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Recent Decisions of the NLRB—The Reagan Influence†

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INTRODUCTION

> "I would like to think that my term as Chairman will be perceived as the beginning of the period in which the Board changed from being viewed as prolabor to a time of being strictly nonpartisan, as indeed it was meant to be."[1]
>
> John R. Van de Water,
> Former Chairman,
> National Labor Relations Board

One might question whether the NLRB[2] has *ever* been perceived as neutral, at least by those whose environment it regulates. The pro-labor tilt of the NLRB under the Wagner Act[3] is sometimes cited as a factor which prompted

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1. Van de Water, *The NLRB . . . New Directions,* 12 STETSON L. REV. 297, 319-20 (1983). John Van de Water was appointed Chairman of the NLRB by President Reagan through a recess appointment on June 18, 1981. He was never confirmed by the Senate, and he resigned on December 16, 1982.

2. The National Labor Relations Board (hereinafter NLRB or Board) is an administrative agency created by the National Labor Relations Act, 29 U.S.C. §§ 151-169 (1982). The Board's powers are set forth in 29 U.S.C. §§ 156-161. Its most important function, and the primary focus of this article, is its responsibility to prevent unfair labor practice. *See* 29 U.S.C. § 160.

3. National Labor Relations (Wagner) Act, ch. 372, 49 Stat. 449 (1935) (codified as amended at 29 U.S.C. §§ 151-169 (1982)).

the 1947 Taft-Hartley Amendments.[4] At other times, often during the tenure of conservative administrations, the Board has been viewed as pro-management.[5] Such perceptions are inevitable, given the nature of the Board's task. The fact is that the decisions the Board makes, and the policies it thereby adopts, are either favorable to labor or they are not. NLRB decisions concerning the right of employees to discuss unionization or distribute literature in the workplace, for example, might be based on how the Board members value free communication or value the right to control one's property.[6] That is, the decisionmaker may not consciously opt for a result because of its effect on labor or management. Nonetheless, the decision has an effect. An NLRB panel that renders decisions broadening the right of employees to communicate in the workplace is often viewed, then, not as composed of decisionmakers who value first amendment freedoms and frank discussion of controversial issues, but as a "pro-labor" Board. Conversely, a panel that narrows communication rights is ordinarily regarded as pro-management, rather than as decisionmakers who value the rights of property owners and managers to control their holdings.

Whether the members of the Board engage in principled decisionmaking or whether they consciously promote the interests of just one side of the conflict is something about which one can only surmise. Certainly, the Board is supposed to be neutral, and its members claim neutrality, as former Chairman Van de Water did in the passage that opens this article. Even so, the actions of the Board are, within limits, predictable. The Eisenhower Board of the 1950's was generally regarded as pro-management. Many of its decisions, however, were reversed by the Kennedy Board in the early 1960's.[7] The designation of these panels by reference to the incumbent

4. Labor Management Relations (Taft-Hartley) Act, ch. 120, tit. 1, § 101, 61 Stat. 136 (1947) (codified as amended at 29 U.S.C. §§ 141-167 (1982)). *See, e.g.* R. GORMAN, BASIC TEXT ON LABOR LAW UNIONIZATION AND COLLECTIVE BARGAINING 5 (1976).

5. *See* cases and authorities cited *infra* note 7.

6. Full discussion of NLRB decisions on solicitation and distribution is beyond the scope of this article. Basically, the Board permits employers to maintain rules that restrict solicitation to nonworking time, *see, e.g.*, Republic Aviation Corp. v. NLRB, 324 U.S. 793 (1945), and those that restrict distribution to nonworking time in nonworking areas, *see, e.g.*, Stoddard-Quirk Mfg. Co., 138 N.L.R.B. 615 (1962). *See generally* R. GORMAN, *supra* note 4, at 179-84. *See also* discussion of Our Way, Inc., 268 N.L.R.B. 394 (1983), *infra* notes 243-54 and accompanying text.

7. *See, e.g.*, A. COX, D. BOK & R. GORMAN, CASES AND MATERIALS ON LABOR LAW 143-45 (9th ed. 1981) (discussing NLRB treatment of employer speech in election campaigns during the years of the Eisenhower administration and the effect of the Kennedy appointments beginning in 1961). The changes in the Board wrought by the Kennedy administration had even more far-reaching effects. In Fibreboard Paper Prods. Corp., 130 N.L.R.B. 1558 (1961), the Board found that the employer did not violate § 8(a)(5) (29 U.S.C. § 158(a)(5)) when it failed to bargain with the union about its decision to subcontract maintenance work performed by bargaining unit employees. The following year, after new appointments by President Kennedy, the Board reconsidered the same record and reversed its previous position. 138 N.L.R.B. 550 (1962). That decision was enforced by the Supreme Court, 379 U.S. 203 (1964), and has had wide-reaching impact. *Cf.* First Nat'l Maintenance Corp. v. NLRB, 452 U.S. 666 (1981), discussed *infra* notes 164-206 and accompanying text. For another example of a case in which the Kennedy Board reconsidered a decision in the same case, see Hod Carriers Local No. 840 (Blinne Constr. Co.), 135 N.L.R.B. 1153 (1962) (reaffirming earlier decision on other grounds). *See also* Fanning, *The NLRB in Transition,* 12 CATH. U.L. REV. 16 (1963); Folgen, *What's Right is Right—Labor Board Should Not Be Political,* 13 LAB. L.J. 1060 (1962); Christensen, *The "New" NLRB: An Analysis of Current Policy,* 15 N.Y.U. CONG. ON LAB. 213 (1962).

administration is no mistake. The President nominates the members of the Board to five-year terms.[8] Not suprisingly, the appointees often share the economic and social, if not the political, philosophy of the administration.[9] This philosophy is often revealed in NLRB opinions. During Democratic (or "liberal") administrations, NLRB decisions often favor labor. The converse is often true during Republican (or "conservative") presidencies.[10]

Given the relatively direct impact of an administration's philosophy on the Board, it seems likely that Board decisions are, in fact, principled and are not merely expedients to bolster one side or the other. The predictability of the decisions of a "liberal" or "conservative" panel stems not from narrow-minded attempts to help or hurt one side, but from the values and philosophy shared by the membership. One might expect, then, that appointees chosen by President Kennedy would share perceptions of national labor policy that differ from members chosen by President Reagan. Within the political context of each Board, however, its decisions can be called "neutral." At least, Board members implement a social and economic philosophy in a consistent and neutral fashion, though the decisions may favor one side more often than the other.

Critics of the Board who charge bias ignore the fundamental issue underlying NLRB decisionmaking. The question that should be addressed is not whether a particular Board membership is pro-labor or pro-management, but whether its decisions implement a desirable national labor policy. In short, critics should not dismiss the Board as composed of narrow-minded automatons who cater to only one constituency, but should debate the values and assumptions that shape its decisions. Within that framework, this article examines the effect of the Reagan appointees on Board policy.

For the most part, the important decisions of the Reagan Board have favored management. Several of the decisions have been cited by labor as strong evidence of a pro-management bias. This article analyzes each of those decisions. The analysis indicates that, even though many of the Board's decisions are subject to significant criticism, there is no warrant for the frenzied reaction the decisions have produced.

I. ARBITRATION

One of the more controversial questions the NLRB has faced over the past 30 years is how much deference it should show to arbitration in the

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8. 29 U.S.C. § 153(a) (1982).

9. There are a few notable exceptions. John Fanning, for example, was first appointed to the Board by President Eisenhower, but was generally regarded as one of the NLRB's most "liberal" members. For example, in the first *Fibreboard Paper Prods.* decision, discussed *supra* note 7, Fanning dissented from the Board's dismissal of the § 8(a)(5) allegations. 130 N.L.R.B. 1558, 1562 (1961). Subsequently, the Board reconsidered the case and adopted Fanning's position, 138 N.L.R.B. 550 (1962). For more on the views of former Chairman Fanning, see Fanning, *The National Labor Relations Act and the Role of the NLRB,* 29 LAB. L.J. 683 (1978).

10. *See, e.g.,* the discussion of the "Kennedy Board," *supra* note 7. Today's "Reagan Board" is regarded as a conservative panel.

adjudication of unfair labor practice cases. The Supreme Court has said that private agreements to arbitrate contractual disputes do not deprive the Board of jurisdiction to hear unfair labor practice charges.[11] Often, however, the same facts are alleged to constitute both an unfair labor practice and a violation of a collective bargaining agreement.[12] In such cases, the Board has been urged both by commentators and by some of its own members to defer its processes in favor of arbitration.[13] Although deferral might contribute to Board efficiency by reducing its caseload, the primary benefit is thought to be encouragement of the voluntary arbitration process as a way of settling labor disputes peacefully.[14]

NLRB deferral to arbitration falls into two distinct, though related, categories. In *Spielberg Manufacturing Co.*,[15] the Board said it would defer its unfair labor practice jurisdiction in favor of an already completed arbitration award where "the proceedings appear to have been fair and regular, all parties had agreed to be bound, and the decision of the arbitration panel is clearly not repugnant to the purposes and policies of the Act."[16] As the Board further explained in *International Harvester Co.*,[17] deferral to an arbitration that involved the same subject matter as an unfair labor practice charge would give hospitable acceptance to the arbitration process as "part and parcel of the collective bargaining process itself."[18]

The other branch of the deferral doctrine is represented by *Collyer Insulated Wire*.[19] In that case the union filed a refusal to bargain charge against an employer who unilaterally changed wage rates during the contract term. The Board noted that the legitimacy of the employer's action depended on the meaning of the contract clause that allowed the employer to make certain "adjustments" in order to "remove inequalities or for other proper reasons" subject to review through the grievance and arbitration procedures.[20] Al-

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11. *See, e.g.*, NLRB v. C & C Plywood Corp., 385 U.S. 421 (1967); NLRB v. Acme Indus. Co., 385 U.S. 432 (1967).

12. For example, an employee who claims that her discharge or discipline was promptcd by employer opposition to union activity might allege a violation of § 8(a)(3) (29 U.S.C. § 158(a)(3)), which prohibits such discrimination. She might also allege that the action violates a contractual requirement that discipline be only for "proper cause." In addition, unilateral action by an employer concerning a mandatory subject for bargaining might be alleged to violate the terms of a labor contract, and may also violate § 8(a)(5) (29 U.S.C. § 158(a)(5)).

13. *See, e.g.*, Kansas City Star Co., 236 N.L.R.B. 866, 867-69 (1978) (Truesdale, concurring); Note, *The NLRB and Deferral to Awards of Arbitration Panels*, 38 WASH. & LEE L. REV. 124 (1981); Wollett, *The Agreement and the National Labor Relations Act: Courts, Arbitrators and the NLRB—Who Decides What?*, 14 LAB. L.J. 1041 (1963).

14. *See, e.g.*, International Harvester Co., 138 N.L.R.B. 923, 926-27 (1962).

15. 112 N.L.R.B. 1080 (1955).

16. *Id.* at 1082.

17. 138 N.L.R.B. 923 (1962), *enforced sub nom.* Ramsey v. NLRB, 327 F.2d 784 (7th Cir.), *cert. denied*, 377 U.S. 1003 (1964).

18. *Id.* at 927, *quoting* United Steelworkers v. Warrior & Gulf Navigation Co., 363 U.S. 574, 578 (1960).

19. 192 N.L.R.B. 837 (1971).

