 319 F.2d 375 (9th Cir. 1963).

⁹⁹ 370 U.S. at 216.

¹⁰⁰ *Id.* at 217 n.2, quoting from *Local 174, Teamsters v. Lucas Flour Co.*, 369 U.S. 95, 105 (1962).

has pledged himself to a whole range of wage and fringe benefits for a fixed period of time, is left by himself on a one-way street. The *Sinclair* decision effectively denies the employer the period of labor peace and stability he has bargained for, thereby depriving him of the fruits of negotiation. A suit for damages is a poor remedy, being untimely, costly (because of delay), and often the spawning ground of many complexities.¹⁰¹ Attempts to obtain state court injunctions will either be met with an action to remove to the federal courts,¹⁰² or will vary in success depending on the law of the jurisdiction. Therefore, consistent with a uniform national labor policy and the industrial tranquility it purports to serve—to say nothing of requiring parties to abide by their promises—section 301 should be amended to permit judicial enforcement of no-strike, no-picketing, and no-lockout agreements without regard to the restrictions of the Norris-LaGuardia Act.

C. *Fibreboard and Darlington*

Two recent Supreme Court decisions have indicated the possibility of an NLRB program requiring employers to submit to collective bargaining all decision-making processes by which management directs and controls the basic operations of a business. Such an approach could require disclosure when secrecy was a necessity and could involve the delay of "bargaining to an impasse" when time was vital. Naturally, such a possibility evoked startled reaction.¹⁰³

The first of the two decisions was *Fibreboard Paper Prods. Co. v. NLRB*.¹⁰⁴ In that case, the Court held that an employer was required to bargain with the union which represented its maintenance employees concerning an economically motivated decision to subcontract maintenance work, and that the NLRB had authority to order resumption of the subcontracted work by the maintenance employees and reinstatement with back pay of those displaced. Prior to that time, if economic factors prompted the subcontracting, there was no unfair labor practice.¹⁰⁵

¹⁰¹ See Spelfogel, *Enforcement of No-Strike Clause by Injunction, Damage Actions and Discipline*, 7 B.C. Ind. & Com. L. Rev. 239 (1966). An example of such complexities might be seen in the General Motors' Mansfield, Ohio strike in February 1967, which cost the UAW dearly, but involved only an incidental economic setback to GM. See *Washington Post*, Feb. 23, 1967, p. 1.

¹⁰² See 28 U.S.C. §§ 1441-50 (1964).

¹⁰³ See, e.g., *Bart & Kingston, The Specter of Darlington—Restrictions on an Employer's Right to Make a Change in His Business Operations*, 8 B.C. Ind. & Com. L. Rev. 55 (1966).

¹⁰⁴ 379 U.S. 203 (1964).

¹⁰⁵ See *NLRB v. Houston Chronicle Publishing Co.*, 211 F.2d 848 (5th Cir. 1954) (semble). But a discriminatory motive may convert legitimate management actions into violations, see *NLRB v. Erie Resistor Corp.*, 373 U.S. 221 (1963), even if discrimination is only part of the motive, see *Town & Country Mfg. Co. v. NLRB*, 316 F.2d 846 (5th Cir. 1963).

The circumstances of the subcontracting attempted in *Fibreboard* exhibit the extreme situation wherein a whole group or unit of employees is replaced by another group of outside workers to perform the very same functions in the same plant under the ultimate control of the same employer. The union had represented the maintenance employees at the plant for over twenty years. Four days before expiration of an existing contract, the employer informed the union representative of its decision to replace these workers and of the futility of any bargaining over a new contract. Surely here the equities, if not the law, pointed in the union's favor. Consequently, the Court stated that it was "not expanding the scope of mandatory bargaining"¹⁰⁶ to hold on such facts that this specific subcontracting was within the ambit of section 8(d), and that its decision did not "encompass other forms of 'contracting out' or 'subcontracting' which arise daily in our complex economy."¹⁰⁷ Three Justices concurred, but remarked that "the Court's opinion radiates implications of . . . disturbing breadth."¹⁰⁸

Fortunately, few of these implications have, as yet, come to pass. Apparently the Board realized the limitations implied by *Fibreboard* and the unwisdom of a total agency immersion in the bargaining process that a contrary course involved. Accordingly, in *Westinghouse Elec. Corp.*,¹⁰⁹ it held that an employer is under no duty to notify and bargain with the union before contracting out work when:

- (1) such subcontracting was motivated solely by economic considerations,
- (2) it comported with traditional methods of business operation,
- (3) there was no significant variance in kind or degree from what had been customary under past established practice,
- (4) no demonstrable adverse impact on employees in the unit was evident, and
- (5) the union had the opportunity to bargain about changes in existing subcontracting practices at general negotiating meetings.¹¹⁰

In the period since the *Westinghouse* decision, the Board has applied the tests there laid down in a number of cases.¹¹¹ As a con-

¹⁰⁶ 379 U.S. at 215.