20. *Id.* at 839-40.

though the Board *can* interpret labor contracts in order to resolve unfair labor practice charges,[21] it deferred action to arbitration, reasoning that because the dispute centered entirely on the parties' contract, it "ought to be resolved in the manner which that contract prescribes."[22] Rejecting a dissenter's contentions that deferral stripped the charging party of its statutory right to an unfair labor practice adjudication and substituted compulsory arbitration,[23] the majority said its decision did nothing more than relegate the parties to the procedure they had voluntarily adopted for the resolution of contractual disputes.[24]

Although the *Collyer Wire* doctrine has provoked more controversy,[25] neither *Collyer Wire* nor *Spielberg* has enjoyed a stable history and both have produced harsh exchanges among Board members.[26] Recently, the Board has rekindled the debate in decisions that expand the scope of deferrable cases under both *Collyer Wire* and *Spielberg*.

A. Spielberg *Deferral: The* Olin *Case*

Unlike *Collyer Wire* deferral, which some members have criticized as an abdication of the Board's unfair labor practice jurisdiction in favor of an unnamed arbitrator,[27] most Board members have accepted the *Spielberg* principle of deferring to an already completed arbitration.[28] There is even general agreement about most deferral criteria. Although Board members have occasionally criticized colleagues for reconsidering the merits of a case under the guise of determining repugnancy,[29] most have at least *said* they will defer to arbitration decisions that are not repugnant to the purposes and policies of the Act. In addition, to warrant deferral, all have conceded that the parties had to agree to be bound by the arbitrator's award and that the procedures used in the arbitration had to be fair and regular. As discussed

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21. NLRB v. C & C Plywood Corp., 385 U.S. 421, 428 (1967).

22. *Collyer Wire,* 192 N.L.R.B. at 839.

23. *Id.* at 849 (Fanning, dissenting).

24. *Id.* at 842.

25. *See, e.g.,* Getman, *Collyer Insulated Wire: A Case of Misplaced Modesty,* 49 IND. L.J. 57 (1973); Schatzki, *NLRB Resolution of Contract Disputes Under Section 8(a)(5),* 50 TEX. L. REV. 225 (1972).

26. As to *Spielberg* deferral, see Olin Corp., 268 N.L.R.B. 573, 574 (1984) ("[t]he dissent attempts to distort our holding") and the dissenting opinion of Member Zimmerman, *id.* at 577-81. As to *Collyer* deferral, see the *Collyer Wire* opinion itself, 192 N.L.R.B. at 846 (Fanning, dissenting) and *id.* at 850 (Jenkins, dissenting).

27. *See, e.g., Collyer Wire,* 192 N.L.R.B. at 849 (Fanning, dissenting).

28. The legitimacy of *Spielberg* deferral was questioned by the dissenters in Electronic Reproduction Serv. Corp., 213 N.L.R.B. 758 (1974), who contended that the Supreme Court's decision in Alexander v. Gardner-Denver Co., 415 U.S. 36 (1974) (federal courts not required to defer actions brought under title VII of the Civil Rights Act of 1964, 42 U.S.C. §§ 2000e to 2000e—17, to previously concluded arbitration covering the same facts) deprived the Board of the power to defer cases involving statutory rights to arbitration. 213 N.L.R.B. at 765 (Fanning and Jenkins, concurring in part and dissenting in part).

29. *See, e.g.,* Kansas City Star Co., 236 N.L.R.B. 866, 869 (1978) (Truesdale, concurring).

earlier, those criteria were established in *Spielberg* itself. Much controversy, however, has been generated by a criterion added subsequently: congruence of issues between the subject of the arbitration and the substance of the unfair labor practice charge.

The congruence requirement is often traced to the Board's opinions in *Monsanto Chemical Co.*[30] and *Raytheon Co.*[31] The *Monsanto* case involved the discharge of a union steward, allegedly for an unexcused absence. Although the union contended that Monsanto's asserted reason was a mere pretext and that the discharge had been prompted instead by the steward's union activities, the arbitrator refused to even consider the issue. Noting that the Board had jurisdiction over unfair labor practice cases, the arbitrator said, "I have chosen to ignore . . . the allegations herein contained that [the steward's] Union activities played a part in his discharge."[32]

Although the Board declared that it would continue to adhere to *Spielberg* principles in order to "promote . . . voluntary adjustment of labor disputes,"[33] it declined to defer in *Monsanto* in light of the arbitrator's express refusal to consider the pretext evidence:

> It manifestly could not encourage the voluntary settlement of disputes or effectuate the policies and purposes of the Act to give binding effect in an unfair labor practice proceeding to an arbitration award which does not purport to resolve the unfair labor practice issue which was before the arbitrator and which is the very issue the Board is called upon to decide in the proceeding before it.[34]

In short, the arbitrator's refusal to consider facts allegedly showing that the steward was fired for union activity (evidence which was properly before

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30. 130 N.L.R.B. 1097 (1961).

31. 140 N.L.R.B. 883 (1963).

32. *Monsanto,* 130 N.L.R.B. at 1099.

33. *Id.* at 1098.

34. *Id.* at 1099. Although the Board did not defer in *Monsanto,* another case decided the same day indicates that *Monsanto* did not signal a retreat from *Spielberg* principles. In I. Oscherwitz & Sons, 130 N.L.R.B. 1078 (1961), an arbitrator had upheld the discharge of a union steward who had been fired, allegedly for insubordination. The extent to which the arbitrator considered allegations that the discharge was actually prompted by union activity is not made clear in the Board's opinion. The Hearing Examiner recommended that the Board not defer. He questioned whether the proceedings were fair and regular and whether all parties had agreed to be bound and concluded that the award was repugnant to the Act:

> To permit an arbitration award to stand in the way of remedying an act of discrimination against an employee in violation of section 8(a)(3) would be to deny enforcement of the provision of the Act that goes to the very heart of its policy.

Id. at 1095 (citations omitted).

Despite the Hearing Examiner's recommendation, the Board deferred to the arbitrator's opinion, simply saying in conclusory fashion that the *Spielberg* criteria were satisfied and that the award was not repugnant to the purposes and policies of the Act. *Id.* at 1079-80.

In contrast to *Monsanto,* then, the Board deferred to arbitration, even though the opinions did not disclose the extent to which the arbitrator had considered allegations of anti-union motivation. This decision would seem to narrow the effect of *Monsanto,* where the Board refused deferral because the arbitrator *expressly* refused to consider the union activity issue.

the arbitrator because it presumably would negate the employer's position that the employee was fired for an unexcused absence) precluded deferral in the subsequent Board proceeding where the same facts were asserted to establish an unfair labor practice.

On its face, the *Raytheon* opinion seems equally non-controversial. There, an arbitrator upheld the discharge of two employees who, he found, had instigated and participated in a work stoppage in violation of the contract. At the inception of the hearing, the employer's counsel cautioned the arbitrator that his jurisdiction extended only to the alleged contract violation.[35] Citing *Monsanto* as authority, the Board refused to defer, holding that deferral is not appropriate where an arbitrator does not consider evidence concerning the unfair labor practice.[36]

Taken together, *Monsanto* and *Raytheon* seem to say that the Board will not defer its jurisdiction to arbitration awards that do not resolve the statutory issue. However important the national labor policy of encouraging peaceful settlement of disputes through arbitration might be, the Board's statutory obligation to resolve unfair labor practices cannot yield merely because an employer and a union have arbitrated a case. At the very least, the arbitrator must have considered the issues present in the unfair labor practice case. Despite this seemingly uncomplicated requirement, consistent application of the *Monsanto-Raytheon* congruence criterion has, as the Board said recently, "proven elusive."[37]

Although subsequent cases reaffirmed the *Monsanto-Raytheon* holdings,[38] the Board adopted a new and controversial stance in 1974. In *Electronic Reproduction Service Corp.*,[39] the arbitrator considered whether the layoff of three employees violated the contract. During the hearing the employer argued that the union should be required to submit any evidence it had bearing on the issue, including facts that might demonstrate anti-union discrimination. The union replied that it would submit the evidence it deemed "pertinent."[40] With respect to one of the employees, the Board found not only that the union had submitted evidence of anti-union bias, but also that the arbitrator had considered it and had based his decision on it.[41] With respect to the other two employees, however, the arbitrator's award did not disclose whether such evidence was offered by the union or, if it was, whether the arbitrator considered it. He merely denied the grievance, finding erro-

35. *Raytheon,* 140 N.L.R.B. at 884.
36. *Id.* at 884-85.
37. *See* Olin Corp., 268 N.L.R.B. 573, 574 (1984).
38. Trygon Elec., Inc., 199 N.L.R.B. 404 (1972); Yourga Trucking, Inc., 197 N.L.R.B. 928 (1972); Montgomery Ward & Co., 195 N.L.R.B. 725 (1972); Airco Indus. Gases, 195 N.L.R.B. 676 (1972); and Kalamazoo Gazette, 193 N.L.R.B. 1065 (1971).
39. 213 N.L.R.B. 758 (1974).
40. *Id.* at 759.
41. *Id.* at 759-60. Employee Brown was found to have been discriminatorily laid off as a result of his activities as union steward.

neous a union contention that the employees were contractually entitled to recall notice.[42]

Under the *Monsanto-Raytheon* progeny, the unfair labor practice charge filed on behalf of these two employees should not have been deferred because the arbitrator's award gave no indication that he had ruled on the discrimination issue or, for that matter, that he had even received evidence of discrimination. Notwithstanding its prior cases, however, the Board deferred to the arbitrator's award, in the process adopting a new test intended to increase the breadth of post-arbitral deferral.

The Board noted that the objectives of deferral to arbitration were to discourage "dual litigation and forum shopping" and to encourage resort to contractual dispute resolution procedures.[43] It claimed, however, that the *Monsanto-Raytheon* progeny had undermined those objectives by encouraging the parties to withhold relevant evidence from the arbitrator in the hope of getting two chances to win what was essentially one case. The Board majority said that those tactics created an artificial separation of the just cause contractual issue and the statutory discrimination issue:

> For in discharge and discipline cases the basic contractual issue is whether or not the grievant has been disciplined or discharged for just cause. It is of course obvious that 'just cause' does not include illegal or discriminatory reasons . . . [and] [a]rbitrators have repeatedly so held.[44]

The Board conceded that there were some cases in which allegations of discriminatory motive were not resolved by arbitrators. It acknowledged that the parties could restrict the arbitrator's authority to consider the issue and that arbitrators could simply decline to pass upon it, as happend in *Monsanto*. The Board was confident, however, that the "usual and normal practice" was for all evidence concerning "justness or unjustness" to be submitted to the arbitrator, including evidence of anti-union bias.[45] Therefore, the Board said it would defer to arbitration awards even though evidence of anti-union discrimination was not presented to the arbitrator, unless the failure to present it was prompted by "unusual circumstances" other than a desire to preserve a second forum before the Board.[46]

The *Electronic Reproduction* standards not only produced disagreement among Board members,[47] they also encountered significant criticism in the courts of appeals.[48] After issuing several opinions that seemed to question

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42. *Id.* at 759.
43. *Id.* at 761.
44. *Id.* (footnote omitted).
45. *Id.*
46. *Id.* In addition to not ordering deferral when the parties excluded from the arbitrator evidence relating to the unfair labor practice or when the arbitrator refused to consider the evidence, the Board also said it would not defer if there was newly discovered evidence or evidence that had been unavailable at the time of the arbitration hearing. *Id.* at 762 n.18.
47. *See, e.g., id.* at 765 (Fanning and Jenkins, concurring in part and dissenting in part).
48. *See, e.g.,* Stephenson v. NLRB, 550 F.2d 535, 540 (9th Cir. 1977).

the continuing validity of *Electronic Reproduction*,[49] the Board overruled it in *Suburban Motor Freight, Inc.*[50] The opinion was brief, as it might well have been since only the Board's membership, and not the policy issues at stake, had changed in the interval since *Electronic Reproduction*.[51] The Board found that the union had not, during an arbitration, raised anti-union bias as a factor contributing to the discipline of a truck driver. Citing a law review article that criticized *Electronic Reproduction* as a "shocking sacrifice of individual rights on the altar of institutionalism,"[52] the Board said that experience had led it to believe that its practice "[p]romote[s] the statutory purpose of encouraging collective bargaining relationships, but derogates the equally important purpose of protecting employees in the exercise of their rights under section 7 of the Act."[53] The Board announced that it would return to the deferral policy that existed prior to *Electronic Reproduction*. Specifically, the Board said it would not defer under *Spielberg* unless the unfair labor practice issue was "both presented to and considered by the arbitrator" and that it would "give no deference to an arbitration award which bears no indication that the arbitrator ruled on the statutory issue of discrimination in determining the propriety of an employer's disciplinary actions."[54] The Board also announced it would place on the party seeking deferral the burden of establishing that the unfair labor practice issue was litigated in arbitration.[55]

In early 1984, following another shift in membership and philosophy,[56] the Board overruled *Suburban Motor Freight*. In *Olin Corp.*,[57] the employer discharged the president of the local union after he allegedly violated a provision of a collective bargaining agreement that not only prohibited strikes but also placed an affirmative obligation on union officers and represen-

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49. *See, e.g.*, Max Factor & Co., 239 N.L.R.B. 804 (1978), *enforced*, 640 F.2d 197 (9th Cir. 1980); Mason & Dixon Lines, Inc., 237 N.L.R.B. 6 (1978); Kansas City Star Co., 236 N.L.R.B. 866 (1978).

50. 247 N.L.R.B. 146 (1980).

51. By the time of the Board's decision, two members of the three-person majority in *Electronic Reproduction* (Chairman Miller and Member Kennedy) had left the Board. The Board had only four members when it decided *Suburban Motor Freight*. Chairman Fanning and Member Jenkins, the dissenters in *Electronic Reproduction*, were joined by new Member Truesdale in overruling it. Member Pennello, the sole remaining member of the *Electronic Reproduction* majority, dissented in *Suburban Motor Freight*.

52. *See* Schatzki, *Majority Rule, Exclusive Representation and the Interests of the Individual Worker: Should Exclusivity Be Abolished?*, 123 U. PA. L. REV. 897, 909 n.32 (1975).

53. *Suburban Motor Freight*, 247 N.L.R.B. at 146.

54. *Id.* at 146-47.

55. *Id.* at 147.

56. None of the members who participated in *Suburban Motor Freight* remained on the Board when it was overruled in Olin Corp., 268 N.L.R.B. 573 (1984). The three members in the *Olin* majority (Chairman Dotson, and Members Hunter and Dennis) were appointed by President Reagan. Member Zimmerman, who dissented in part in *Olin*, was appointed by President Carter.

57. 268 N.L.R.B. at 573.

tatives not to cause or permit them.[58] An arbitrator upheld the discharge, finding that the union president had "at least partially caused or participated" in a sick out, and that he had failed to help prevent it. The arbitrator found that the union president's conduct violated both the express terms of the collective bargaining agreement and an implicit duty of union officers not to cause or participate in strikes forbidden by the labor contract.[59] The arbitrator also found "no evidence" that the discharge was prompted by "legitimate Union activities."[60]

Despite the arbitrator's finding with respect to lack of anti-union bias, the Board's administrative law judge (ALJ) refused to defer to the award. The ALJ reasoned that the arbitrator had not considered the discrimination issue "in any serious way" and that, in any event, he was "not competent" to decide the unfair labor practice issue since his authority was limited to contract interpretation.[61] The ALJ decided the case on the merits, ultimately reaching the same result as the arbitrator.[62]

The Board majority agreed with the ALJ's recommendation to dismiss the charge, but in doing so criticized his reconsideration of the merits of the case and, instead, deferred to the arbitrator's award.[63] In broadening the scope of post-arbitral deferral, the majority criticized prior decisions as having applied a standard that made deferral appropriate "only when the Board determines on *de novo* consideration that the award disposes of the issues just as the Board would have."[64] Adopting a test proposed by Member Hunter in a previous dissenting opinion,[65] the Board reaffirmed the traditional *Spielberg* criteria and, with respect to the congruence issue, said it would find that an arbitrator had adequately considered an unfair labor practice issue if: "(1) the contractual issue is factually parallel to the unfair labor practice issue, and (2) the arbitrator was presented generally with the facts relevant to resolving the unfair labor practice issue."[66] In addition, the Board shifted the burden of proof, announcing that it would require the party opposing deferral (typically the General Counsel who prosecutes the

58. *Id.* The discharge notification charged the union president with threatening a sick out, participating in it, and failing to prevent it. *Id.*

59. *Id.*

60. *Id.* The arbitrator made this finding in light of his recognition that the Board had deferred consideration of a § 8(a)(3) charge under Dubo Mfg. Corp., 142 N.L.R.B. 431 (1963). *Olin,* 268 N.L.R.B. at 573.

61. *Olin,* 268 N.L.R.B. at 573.

62. The ALJ found that the no-strike clause at issue was a "clear and unmistakable" waiver of the right of union representatives to engage in strike activity, and that the union president's participation was "inconsistent with his manifest contractual obligation." *Id.* He also noted that the union's clear waiver of the president's rights had been sanctioned by the Supreme Court in Metropolitan Edison Co. v. NLRB, 46 U.S. 912 (1983).

63. *Olin,* 268 N.L.R.B. at 573.

64. *Id.* at 574.

65. *See* Propoco, Inc., 263 N.L.R.B. 136, 145 (1982) (Hunter, dissenting), *enforced,* 742 F.2d 1438 (2d Cir. 1983).

66. *Olin,* 268 N.L.R.B. at 574.

unfair labor practice charge) to show that the new congruence standards have not been met.[67]

Noting that contractual and statutory standards sometimes vary (a factor that had precipitated the administrative law judge's refusal to defer),[68] the Board said such differences, if any, would be weighed in the determination of whether the result reached by the arbitrator was clearly repugnant to the purposes and policies of the Act, a traditional *Spielberg* criterion. However, the Board cautioned that the repugnancy standard did not require an arbitrator's decision to be "totally consistent with Board precedent" and that it would defer unless the award is "palpably wrong," i.e., unless the arbitrator's decision is "not susceptible to an interpretation consistent with the Act."[69]

In a sharply worded dissent, Member Zimmerman accused the majority of grossly mischaracterizing prior Board decisions and of adopting a new test that he called indistinguishable from the discredited standard of *Electronic Reproduction.*[70] Zimmerman charged that the Board's new two-step congruence test actually involved only one step:

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67. *Id.* In addition, the Board said, "if a respondent establishes that an arbitration concerning the matter before the Board has taken place, the burden of persuasion rests with the General Counsel to demonstrate that there are deficiencies in the arbitral process requiring the Board to ignore the determination of the arbitrator and subject the case to de novo review." *Id.* at 575.

68. *Id.* at 574. In unfair labor practice cases involving allegations that an employee has waived a statutory right to engage in union or concerted activity or that a party has waived its right to bargain, the Board, with Supreme Court approval, requires evidence of clear and unmistakable waiver, *see, e.g.,* Metropolitan Edison Co. v. NLRB, 461 U.S. 912 (1983), a standard which is presumably more stringent than contractual waiver standards applied by arbitrators. *See generally* 2 C. MORRIS, THE DEVELOPING LABOR LAW 640-50 (2d ed. 1983) [hereinafter cited as C. MORRIS].

69. *Olin,* 268 N.L.R.B. at 575. With respect to the particular facts at issue, the Board found the contractual and unfair labor practice issues to be parallel: the arbitrator considered whether there was a "sick out" and whether the discharged employee caused it, participated in it, or failed to stop it. He also considered whether the discharge was a result of the sick out or anti-union bias. Those issues, said the Board, were "coextensive" with the statutory question of whether the labor contract "clearly and unmistakably proscribed the behavior" of the union president. *Id.* at 576. The Board also said that the arbitrator was presented with facts relevant to the unfair labor practice issue and that the General Counsel had failed to show that the arbitrator lacked evidence "relevant to the determination of the nature of the obligations imposed by the no strike clause . . . and to a determination of the nexus between that clause and [the president's] conduct," *id.,* a burden the General Counsel did not realize he shouldered when the case was tried. In any event, the Board said that the evidence necessary for a determination of either the unfair labor practice charge or the contractual issue was "essentially the same" and that the Board had no business relitigating the case if the arbitrator had already considered the essential facts. *Id.* Finally, the Board concluded that the arbitrator's decision did not offend the waiver standards established by the Supreme Court in *Metropolitan Edison, see supra* note 68, and that the General Counsel had not shown the arbitrator's decision to be clearly repugnant to the Act. Although the Board noted that members might disagree as to the "standards of specificity" necessary to find a waiver of protected rights, it said the arbitrator had a "reasonable basis" for his decision. *Id.*

70. *Id.* at 578.

> If the contractual issue is factually parallel to the unfair labor practice issue, then how can one possibly prove that the facts relevant to resolving the unfair labor practice issue have not been presented to the arbitrator unless one proves the absurdity that even the facts relevant to the contract issue were not presented?[71]

Zimmerman contended that under the majority's test the only real issue was one of factual parallelism and that, once that hurdle was cleared, the Board would presume that the arbitrator had considered both the statutory and contractual issues unless the General Counsel could prove otherwise. He argued that *Electronic Reproduction* had been based on the same presumption and that, just as in that case, the Board would defer to an arbitrator's award "without actually knowing if the issue was presented to or considered by the arbitrator."[72]

Although *Olin* centers around the congruence requirement, the issues it stirs are larger. Board members have often charged that NLRB decisions accept the principle of post-arbitral deferral in form only, deferring to arbitrator's awards only if *de novo* consideration of the facts by the Board produces the same result. They also charge that the Board too often rejects awards as repugnant to the Act merely because it disagrees with the result reached by the arbitrator.[73] *Olin* not only establishes what could be a workable test for determining whether the unfair labor practice issue was resolved in arbitration, it also signals an intention to give the awards themselves more hospitable acceptance.

As recognized by Zimmerman in his dissenting opinion, the Board's new two-tiered approach to congruence may not be as benign as it appears. Viewed objectively (no mean feat in labor relations), the test makes sense. If the unfair labor practice issue and the contractual issue are, in fact, parallel and if the arbitrator considered facts relevant to the unfair labor practice issue, relitigation of those same facts before the Board holds the arbitration award for naught and frustrates the parties' effort to settle disputes peacefully without governmental intervention. Although the Board retains jurisdiction over the case, its function should be limited to determining procedural fairness and in deciding whether the result reached by the arbitrator was consistent with the Act, which does not mean that the Board would necessarily have reached the same result.

Zimmerman suggests, however, that a broad interpretation of the parallelism requirement could deprive the Board of jurisdiction even though the arbitrator might not have considered facts relevant to the unfair labor practice issue. Zimmerman's concern is a significant one: casual acceptance of parallelism will too readily deprive employees of their statutory forum. Never-

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71. *Id.* at 579.

72. *Id.*

73. *See, e.g., id.* at 573-74. *See also* Kansas City Star Co., 236 N.L.R.B. 866 (1978); Propoco, Inc., 263 N.L.R.B. 136, 145 (1982) (Hunter, dissenting), *enforced,* 742 F.2d 1438 (2d Cir. 1983).

theless, the possibility that the test will be misapplied is not a sufficient reason to oppose it and, as Zimmerman's opinion indicates, probably is not his real concern.