¹⁰⁷ Ibid.

¹⁰⁸ Id. at 218 (Stewart, J., with Douglas & Harlan, JJ., concurring).

¹⁰⁹ 150 N.L.R.B. 1574 (1965).

¹¹⁰ Id. at 1577.

¹¹¹ E.g., *Empire Terminal Warehouse Co.*, 151 N.L.R.B. 1359 (1965); *Allied Chem. Corp.*, 151 N.L.R.B. 718 (1965); *Fafnir Bearing Co.*, 151 N.L.R.B. 332 (1965); *Superior Coach Corp.*, 151 N.L.R.B. 188 (1965). See *General Tube Co.*, 151 N.L.R.B. 850 (1965); *American Oil Co.*, 151 N.L.R.B. 421 (1965); *General Motors Corp.*, 149 N.L.R.B. 396 (1965), supplemented, 158 N.L.R.B. No. 24, 62 L.R.R.M. 1009 (1966).

sequence of the approach now taken by the Board concerning the need to bargain over subcontracting, and its ostensible reliance on a few specific tests to guide its own decisions as well as those of employers, it might be expected that the threat initially seen in *Fibreboard* could now be disregarded. Unfortunately, a parallel line of cases dealing with the partial or complete shutdown of a business mitigates against such optimism.

The leading case relating to plant closures, and the second Supreme Court decision radiating ominous implications, is *Textile Workers v. Darlington Mfg. Co.*¹¹² There the Board found that the employer violated both sections 8(a)(3) and 8(a)(5) of the act by closing his plant in order to avoid bargaining with a newly certified union.¹¹³ The court of appeals disagreed, holding that the employer had an absolute right to discontinue his business, no matter what the motive.¹¹⁴ The Supreme Court, in effect, split the difference, agreeing with the lower court that an employer could close his *entire* business, even if motivated by vindictiveness toward the union, but holding that any *partial* closing would violate section 8(a)(3) if its purpose were to "chill unionism."¹¹⁵ The "duty to bargain" aspects of the case were ignored by the Court, leaving open the question of whether an employer must negotiate before terminating business operations for an economic reason. The NLRB for its part continues to interpret section 8(a)(5) to require such negotiations.¹¹⁶ Such an interpretation of the law is contrary to the view of two courts of appeals that a company need not bargain over a bona-fide decision to make basic operational changes.¹¹⁷

It would appear that the NLRB has attempted to superimpose on the area of plant closures and business terminations the "significant detriment" or "adverse impact" tests which it applies in subcontracting. But the closing of a plant or the discontinuance of part of a business involves entirely different management considerations from those present in a subcontracting decision. Administrative rules appropriate in the latter case merely invite obfuscation, delay, and hardened attitudes in the former. The Board, if pressed, might agree, but now

¹¹² 380 U.S. 263 (1965).

¹¹³ 139 N.L.R.B. 241, 245 (1962).

¹¹⁴ 325 F.2d 682, 685 (4th Cir. 1963).

¹¹⁵ 380 U.S. at 275. More specifically, a partial closing is an unfair labor practice under § 8(a)(3) if motivated by a purpose to stifle unionism in any of the remaining plants or business activities of the single employer, and if the employer may reasonably have foreseen that such closing was likely to have that effect. *Id.* at 275-77.

¹¹⁶ See *Ozark Trailers, Inc.*, 161 N.L.R.B. No. 48, 63 L.R.R.M. 1264 (1966).

¹¹⁷ *NLRB v. Royal Plating & Polishing Co.*, 350 F.2d 191 (3d Cir. 1965); *NLRB v. William J. Burns Detective Agency, Inc.*, 346 F.2d 897 (8th Cir. 1965). See *NLRB v. Adams Dairy, Inc.*, 350 F.2d 108 (8th Cir. 1965), cert. denied, 382 U.S. 1011 (1966). But see *NLRB v. Johnson*, 368 F.2d 549 (9th Cir. 1966); *NLRB v. American Mfg. Co.*, 351 F.2d 74 (5th Cir. 1965).