The difficulty in applying *Spielberg* has not been confusion over congruence of issues or the obscurity of repugnancy standards. Rather, the problem has been the stubborn refusal of some NLRB members to recognize arbitration as a significant dispute resolution procedure. Nowhere is that attitute more apparent than in Zimmerman's characterization of arbitration in his *Olin* dissent:

> Sometimes less expensive, more informal, or more expeditious arbitration may be an attractive way to resolve *minor grievances* and disputes which are essentially contractual in nature.[74]

If one starts with the premise that labor arbitration is appropriate for resolution of only minor contractual disputes, while the Board is engaged in the important business of securing statutory rights, one will undoubtedly conclude that the Board should rarely defer to arbitration. Those same attitudes were present in the opinion of the *Olin* ALJ, who concluded that the arbitrator was "not competent" to resolve the unfair labor practice issue.[75] This theme runs through other Board opinions as well.[76]

It is not clear why Board members have been suspicious of the ability of arbitrators to resolve factual disputes in a manner that protects the rights of individual employees, unions, and employers. Many arbitrators hear dozens of cases a year, some of which rival or exceed the complexity of NLRB hearings. There is no reason to assume that the Board's administrative law judges are either more skilled as fact-finders or more sensitive to the labor relations environment. Moreover, traditional *Spielberg* criteria protect against the possibility that procedural failures within the arbitration will prejudice employee rights. Even when procedural problems have not been present, however, the Board has often refused to defer, sometimes claiming either repugnancy or a lack of congruence to mask the resentment to the arbitral process openly expressed by Zimmerman in *Olin*. Although the Board was less candid about its motives, the *Raytheon* case itself provides an example.

In *Raytheon,* two employees (Reikard and Fisk) were discharged for instigating and participating in a brief work stoppage. The contract forbade strikes during its term and gave the company the right to discipline or discharge employees (subject to the grievance procedure) for "engaging in, participating in, or encouraging such unauthorized action. . . ."[77] The ar-

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74. 268 N.L.R.B. at 581 (emphasis added).

75. *Id.* at 573.

76. *See, e.g.,* United Technologies Corp., 268 N.L.R.B. 557, 563 (1984) (Zimmerman, dissenting) ("The arbitration process is . . . not particularly adept at protecting employee statutory or public rights."); Collyer Insulated Wire, 192 N.L.R.B. 837, 848 (1971) (Fanning, dissenting).

77. *Raytheon,* 140 N.L.R.B. at 888 n.9.

bitrator concluded that the two employees had "instigated and led" a work stoppage and that their discharge was "not improper."[78]

Upholding its hearing examiner's refusal to defer, the NLRB noted that, at the inception of the arbitration hearing, the employer's counsel cautioned the arbitrator that his jurisdiction extended no further than a determination of the alleged contract violation.[79] Relying on *Monsanto,* the Board decided that deferral was not appropriate since the arbitrator had been presented solely with evidence concerning the contractual issue and not with any evidence of protected union or concerted activities.[80]

The majority's characterization of the case was clearly wrong. Although they disagreed about the result, the arbitrator and the ALJ did the same thing. The arbitrator found that there was a work stoppage and that the two discharged employees both instigated it and participated in it. Despite the contrary suggestion of the Board, the hearing examiner did not apply special statutory standards beyond the competency of the arbitrator. He simply drew conflicting inferences from essentially the same evidence considered by the arbitrator.[81] Thus, the hearing examiner found that there was, in fact, no walkout and that Reikard and Fisk did not incite employees "to engage in what as a fact did not occur."[82] Since there was no walkout that could conceivably prompt discipline, the hearing examiner concluded that the employer's reason for discipline must have been pretextual.[83]

In its opinion, the Board argued that the arbitrator could not have considered the unfair labor practice issue because the employer expressly limited his authority to contract interpretation. The deferral issue, however, ignored by the *Raytheon* majority and overlooked as well by Zimmerman in *Olin,*[84] is not whether the arbitrator expressly decided the unfair labor practice charge but whether he resolved the factual issues which themselves would

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78. *Id.* at 897.

79. The Board quoted the following passage from the transcript of the arbitration:

> Therefore if you find on the basis of the evidence that will be introduced today that the two grievants in question engaged in conduct violative of Article 23 . . . then it is submitted that you have no choice but to sustain the discharge, *that your jurisdiction does not extend any further than to such a determination.*

Id. at 884 (emphasis supplied by the Board).

80. *Id.*

81. The evidence before the arbitrator was not identical to that presented to the Hearing Examiner. The supervisor of the discharged employees did not testify at the arbitration hearing, but he was called at the unfair labor practice hearing. *Id.* at 885-86. The Board also noted that neither of the discharged employees attended the arbitration hearing. *Id.* at 886. The dissent asserted, however, that both employees had notice of the hearing and that neither explained her absence. *Id.* at 890-91.

82. *Id.* at 897.

83. *Id.* at 898.

84. 268 N.L.R.B. at 579.

determine the existence of an unfair labor practice.[85] In *Raytheon,* for example, the arbitrator determined that there had been a walk-out which the two discharged employees instigated and participated in and that their discharge was prompted by the action. Those facts not only determine the contractual issue, but the unfair labor practice issue as well. The hearing examiner did not discover any "secret" intention on the part of the employer to retaliate against the discharged employees for union activity, nor did he apply to the evidence any test peculiar to the knowledge or ability of the Board. He simply disagreed with the arbitrator about what the evidence proved.[86] Although hailed by Zimmerman as the cornerstone of NLRB deferral policy, *Raytheon* is, in reality, a transparent decision that does nothing more than reverse an arbitration award with which the Board majority disagreed.[87]

The two-tiered approach adopted in *Olin* would have—and should have—produced deferral in *Raytheon.* The issues before the Board and the arbitrator depended on the same factual determination, i.e., whether the two discharged employees instigated and participated in a work stoppage. The arbitrator received evidence concerning that factual issue and resolved it. Because the factual issues were parallel and because the arbitrator heard evidence relevant to the unfair labor practice issue, the only other inquiry before the Board was application of traditional *Spielberg* criteria, including whether the arbitrator's decision was repugnant to the purposes and policies of the Act. As part of that inquiry the Board would consider whether the *facts* found by the arbitrator justified the result in light of established Board precedent. That does not mean that the arbitrator had to apply NLRB standards with

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85. In *Olin,* for example, Zimmerman said the Board's new test will allow deferral even though the unfair labor practice issue may not have been presented to the arbitrator. *Id.* Similarly, in *Raytheon,* the Board stressed that only the contractual issue had been presented to the arbitrator. 140 N.L.R.B. at 884-85. Such allegations miss the point of deferral entirely. Arbitration, by its very nature, is contractual—it exists to resolve *contractual* disputes. It is not intended to be a forum for the adjudication of statutory rights. The issue in deferral, however, is the deference owed arbitration when an arbitrator, in a contractual proceeding, resolves the same facts alleged to constitute a statutory violation as well. Assuming the similarity of proof required (i.e., assuming "parallelism"), it is not necessary for the arbitrator to have expressly considered statutory elements for the Board to defer to his *factual* findings.

86. The Board's decision was also premised on alleged procedural irregularities in that the discharged employees did not attend the hearing. *Raytheon,* 140 N.L.R.B. at 886-87. It is unclear why their absence would necessarily prejudice the case since each had notice of the hearing, but failed to attend. *Id.* at 891.

87. The dissenting opinion in *Raytheon* recognized the proper role of deferral:

> The underlying factual issue in both the arbitration and the unfair labor practice proceeding was whether the dischargees engaged in a walkout or in conduct inciting a walkout. If they had, their action was a breach of the no strike provisions of the contract, and their conduct was not protected under the Act.

Id. at 890 (Leedom and Brown, dissenting).

For another case in which the Board did little more than relitigate the same facts that had been tried in arbitration, see Propoco, Inc., 263 N.L.R.B. 136 (1982), *enforced,* 742 F.2d 1438 (2d Cir. 1983).

the same specificity used by the Board. Rather, the requirement is demonstrated by what happened in *Olin*.

Resolution of the unfair labor practice issue in *Olin* depended on whether the union had clearly and unmistakably waived the right of its officers to engage in certain activity. The arbitrator found that the contract specifically prohibited participation in strikes by union officers.[88] That factual finding resolves the unfair labor practice issue even though the arbitrator did not apply the statutory standard of clear and unmistakable waiver. Although some Board members might use the same facts to justify a finding of "no waiver," an express contractual prohibition of strikes is enough to support a conclusion that the union had waived the right of its officers to strike. While the Board might have resolved the issue differently in the first instance, it did not consider the case first. Unless it is to merely ignore the results reached in labor arbitration, *Spielberg* requires the Board to defer when the labor arbitrator's opinion is consistent with a proper interpretation of the Act, even if it is not the decision the Board might have reached.

The application of the *Olin* test suggested here also indicates the fallacy of Zimmerman's charge that the Board did nothing more than return to the standard of *Electronic Reproduction*. Unlike *Electronic Reproduction, Olin* requires the Board to defer only if the facts relevant to the unfair labor practice charge are presented to the arbitrator. In order to warrant Board deferral in the typical section 8(a)(3) discriminatory discharge case, for example, the arbitrator will have to have considered facts bearing on the allegation of anti-union retaliation. This does not mean that the arbitrator has to recognize expressly the possibility of a statutory violation or has to apply statutory standards. In the course of its review, the Board can determine if the result reached by the arbitrator is consistent with those standards. The arbitrator, however, must consider the facts from which an inference of discrimination can be drawn. If no such facts are presented, then the second half of the *Olin* standard is not met and deferral is not possible.

Finally, the Board's decision in *Olin* to shift the burden of proof to the General Counsel is wholly unwarranted. The Board has jurisdiction over unfair labor practice cases. The prosecutor should not have to convince the Board to exercise it. Instead, the party seeking to avoid the jurisdiction of the Board (typically the employer) should carry the burden of persuading the Board to recognize the result reached by another tribunal.

B. Collyer Wire *Deferral:*

The United Technologies *Case*

Although pre-arbitral deferral of unfair labor practice charges has provoked more controversy than the *Spielberg* doctrine, such action is easily

88. *Olin*, 268 N.L.R.B. at 573.

justified in section 8(a)(5) cases. In many cases involving unlawful unilateral action, as in *Collyer Wire* itself, the employer's defense will be either that the union waived its right to bargain or that the contract otherwise authorized the change. In such cases, resolution of the charge will depend on an interpretation of the collective bargaining agreement. Clearly, the Board has the power to interpret contracts in order to resolve an unfair labor practice case. Even so, such disputes are essentially contractual and the *Collyer Wire* doctrine does little more than relegate the parties to the procedure they voluntarily agreed would be used to settle contract disputes. Deferral of section 8(a)(5) charges, then, poses little danger to the rights of unions or individual employees, or to the jurisdictional integrity of the Board. Rights granted by contract will be secured by contractually provided remedies; waivers authorized by contract will be enforced through the same procedure. There is also little doubt that arbitrators, who sit only to decide contract disputes, are just as adept at contract interpretation as Board members or administrative law judges, whose statutory function divorces them from a role in contract administration. Moreover, to the extent that the Board uses stricter standards than arbitrators do in resolving questions of waiver, the arbitration award can be measured against the *Spielberg* repugnancy standard *after* the arbitration is concluded.[89]

More controversial is the question of whether the Board should defer in cases that do not necessarily depend on contract interpretation. Sections 8(a)(1) and 8(a)(3), for example, secure for employees the right to engage in concerted or union activity without employer interference or discrimination. A unionized employer charged with a violation of employee rights under these sections will often claim a contractual justification for his actions, usually that discipline was imposed for "just cause." The union, however, will almost certainly claim that the contractual justification is a mere pretext used by the employer to cover up its unlawfully motivated conduct.[90] If, during an arbitration hearing, the union presents evidence bearing on its allegation of anti-union animus, then the Board can (and should) defer to the arbitrator's opinion under its *Spielberg* doctrine, assuming the *Olin*

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89. In pre-arbitral deferral under *Collyer Wire,* the Board retains jurisdiction for the application of *Spielberg* principles following the arbitration. *See* Collyer Insulated Wire, 192 N.L.R.B. 837, 843 (1971). The factors warranting *Collyer* deferral, reiterated in *United Technologies,* are:

> [T]he dispute arose within the confines of a long and productive collective bargaining relationship; there was no claim of employer animosity to the employees' exercise of protected rights; the parties' contract provided for arbitration in a very broad range of disputes; the arbitration clause encompassed the dispute at issue; the employer had asserted its willingness to utilize arbitration to resolve the dispute; and the dispute was eminently well suited to resolution by arbitration.

United Technologies Corp., 268 N.L.R.B. 557, 558 (1984).

90. For a fuller description of the issues raised in such "pretext" cases, see C. MORRIS, *supra* note 68, at 214-17. For the burden of proof required in such cases, see Wright Line, Inc., 250 N.L.R.B. 1083 (1980), *enforced,* 662 F.2d 899 (1st Cir. 1981).

guidelines are satisfied.[91] The question presented by *Collyer Wire* deferral is whether the Board should refuse to hear an unfair labor practice case alleging violations of individual statutory rights when the dispute is also arbitrable under a collective bargaining agreement, but there has not been an arbitration. If the *Collyer Wire* doctrine applies, the Board defers the case to the arbitral forum, retaining jurisdiction only for the purpose of determining that the arbitration met *Spielberg* standards. As with *Spielberg* deferral, NLRB decisions have been inconsistent.

While *Collyer Wire* dealt only with deferral of a section 8(a)(5) charge, in the following year the Board decided that it would defer in section 8(a)(3) cases as well. Although the Board recognized that section 8(a)(3) discrimination cases raise statutory issues that do not depend on the interpretation of contractual terms for resolution, in *National Radio Co.*,[92] it said that deferring such cases would foster the federal policy of encouraging voluntary arbitration of labor disputes.[93] The Board asserted that its decision was not an abdication of its statutory power, but only an abstention in favor of other important labor policies.[94] Five years later the Board retreated from *National Radio* in its decision in *General American Transportation Corp.*[95] Coupled with another decision issued the same day,[96] *General American Transportation* produced a strange array of opinions that precluded application of *Collyer Wire* deferral to section 8(a)(I) and section 8(a)(3) cases[97] but permitted it in section 8(a)(5) cases.[98]

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91. *See supra* text accompanying note 66.

92. 198 N.L.R.B. 527 (1972).

93. *Id.* at 530-31. The Board assumed that arbitration would provide a forum that would resolve the dispute in a manner not repugnant to the Act. *Id.* at 531.

94. *Id.*

95. 228 N.L.R.B. 808 (1977).

96. Roy Robinson Chevrolet, Inc., 228 N.L.R.B. 828 (1977).

97. Deferral was also precluded for cases arising under § 8(b)(1)(A) and § 8(b)(2).

98. Deferral is also available for § 8(b)(3) cases.

In *General American Transportation* the question was whether the Board should defer in § 8(a)(3) cases. In *Roy Robinson Chevrolet,* the Board considered the applicability of *Collyer Wire* to § 8(a)(5) cases. Two members of the Board who had dissented in *Collyer* (Fanning and Jenkins) also dissented in both *General American Transporation* and *Roy Robinson Chevrolet,* maintaining, as they had in *Collyer,* that the Board had no power to "cede its jurisdiction to private tribunals." *General Am. Transp.,* 228 N.L.R.B. at 808. Thus, Fanning and Jenkins opposed deferral of both § 8(a)(3) and § 8(a)(5) cases, although they found deferral of § 8(a)(3) cases particularly objectionable. *Id.* at 808-09. Two other members of the Board (Penello and Walther) embraced a broad application of deferral, finding it appropriate in both § 8(a)(3) and § 8(a)(5) cases. *Id.* at 813.

The swing vote belonged to then Chairman Murphy. In *General American Transportation,* Murphy joined Fanning and Jenkins to produce a three-person majority denying deferral in § 8(a)(3) cases. *Id.* at 810. Unlike Fanning and Jenkins, however, Murphy believed the Board had the power to order pre-arbitral deferral. She found it inappropriate, however, in cases that involved statutory rights as opposed to mere contract interpretation. *Id.* at 810-12. In *Roy Robinson Chevrolet,* however, Murphy formed a three-person majority with Penello and Walther, agreeing that deferral was appropriate in cases involving "purely the interpretation of the rights and obligations of the parties under the collective bargaining agreement." Roy Robinson Chevrolet, Inc., 228 N.L.R.B. 828, 831 (1977).

General American Transportation remained in force until early 1984, when the Board returned to the standard of *National Radio.* In *United Technologies Corp.*,[99] the union filed a section 8(a)(1) charge contending that the employer had threatened an employee in order to discourage prosecution of a grievance. Although noting that the administrative law judge had correctly denied deferral under *General American Transportation,* the Board overruled that case, thus opening the way to pre-arbitral deferral of sections 8(a)(3) and 8(a)(1) cases. The Board majority charged that *General American Transportation* had "emasculated" its deferral policy, one that had survived judicial scrutiny and was based on sound practical considerations.[100] It said broad-based deferral of unfair labor practice charges was not an abdication but merely a "postponement" of its own processes in order to "give the parties' own dispute resolution machinery"[101] an opportunity to settle the dispute:

> Where an employer and a union have voluntarily elected to create dispute resolution machinery culminating in final and binding arbitration, it is contrary to the basic principles of the Act for the Board to jump into the fray prior to an honest attempt by the parties to resolve their disputes through that machinery. . . . In our view, the statutory purpose of encouraging the practice and procedure of collective bargaining is ill-served by permitting the parties to ignore their agreement and to petition the Board in the first instance for remedial relief.[102]

Member Zimmerman dissented, asserting that the Board's decision needlessly sacrificed employees' statutory rights by forcing them to arbitrate their unfair labor practice cases.[103] He contended that the majority's decision was reached despite the lack of any evidence that *General American Transportation* had adversely affected the operation of grievance-arbitration systems and despite the absence of judicial criticism. Zimmerman argued that the return to *National Radio* was premised merely "on three articles of faith."[104]

First, Zimmerman criticized the majority's assertion that *National Radio* had found judicial sanction. Although he conceded that there was judicial acceptance of deferral generally, and *Collyer Wire* specifically, he denied that such judicial approval embraced *National Radio.* To the contrary, he read judicial opinions to mean that the Board's power to defer "is not unlimited." Claiming support from both appellate and Supreme Court opinions, Zimmerman argued that judicial precedent did not countenance the abdication of Board jurisdiction to preserve employee section 7 rights.[105]

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99. 268 N.L.R.B. 557 (1984).
100. *Id.* at 559.
101. *Id.* at 560.
102. *Id.* at 559.
103. *Id.* at 561.
104. *Id.* at 562.
105. *Id.* at 563.

Zimmerman also disagreed with his colleagues' assertion that deferral was necessary in order to bind parties to their collective agreements, a concept the majority said was fundamental to collective bargaining.[106] Zimmerman charged that the Board's decision bound individual employees to arbitration "as the *only* forum of first resort."[107] He asserted that a union could not, by agreeing to an arbitration clause, waive the statutory right of employees "to choose a statutory forum in which to initiate and litigate an unfair labor practice issue."[108]

Finally, Zimmerman harshly criticized the majority's assertion that *Collyer Wire* deferral of section 8(a)(1) and 8(a)(3) cases was merely a "prudent exercise of restraint"[109] calculated to allow the parties time to use their own procedures to settle the dispute and subject always to review under *Spielberg* standards. Reminiscent of his *Olin* dissent, Zimmerman said that arbitration was not "particularly adept at protecting employee statutory or public rights" and that arbitrators might lack the capacity to resolve statutory issues.[110] He also asserted that unions, in bowing to majoritarian interests, might not "vigorously support an employee's claim."[111] Presumably, arbitrator incompetency or union neglect would be matters considered by the Board in post-arbitral review. Without explaining his reasoning, however, Zimmerman simply asserted that *Spielberg* "is not a catchall justification for withholding Board processes until a reviewable arbitration award has been made."[112]

Although Zimmerman's refusal to overrule *General American Transportation* has merit, only his second criticism of the majority's decision is sound. It is true, as Zimmerman asserts, that judicial opinions counsel some restraint in NLRB deferral to arbitration. He cites no case, however, that directly questions the principles of *National Radio,* even though they were applied by the Board for nearly six years. Moreover, Zimmerman's criticism of arbitrators' competency is the same tired refrain he sang in *Olin.* To the contrary, there is every reason to believe that arbitrators are as skilled at resolving facts as are administrative law judges and that those factual resolutions can, subject to *Spielberg* review, resolve both statutory and contractual issues.

On the other hand, Zimmerman's charge that the majority has denied employees their right to a statutory forum has considerable force. It is one thing to defer under *Spielberg* when the parties to a collective agreement have voluntarily submitted a case to arbitration. It is quite another thing, however, to tell employees that statutory procedures are unavailable even though there has been no arbitration. In *Spielberg* deferral, there has already

106. *Id.* at 561.
107. *Id.* at 562.
108. *Id.* at 563.
109. *Id.* at 562.
110. *Id.* at 563.
111. *Id.*
112. *Id.*

been a full hearing of the employee's case and the complaint has been resolved in a manner consistent with the Act. If arbitration is to mean anything at all, the Board should withhold its jurisdiction in those circumstances. In *Collyer Wire* deferral, however, there has been no hearing. The Board's decision to withhold its processes is clearly justified in section 8(a)(5) cases when an interpretation of the contract will settle the dispute. It is not justifiable in section 8(a)(1) and section 8(a)(3) cases where the issue involves the application of statutory standards. Although the arbitrator *can* make the factual resolutions necessary to apply those standards, the question is whether an employee should be forced into an arbitral forum when he prefers the statutory procedures established by Congress.

In *United Technologies,* the Board essentially ignored that issue, relegating the problem to a footnote in which it asserted:

> Nothing in this decision diminishes the rights of employees to seek statutory relief for alleged unfair labor practices. We simply hold that where contractual grievance-arbitration procedures have been invoked voluntarily we should stay the exercise of the Board's procedures in order to permit the parties to give full effect to those procedures.[113]

This curious statement is, at best, confusing. Of course an employee's statutory right to invoke Board processes is diminished. Indeed, the right is effectively denied. In addition, it is not clear how invocation of the grievance-arbitration procedures can be called "voluntary" when the Board has told employees that *only* those procedures are available for resolution of the dispute.

Unlike the majority, Zimmerman confronts the issue directly in his dissenting opinion. He asserts that pre-arbitral deferral of section 8(a)(1) and section 8(a)(3) cases constitutes an unwarranted waiver of employee statutory rights. Although the majority did not couch its opinion in those terms, it is clear that the decision has that effect. For example, the majority opinion recognizes that unions and employers negotiate arbitration provisions to resolve "their" disputes through "the parties' own . . . machinery."[114] The parties to the contract are the employer and the union, not the individual employees.[115] Clearly, the union has the power to confine employees to contractual procedures for the resolution of contractual claims.[116] The effect of *United Technologies,* however, is to confine employees to the contractual procedure for some unfair labor practice claims as well, even though those claims do not arise under the contract and are not necessarily disputes between the parties to the contract. The only justification ever asserted for

113. *Id.* at 563 n.17.
114. *Id.* at 559.
115. *See, e.g.,* J.I. Case Co. v. NLRB, 321 U.S. 332 (1944).
116. *See, e.g.,* Vaca v. Sipes, 386 U.S. 171 (1967).

this broad waiver of statutory rights is encouragement of a dispute resolution system created principally to resolve *contractual* claims.