argues that there really is not much difference between the two management actions, and, in any case, that considerations of social value are paramount in administering the act.¹¹⁸ Yet, granting the importance of mitigating, if not altogether eliminating the economic consequences to employees left without employment when a business is terminated, how much wiser it would be to require bargaining about the effects on employees of a closure. On occasion the Board has done this in the past.¹¹⁹ In *New York Mirror*,¹²⁰ for example, a unilateral shutdown was upheld by the Board as consistent with 8(a)(5) when negotiations, after the employer's action had taken place, were directed to the issue of employee severance and termination pay. They also involved employer efforts to secure new positions for those discharged, which extended to the establishing of an employment office and to the placing of ads in various publications for available jobs. Such steps by the employer to alleviate the consequences of the closing were of course far more meaningful than any NLRB-required predecision "impasse" bargaining could ever be. Would it not be equally reasonable for Congress to insure some employment security for workers displaced by discontinuance, sale, or other disposal of a business or plant by amending section 8(d) to provide for meeting and discussion by management with union representatives as to the effect of such employer action? At the same time Congress ought not to require an employer to bargain collectively before taking any action regarding *basic operational changes* in a business.

If both the subcontracting and basic-operational-change problems are to be governed by the same rules, it would seem preferable to use the rule just proposed, rather than that presently governing subcontracting. Thus, section 8(d) might be amended to require bargaining over any decision which would cause a "significant detriment" or "adverse impact" to the bargaining unit, but adding a proviso which would absolve an employer of any refusal to bargain if he afterwards negotiates with the union regarding the effects of such a change in opera-

¹¹⁸ True it is that decisions of this nature are, by definition, of significance for the employer. It is equally true, however, and ought not to be lost sight of, that an employer's decision to make a "major" change in the nature of his business, such as the termination of a portion thereof, is also of significance for those employees whose jobs will be lost by the termination. For, just as the employer has invested capital in the business, so the employee has invested years of his working life, accumulating seniority, accruing pension rights, and developing skills that may or may not be salable to another employer. And, just as the employer's interest in the protection of his capital investment is entitled to consideration in our interpretation of the Act, so too is the employee's interest in the protection of his livelihood.

Ozark Trailers, Inc., *supra* note 116, at 1267.

¹¹⁹ See *Georgia-Pacific Corp.*, 150 N.L.R.B. 885 (1965); *Shamrock Dairy, Inc.*, 124 N.L.R.B. 494 (1959).

¹²⁰ 151 N.L.R.B. 834 (1965).

tions. In this way, labor unions would be given a greater role to play in insuring and protecting the employment security of their members. At the same time, employers would be made more clearly aware of the necessary considerations to be included in economic decision making, without having to defer such action indefinitely.

V. CONCLUSION

The preceding has been an attempt to explore those areas of our present labor laws that are in need of reevaluation and change. Limitations of space have not permitted an examination of every amendment which might be desirable at this time, and another writer, while perhaps agreeing on the need for national-emergency-strike legislation, might assign different priorities to various other sections of the law deemed in need of correction.¹²¹ Perhaps, for example, a union spokesman might deem it most essential to enact legislation curtailing government contracts to firms which persistently violate the labor laws.¹²²

Admittedly, some partisanship is difficult if not impossible for any commentator on contemporary labor relations to eschew. But it does seem possible, in proposing statutory improvements, to objectively look to an overall norm: one that would assign priority to the protection of the public, then preserve established rights of unions, and yet still leave employers in a status of coequal. Too often today, when an administrative agency adjudicates the propriety of employer or union conduct, this norm is disregarded. It seems pointless to indulge in a "chamber-of-horrors" recital of the questionable, sometimes bizarre, decisions handed down by the NLRB in recent years—one case even holding that an employer who permitted a penny rise in the cost of a cup of coffee, without consulting the union first, violated the act.¹²³ At the same time, at least a number of those agency interpretations considered above stand out as clear-cut examples of significantly inappropriate applications of the law. But an appraisal of the Board's point of view in selected contexts does not necessarily imply that the agency cannot or will not correctly follow Congress' legislative direction—if it is redefined and made explicit. This is, of course, the challenge, and indeed the obligation, of the legislative branch. Hopefully, both will be soon met.

¹²¹ Compare Griffin, *The Labor Board and Section 8(b)(7)*, 40 U. Det. L.J. 212 (1962); Stewart & Townsend, *Strike Violence: The Need For Federal Injunctions*, 114 U. Pa. L. Rev. 459 (1966); Warner, *Product Picketing—A New Loophole in Section 8(b)(4) of the National Labor Relations Act?* 63 Mich. L. Rev. 682 (1965).

¹²² See BNA Daily Labor Report, May 25, 1966, p. 1.

¹²³ *Westinghouse Elec. Corp.*, 156 N.L.R.B. No. 96, 61 L.R.R.M. 1165, 1167 (1966).

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