As argued above, the Board has often been guilty of underestimating both the value of labor arbitration and the competency of labor arbitrators. The peaceful processes of arbitration are a significant part of our system of collective bargaining and have contributed to the protection of employee rights and the enhancement of employee status. The Board should be hesitant to take action that will undermine the utility of the system or the trust that employees have for it. There is a limit, however, to the deference the Board must pay. Arbitration is a concomitant to the Act; it does not replace it. Arbitration deserves deference when it has already resolved the dispute or when the issues are essentially contractual. However, employees who choose, in the first instance, to press their statutory claims in the statutory forum surely have that right. Forcing an employee to take his case elsewhere does not foster the federal policy of encouraging resort to arbitration. One might just as well assert that pre-arbitral deferral of individual statutory rights cases discourages agreements to arbitrate, because such agreements are reached only by forfeiting the statutory forum. In sum, the result of *General American Transportation,* though at the time reflecting the views of only one member of the Board, was sound. The Board's reversal in *United Technologies* is an unwarranted denial of its statutory jurisdiction that provides only questionable benefits for arbitration, but significant detriment to employee rights.

II. *GISSEL* ORDER CASES

A. Gourmet Foods

Gourmet Foods[117] is the latest round in the continuing debate about whether the Board has authority to impose a remedial bargaining order (often called a *Gissel* order) absent a showing of majority support for the union. The problem can be traced to Chief Justice Warren's ambiguous opinion in *NLRB v. Gissel Packing Co.,*[118] where the Court approved the Board's practice of ordering employees to bargain with the union as a remedy for serious unfair labor practice notwithstanding the absence of an election or even a union election loss. It did not indicate clearly, however, all the criteria necessary to support such an order.

In the typical *Gissel* order case, the union will have either lost the election or filed unfair labor practice charges against the employer that preclude an election. In the latter case, the assumption usually is that the union no longer

117. 270 N.L.R.B. No. 113, 116 L.R.R.M. 1105 (1984).
118. 395 U.S. 575 (1969).

has the strength necessary to win the election.[119] In *Gissel,* the Court said that if the union once enjoyed majority status (usually proved through signed union authorization cards) and if that status was undermined by an employer's serious unfair labor practices that made the holding of a free and fair election unlikely, the Board could order the employer to bargain with the union.[120] This remedy is popularly known as a *Gissel* category two order (*Gissel*-II). Although such orders pose some danger to the Act's principle of majority rule, the Court reasoned that the harm was slight because the union once had a majority and because the employees are free, after a time, to rid themselves of an unwanted union.[121]

The question left open in *Gissel,* and purportedly resolved in *Gourmet Foods,* concerns the validity of the so-called category one order (*Gissel*-I). In a *Gissel*-I case, the union cannot show that it ever had majority support. Nonetheless, a bargaining order is thought warranted in light of the employer's outrageous and pervasive unfair labor practices.[122] Category one orders were not directly at issue in *Gissel,* and Chief Justice Warren's opinion is unilluminating at best and confusing at worst. Chief Justice Warren noted that the Fourth Circuit had "left open the possibility" of issuing a category one order.[123] Although he said "the actual area of disagreement between our position here and that of the Fourth Circuit is not large as a practical matter,"[124] he did not explain what the disagreement was. The Chief Justice also observed that the "Board itself . . . has long had a similar policy of issuing a bargaining order, in the absence of a section 8(a)(5) violation or even a bargaining demand, when that was the only available, effective remedy for substantial unfair labor practices."[125] This passage, combined with a later reference to an order made in the absence of a section 8(a)(5) violation,[126]

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119. For a fuller discussion of the *Gissel* remedy, see R. GORMAN, *supra* note 4, at 93-104. *See generally* Perl, *The NLRB and Bargaining Orders: Does a New Era Begin with Gissel?,* 15 VILL. L. REV. 106 (1969); Sharpe, *A Reappraisal of the Bargaining Order: Toward a Consistent Application of NLRB v. Gissel Packing Co.,* 69 NW. U.L. REV. 556 (1974).

120. *Gissel,* 395 U.S. at 612.

121. *Id.* at 613.

122. *See generally* Hunter, *Minority Bargaining Orders Usher in 1984 at the NLRB,* 33 LAB. L.J. 571 (1982); Comment, *United Dairy Farmers Cooperative Association: NLRB Bargaining Orders in the Absence of a Clear Showing of a Pro-Union Majority,* 80 COLUM. L. REV. 840 (1980). Both the Supreme Court's opinion and the NLRB decisions indicate that employer misconduct must be more serious to warrant a *Gissel*-I order than a *Gissel*-II order. *See, e.g., Gissel,* 395 U.S. at 613-14; Conair Corp., 261 N.L.R.B. 1189, 1190-91 (1982).

123. *Gissel,* 395 U.S. at 613. In fact, in each of the Fourth Circuit cases considered by the Court in *Gissel,* the union had a card based majority. For further discussion, see Member Penello's opinion in United Dairy Farmers Coop. Ass'n (I), 242 N.L.R.B. 1026, 1038-40, *enforced as modified,* 633 F.2d 1054 (3d Cir. 1979).

124. *Gissel,* 395 U.S. at 613.

125. *Id.* at 614.

126. *Id.* at 615. The Board said:

> In *Sinclair,* No. 585 [one of the cases consolidated into the *Gissel* decision, *see* 395 U.S. at 580], the Board made a finding, left undisturbed by the First Circuit, that the employer's threats of reprisal were so coercive that, even in the absence of a § 8(a)(5) violation, a bargaining order would have been necessary to repair the unlawful effect of those threats.

Presumably, "the absence of a § 8(a)(5) violation" refers to cases in which the union has never had majority status, an issue that had not been before the Board in *Sinclair,* where the union had a valid card majority. *Id.* at 589.

has produced considerable debate. Was the Court approving the category one order? If so, was it aware that the Board had not, in fact, issued one? The opinion did not elaborate. Instead, Chief Justice Warren said that the only effect of the Court's holding was to authorize bargaining orders "in less extraordinary cases marked by less pervasive practices" and that the Board's authority to issue an order based on such a "lesser showing of employer misconduct" required "a showing that at one point the union had a majority."[127] Did the Court mean that in more extreme cases, no majority is necessary? Until 1982, the Board said no, maintaining, with some dissent, that it had no power to impose non-majority bargaining orders.[128]

In *Conair Corp.*,[129] however, the Board endorsed *Gissel*-I orders. The majority criticized two dissenting colleagues for "focusing so narrowly and abstractly on the principle of majority rule," a concededly important principle but one which "has never been interpreted as standing in supreme isolation from Board's other statutory policies and purposes."[130] The majority argued that the employer's outragous unfair labor practices had precluded a free and fair election and concluded that the risk of imposing a union against the wishes of the majority "is greatly outweighed by the risk that, without a bargaining order, all employees would be indefinitely denied their statutory right to make a fair determination whether they desire union representation."[131] *Conair* was denied enforcement by a divided D.C. Circuit which, like the Board, split over the tension generated between majority rule and remedial efficacy.[132] In *Gourmet Foods,* the Board overruled *Conair*

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127. *Id.* at 614.

128. In 1981, the Board issued a *Gissel*-I order in United Dairy Farmers Coop. Ass'n (II), 257 N.L.R.B. 772 (1981). Its order, however, was in response to an order of the Third Circuit denying effect to the Board's earlier decision that it had no such power. United Dairy Farmers Coop. Ass'n (I), 242 N.L.R.B. 1026, *enforced as modified,* 633 F.2d 1054 (3d Cir. 1979).

In its 1979 decision, the Board split three ways. Two members thought the Board "may" have *Gissel*-I authority, but should not exercise it because of the risk to majoritarian principles. 242 N.L.R.B. at 1028. One member thought there was no such authority. *Id.* at 1038-45. The other two members thought that the Board had *Gissel*-I authority, and would have imposed such an order. *Id.* at 1031-38. On review, the Third Circuit decided that the Board had *Gissel*-I authority and remanded the case, observing that the "mere absence of such indicia of majority support does not in itself preclude the issuance of a bargaining order." 633 F.2d at 1068.

On remand, the Board had only three members. Two of them, Fanning and Jenkins, had defended the Board's authority in the original decision, and embraced the Third Circuit opinion. Member Zimmerman, who did not participate in the original decision, joined in the Board's order only because of the Third Circuit's opinion. He, therefore, found it "unnecessary to determine whether the Board has such authority." 257 N.L.R.B. at 772 n.8.

129. 261 N.L.R.B. 1189 (1982), *enforcement denied,* 721 F.2d 1355 (D.C. Cir. 1983).

130. *Id.* at 1193.

131. *Id.* at 1194.

132. The majority found that the Board had no authority to issue non-majority bargaining orders. *Conair,* 721 F.2d at 1383-84. The dissenting judge found that such authority existed at least where it was reasonable to believe that the union would have gained majority support. *Id.* at 1390-91. This factor was part of the *United Dairy Farmers* test, but was not among the criteria approved for a *Gissel*-I order by the Board in *Conair.*

The D.C. Circuit had previously commented on the same issue in Teamsters Local 115 (Haddon House Food Prods.) v. NLRB, 640 F.2d 392 (D.C. Cir. 1981), *cert. denied,* 454 U.S. 837 (1982), indicating potential disagreement with the Third Circuit's opinion in *United Dairy Farmers,* 633 F.2d 1054, discussed *supra* note 128.

and produced yet another divided opinion on the scope of its remedial authority.

A three member majority concluded that the Board has no power to issue non-majority bargaining orders, but it produced two different opinions. The plurality opinion[133] said the the Board's remedial power is broad, but not unlimited, particularly "when its exercise would 'violate a fundamental premise on which the Act is based.' "[134] The fundamental premise at issue in *Gissel*-I orders, of course, is majority rule.[135] Member Dennis concurred in a short opinion in which she agreed that the Board had no power to issue *Gissel*-I orders, but adopted the reasoning of the D.C. Circuit in *Conair*.[136]

Even if the Board had statutory authority to issue non-majority orders, the plurality announced that it would not use them, claiming such action would diminish the Board's public stature as an impartial agency.[137] More importantly, the plurality opinion questioned whether a non-majority order could be an effective remedy. It noted that a minority union would lack "the leverage normally possessed by" elected unions in dealing with employers:

> To gain that leverage, employees may be called on to demonstrate active support for a representative in a far more open way than a secret-ballot election. Accordingly, in imposing a representative on employees, the Board may be changing only the sphere of employees' choice. And yet the Board can be no more certain that, in this new sphere of employee choice, employees can more freely exercise their choice without regard to any lingering effects of massive unfair labor practices than it can be if a new election is directed after the Board has applied traditional as well as appropriate extraordinary remedies.[138]

In dissent, Zimmerman said the plurality position was a "distortion of the principle of majority rule"[139] and claimed that failure to issue non-majority orders would permit employers "to engage in unlawful acts that are so coercive as to prevent majority support from ever developing,"[140] thus allowing them the fruits of their own misconduct. Zimmerman asserted that *Gissel*-I orders entail "only a minimal interim encroachment, if [any]

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133. Chairman Dotson and Member Hunter formed the plurality. *See Gourmet Foods,* 116 L.R.R.M. at 1105.

134. *Id.* at 1111 (quoting H.K. Porter Co. v. NLRB, 397 U.S. 99, 108 (1970)).

135. The importance of majority rule was discussed by the Board at some length. The Board read the legislative history to disclose a congressional intention to limit its authority to impose bargaining orders, except in those cases where the union once had a majority. *Gourmet Foods,* 116 L.R.R.M. at 1112-13. The plurality opinion also discounted the effect of Chief Justice Warren's dicta in *Gissel,* and adopted the rationale of Member Penello's dissenting opinion in *United Dairy Farmers,* 242 N.L.R.B. at 1038-40. 116 L.R.R.M. at 1111.

136. *Gourmet Foods,* 116 L.R.R.M. at 1116-17.

137. *Id.* at 1114.

138. *Id.*

139. *Id.* at 1118.

140. *Id.* To support his position, Zimmerman argued at some length that Chief Justice Warren's *Gissel* opinion is not ambiguous and, in fact, means that the Board has *Gissel*-I authority. *Id.* at 1118-19.

at all" on majoritarian principles.[141] Zimmerman claimed that the principle of "absolute" majoritarianism was endangered by Board presumptions in other areas and said that the risk to majority rule in *Gourmet Foods*[142] was outweighed by the need to create an environment in which free choice might prevail.[143]

Whatever the motives of the present Board, *Gourmet Foods* cannot be dismissed as merely another pro-management decision. The issues it raises are central both to the policy of the Act and to effective enforcement of that policy. No one doubts the importance of majority rule. The right to choose a labor organization as an exclusive representative for collective bargaining—the primary focus of the Act—is premised on the free choice of the majority, a principle the Board cannot flout merely because the remedial power in section 10(c) does not expressly refer to it.[144] Decisions that undermine majority rule, even though in pursuit of another legitimate purpose, must be viewed with considerable suspicion.

On the other hand, the efficacy of the Board's remedial power is a substantial concern. Although the Board has some discretion in fashioning remedies, it is limited to imposing corrective action after a violation. The typical remedy is a cease and desist order and, if appropriate, an order to reinstate improperly discharged employees.[145] But even those remedies are not self-executing; they depend for enforcement on the federal courts of appeals, which sometimes disagree with the scope of the order, particularly if the Board has fashioned a broader remedy than it usually does to deal with unusually egregious offenses.[146] The Board's limited remedial power, combined with its cumbersome enforcement procedures, produce real advantages for employers bent on avoiding collective bargaining. Employers can use unlawful tactics to resist unionization efforts with little to fear from the Board. Its remedies are not punitive and may not be enforced for a year

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141. *Id.* at 1119. Zimmerman also observed that, while the Act expressly refers to majority rule in several instances, none of those sections expressly limits the Board's remedial power under § 10(c), 29 U.S.C. § 160 (1982). 116 L.R.R.M. at 1119-20. He also read the legislative history to mean that "the principle of majority rule has been imposed on the Act as a limitation on coercion by employers and unions of employee rights to free choice and self-organization, not as an absolute limitation on the Board's ability to remedy such coercion." *Id.* at 1120.

142. For example, Zimmerman noted the irrebuttable presumption of majority status accompanying either a union election victory or voluntary recognition by the employer. *Gourmet Foods,* 116 L.R.R.M. at 1120.

143. Zimmerman argued that the majority's decision denied to the Board a remedial tool of great deterrent effect that would restore employee § 7 rights. *Id.* at 1121-22.

144. In dissent, Zimmerman argued that the Act's focus on majority rule did not necessarily limit the Board's remedial power. *Id.* at 1119-20.

145. A complete discussion of the Board's remedy power is beyond the scope of this article. For a more thorough discussion, see R. GORMAN, *supra* note 4, at 95-101, 138-42, 532-39. *See also* Bethel, *Profiting From Unfair Labor Practices: A Proposal to Regulate Management Representatives,* 79 NW. U.L. REV. 506, 554-61 (1984).

146. *See, e.g.,* A. COX, D. BOK & R. GORMAN, CASES AND MATERIALS ON LABOR LAW 252-57 (9th ed. 1981).

or more. During that time, the organizational effort may have sputtered, because of either employee intimidation or simply the protracted delay. In either event, the employer has profited from its unlawful conduct.[147]

The Board's trump card in these cases is the *Gissel* bargaining order. In theory, these orders not only effectuate employee rights, they also deter unlawful employer conduct. Until *Conair,* the Board had issued bargaining orders only after finding that the union once had majority support and that the employer's conduct undermined the union's strength. If both findings are accurate, the Act's majoritarian principles are not sacrificed. Even though the union's strength may have ebbed, it was the employer's coercive tactics—and not the employees' free choice—that made the difference. The *Gissel*-II order, in theory, merely restores the status quo. At the same time, it deters the unlawful practices of other employers who know that they do not have free rein to ignore employee section 7 rights. At some point, their coercive tactics will be serious enough to warrant a bargaining order, thus depriving them of the benefit of their coercive conduct.

The *Gissel*-I order carries the theory one stcp further. If the power to impose bargaining orders can reach employers who have destroyed a union majority, should it not also apply when an employer's coercive tactics prevent the union from ever reaching a majority? Stated differently—and more argumentatively—if employers understand that the Board can issue bargaining orders only when the union once had majority support, won't that knowledge prompt even more egregious conduct to ensure that the union never achieves a card majority? And, to carry the argument farther, won't that limitation on the Board's authority produce the anomaly of having encouragcd employer lawlessness which the Board is then powerless to remedy effectively? Assuming the validity of NLRB behavioral assumptions, the *Gissel*-I advocates make a strong case, at least in those instances where the union once had significant employee support.[148] Imposition of a bargaining order would, in theory, normalize relations by giving employees some collective strength against employer intimidation. The order deters outrageous employer conduct by denying the desired advantage. And, interference with majoritarian principles is slight since the union's representative status is not permanent. Once the coercive atmosphere generated by the employer has

147. *See, e.g.,* Bethel, *supra* note 145, at 606-13.

148. Although the Third Circuit relied on the extent of employee support in *United Dairy Farmers,* 633 F.2d at 1069 n.16, that factor was not among the criteria approved by the Board in *Conair.* The Board did note the probability that the union would have achieved a majority, but it said:

> We would not, however, necessarily withhold a bargaining order in the absence of a close election vote, a high majority percentage card showing, or any other affirmative showing of a reasonable basis for projecting a union's majority support. The critical predicate to issuance of a non-majority bargaining order is the Board's finding . . . that an employer's unlawful conduct fits the *Gissel* category 1 description.

Conair, 261 N.L.R.B. at 1194.

abated, employees can, if they choose, decertify the union in an NLRB election.

Both sides of the debate make compelling claims, and neither side necessarily depends on a professed bias for management or labor. Both sides do, however, depend on assumptions about the effect of employer campaigning on employee behavior and about the efficacy of remedial bargaining orders. Those assumptions are dubious enough when applied in support of *Gissel*-II orders. The use of the remedy should not be extended to embrace non-majority orders given the state of the Board's present knowledge.

B. Empirical Studies Completed

The most basic assumption underlying either the *Gissel*-I or *Gissel*-II order is that unlawful employer campaign practices deter employee support for the union. Although the assumption seems reasonable on its face, the only significant empirical evidence is to the contrary. In *Union Representation Elections: Law and Reality,*[149] Professors Getman and Goldberg studied thirty-one election campaigns that included both unlawful and lawful campaign tactics. The authors concluded that employees were generally inattentive to election campaigns and that the most common employer unfair labor practices (coercive speech, discriminatory discharge, interrogation, and promises of benefit) do not affect the way employees vote or their support for the union.[150] The authors also concluded that unlawful campaigning is no more effective than lawful campaigning (with neither mattering very much) and urged the Board to "deregulate" NLRB election campaigns.[151]

To say that Board response has been restrained greatly understates the fact. The Board has not addressed the study in any section 8(a)(3) cases, and has ignored it in most section 8(a)(1) cases. The sole exception is in campaign misrepresentation where, in two decisions, the majority and dissenting opinions debated the findings, although neither side appeared to understand them.[152] The Board has not confronted the study in its imposition of *Gissel* bargaining orders, prompting the conclusion that it has simply rejected it, albeit silently, in favor of its own unverified behavioral assumptions.

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149. J. GETMAN, S. GOLDBERG, J. HERMAN, UNION REPRESENTATION ELECTIONS: LAW AND REALITY (1976) [hereinafter cited as the Getman Study].

150. *Id.* at 109.

151. *Id.*

152. The Board first considered the Getman Study, *supra* note 149, in Shopping Kart Food Market, Inc., 228 N.L.R.B. 1311 (1977), and relied on it, in part to curtail its regulation of campaign misrepresentation. A little more than a year later, the Board reversed *Shopping Kart* in General Knit of California, Inc., 239 N.L.R.B. 619 (1978), with the members again disagreeing over the significance of the Getman Study. For criticism of the Board's treatment of the study, as well as a reaction to other criticism, see Goldberg, Getman & Brett, *Union Representation Elections: Law and Reality: The Authors Respond to the Critics,* 79 MICH. L. REV. 564 (1981).

In addition to the Getman study, another recent empirical project casts doubt on the validity of an important assumption underlying *Gissel.* The typical bargaining order is premised on the union's once having had majority status. The theory is that but for the employer's unlawful conduct, the union would have maintained its majority and won the election. The *Gissel*-II order, theoretically then, merely restores the status quo. In a recent article, Professor Laura Cooper studied 750 NLRB elections conducted between 1978 and 1980 to test empirically the validity of the assumption that a union obtaining authorization cards from a majority of the employees in a bargaining unit is likely to win an NLRB conducted election.[153] She concluded that a union with a bare majority of authorization cards (enough for a *Gissel*-II order) is actually more likely to *lose* an election than win it. In addition, even when union authorization cards are signed by 62.5 percent of the employees, the union still has only an even chance of winning the election.[154] Cooper's work obviously strikes at the heart of the *Gissel* order. Evidence that a union with a substantial card majority is more likely to lose than to win an election requires one to question the Board's assertion that the bargaining order merely restores the union's status. It also undermines the Board's claim that a *Gissel*-II order entails no sacrifice of majoritarian principles.

Not only does the work of Getman and Cooper cast doubt on the assumptions underlying *Gissel,* but many other commentators have criticized the Board's action.[155] The typical complaint is that the Board has never promulgated standards which indicate when an employer's conduct is serious enough to warrant a bargaining order.[156] Rather, the Board merely lists the employer's unfair labor practices and then recites a litany that the violations are or are not serious enough to warrant an order.[157] Even a cursory review of the cases confirms the validity of this criticism.[158] Given the Board's difficulty in making distinctions in *Gissel*-II cases, one must question whether

153. Cooper, *Authorization Cards and Union Representation Election Outcome: An Empirical Assessment of the Assumption Underlying the Supreme Court's Gissel Decision,* 79 NW. U.L. REV. 87 (1984).

154. *Id.* at 137.

155. *See, e.g.,* Note, *Representative Bargaining Orders: A Time for Change,* 67 CORNELL L. REV. 950, 958-63 (1982); Pogrebin, *NLRB Bargaining Orders Since Gissel: Wandering From a Landmark,* 46 ST. JOHN'S L. REV. 193, 201-07 (1971).

156. *See, e.g.,* Pogrebin, *supra* note 155, at 202-03.

157. *See, e.g.,* J.J. Newberry Co. v. NLRB, 645 F.2d 148 (2d Cir. 1981), where the court criticized the Board's *Gissel* policies, saying: "Rather than react in knee jerk fashion the Board must still analyze the nature of the misconduct . . . ." *Id.* at 153.

158. *Compare* C & T Mfg. Co., 233 N.L.R.B. 1430 (1977) (threat of plant closure warranted bargaining order) *with* Pardjiris Welmont Co., 196 N.L.R.B. 180 (1972) (several violations, including threat of plant closure did not warrant bargaining order). *See also* United Oil Mfg. Co., 254 N.L.R.B. 1320 (1981) (§ 8(a)(1) and § 8(a)(3) violations justified bargaining order because coercive effect increased in small unit); House of Cycle, Inc., 264 N.L.R.B. 1030 (1982) (§ 8(a)(1) and § 8(a)(3) violations did not warrant order, despite small bargaining unit).

it could further refine the process to embrace the more difficult conditions necessary for issuance of a *Gissel*-I order.

C. *The Unanswered Question*

Almost all of the criticism of *Gissel* to date has focused either on the circumstances that must exist *before* a bargaining order is issued or on the assumptions the Board uses to justify imposing an order. An equally pertinent inquiry, however, is what effect *Gissel* bargaining orders have, an issue raised by the Board for the first time in *Gourmet Foods*.[159] Unless bargaining orders are used merely to punish employers (a power the Board does not have), the Board must assume that the orders can lead to productive collective bargaining relationships that protect the rights and interests of employees. At the very least, the Board assumes that a *Gissel* bargaining relationship will reestablish conditions in which employees can exercise a free choice and that the employees can (and will) decertify the union if they do not desire representation.

In order to prove the validity of these assumptions, several questions must be answered. (1) Do bargaining order unions retain their majority status? If so, for how long? How does their experience compare to that of elected unions? (2) How do bargaining order unions lose their representative status? Decertification? Abandonment? Rival unions? How do their experiences compare to those of elected unions? (3) How much employee support do bargaining order unions enjoy? How does their support compare to their pre-election card-based strength? How do these results compare to the experience of elected unions? (4) How often are bargaining order unions successful in negotiating labor contracts with employers? How do key features of the agreements (i.e., wages, grievance-arbitration provisions, seniority) compare to those contracts negotiated by elected unions? (5) How do employees feel about having a bargaining agent thrust upon them? Do they understand what has happened? Do they understand that they have the right to decertify the union? How do employers (and their negotiators) view bargaining order unions? How do those attitudes compare to their view of elected unions?

This list of questions is not exhaustive. It does, however, point out a basic deficiency in the Board's knowledge. How can the NLRB justify imposing an order to bargain, with the resulting danger to majoritarian principles, when it knows nothing about the effect of its orders? How can it claim that *Gissel* orders prevent employers from profiting from their unfair labor practices? It may be that *Gissel* bargaining order unions, in fact, never bargain at all or, if they do, are so weak as to be virtually impotent. In that case, the *Gissel* order will have done little, if anything, to remedy the

159. *See supra* text accompanying note 138.

employer's unlawful conduct. Although much work remains to be done, the little empirical evidence that exists refutes the Board's image of *Gissel* as an effective means of restoring employee rights.[160]

Gourmet Foods, like *Conair* before it, produced opinions in which both sides discussed at length their unverified assumptions and what Chief Justice Warren *really* meant in *Gissel.* The time has come to stop arguing about that opinion. It does not answer the question and cannot. Given the existing empirical data generated thus far, and the many questions which abound concerning the effect of the Board's remedial policy, it is difficult to justify the use of *Gissel*-II bargaining orders. Until the Board learns something about the effect of its actions, it is foolhardy to expand the scope of the remedy. The principle of majority rule is too important to be overcome on the basis of conjecture. Only a systematic study of the effect of *Gissel* bargaining orders will justify Board expansion of that remedy to embrace minority unions.

III. Duty to Bargain

A. Otis Elevator

Since 1964, Board members have debated whether the effect of the Supreme Court's decision in *Fibreboard Paper Products Corp. v. NLRB*[161] is to require bargaining about such management decisions as complete or partial closings, relocations, mergers, automation, and the like.[162] In 1981, the Supreme Court reentered the fray, deciding in *First National Maintenance Corp. v. NLRB*[163] that a partial closing is not a mandatory subject for bargaining. Recently, in *Otis Elevator Co.,*[164] the Board fashioned a test designed to apply the holding of *First National Maintenance* to other kinds of business decisions. Although the four Board members do not agree on

160. In addition to the Cooper study, *supra* note 153, there have been three other attempts to test empirically the assumptions underlying the *Gissel* bargaining order. In Wolkinson, *The Remedial Efficacy of NLRB Remedies in Joy Silk Cases,* 55 Cornell L. Rev. 1 (1969), the author studied the success rate of bargaining order unions in obtaining contracts. He determined that in cases that would today warrant a *Gissel* order (the study preceded *Gissel*), the union settled a contract in 38% of its cases. In addition, in 1983 the AFL-CIO organizing department compared the success rate of its affiliated bargaining order unions to those affiliated unions achieving representative status through more traditional means. The results showed that bargaining order unions were successful only 28% of the time, compared to a 63% success rate for other unions. Letter from Charles McDonald to AFL-CIO National Organizing Committee (Feb. 18, 1983) (copy on file with author). Finally, in an unpublished study, O'Shea, *Gissel Bargaining Orders* (copy on file with author), the author conducted non-scientific study of bargaining order union success. She found that such unions achieve a contract only 37% of the time.

161. 379 U.S. 203 (1964).

162. *See, e.g.,* Ozark Trailers, Inc., 161 N.L.R.B. 561 (1966).

163. 452 U.S. 666 (1981).

164. 269 N.L.R.B. 891 (1984).

a common rationale, the effect of their action is to narrow considerably the decisions subject to mandatory collective bargaining.

In *Fibreboard,* the Court found that an employer's decision to subcontract maintenance work was a mandatory subject for bargaining, noting that the employer had done little more than substitute one group of employees for another and that the new employees would perform the same work under essentially the same conditions. The Court claimed that its decision interfered with no significant management perogatives because the company's basic operation was not altered and no capital investment was involved.[165] The Court, however, also justified its action with much broader language. It stated that the subcontracting decision necessarily terminated employment, therefore making it a "term and condition of employment" within the meaning of section 8(d) of the Act.[166] Moreover, the Court said that bargaining would effectuate the purposes of the Act, one of which was to "promote the peaceful settlement of industrial disputes. . . ."[167]

Although agreeing with the Court's decision, Justice Stewart wrote a concurring opinion in which he expressed concern that the Court's opinion was unnecessarily broad and would unduly expand the range of bargainable decisions.[168] Justice Stewart took pains to narrow the effect of the Court's opinion, using language that has become nearly as important as that used by the majority:

> Nothing the Court holds today should be understood as imposing a duty to bargain collectively regarding . . . managerial decisions, which lie at the core of entrepreneurial control. Decisions concerning the commitment of investment capital and the basic scope of enterprise are not in themselves primarily about conditions of employment, though the effect of the decision may be necessarily to terminate employment. If, as I think clear, the purpose of section 8(d) is to describe a limited area subject to the duty of collective bargaining, those management decisions which are fundamental to the basic direction of a corporate enterprise or which impinge only indirectly upon employment security should be excluded from that area.[169]

Following *Fibreboard,* the Board often issued decisions expanding considerably the obligation of management to bargain about matters traditionally

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165. *Fibreboard,* 379 U.S. at 213.

166. *Id.* at 210. In pertinent part, section 8(d), 29 U.S.C. § 158(d) (1982), defines the obligation to "bargain collectively" as the "mutual obligation of the employers and the representatives of the employees to meet at reasonable times and confer in good faith with respect to wages, hours, and other terms or conditions of employment . . . ." Similarly, section 9(a), 29 U.S.C. § 159(a), provides that a union selected by a majority of the employees is the "exclusive representative . . . for the purpose of collective bargaining in respect to rates of pay, wages, hours of employment, or other conditions of employment . . . ." The question raised by *Fibreboard* and similar cases is whether certain management decisions are "terms or conditions of employment" and therefore mandatory subjects of bargaining. For a more detailed review, see generally R. GORMAN, *supra* note 4, at 509-23.

167. *Fibreboard,* 379 U.S. at 210-11.

168. *Id.* at 218.

169. *Id.* at 223 (Stewart, J., concurring).

thought to be solely within its domain.[170] While the Board used the *Fibreboard* majority opinion to support those decisions, the courts of appeals adopted a more restrained approach, often finding support in Stewart's opinion.[171]

In *First National Maintenance,* the Supreme Court itself backed away from the broad language of the *Fibreboard* majority opinion. The Court noted that while the Board often makes decisions concerning mandatory bargaining subjects, most of the dispute under *Fibreboard* has revolved around management decisions that have a direct impact on employment, but that have as their principal focus the economic profitability of the employer.[172] In holding that an employer's decision to close part of its business was not bargainable, the Court adopted a new test:

> Management must be free from the constraints of the bargaining process to the extent essential for the running of a profitable business. It must also have some degree of certainty beforehand as to when it may proceed to reach decisions without fear of later evaluations labeling its conduct an unfair labor practice. . . . [I]n view of an employer's need for unencumbered decision making, bargaining over management decisions that have a substantial impact on the continued availability of employment should be required only if the benefit, for labor-management relations and the collective-bargaining process, outweighs the burden placed on the conduct of the business.[173]

In applying this test to partial closings, the Court tipped the scales in favor of management. It said that the union's sole interest was job security, which will ordinarily prompt it to delay or stop the closing. Although the Court noted that the union might be motivated to offer concessions, it concluded that decision bargaining would not "augment this flow of information and suggestions,"[174] finding it sufficient that employers might have incentive to seek such discussions in required "effects bargaining."[175]

On the other hand, management's interests were deemd "much more complex" and dependent on the particular circumstances of each case. Management, for example, might need speed, flexibility, or security, encounter tax or securities problems, or have no feasible alternative to its chosen course of action.[176] Although none of these factors were necessarily at issue in the case, the Court proceeded to adopt a virtual per se rule that "[t]he harm likely to be done to an employer's need to operate freely in deciding whether to shut down part of its business purely for economic reasons outweighs the

170. *See, e.g.,* Ozark Trailers, Inc., 161 N.L.R.B. 561 (1966). *See generally* R. GORMAN, *supra* note 4.

171. *See, e.g.,* International Union, UAW v. NLRB, 470 F.2d 422 (D.C. Cir. 1972). *See generally* R. GORMAN, *supra* note 4, at 162.

172. *First Nat'l Maintenance,* 452 U.S. at 677.

173. *Id.* at 679.

174. *Id.* at 681.

175. *Id.* at 681-82.

176. *Id.* at 682-83.

incremental benefit that might be gained through the union's participation in making the decision. . . ."[177] In short, the Court decided that employers were not required to bargain about decisions to close part of the business because such disputes are not "amenable to resolution through the bargaining process."[178] The Supreme Court noted that its decision resolved only the question of whether partial closings were bargainable:

> We, of course, intimate no view as to other types of management decisions, such as plant relocations, sales, other kinds of subcontracting, automation, etc., which are to be considered on their particular facts.[179]

The Board's initial reaction to *First National Maintenance* was resistance. In its first decision following the case, for example, the Board manipulated the facts and found the label placed on the transaction determinative.[180] Characterizing an employer's decision to terminate part of its business as subcontracting, the Board decided that *Fibreboard* required bargaining, although the same facts could just as easily have been viewed as a partial closing and therefore not bargainable under *First National Maintenance.*[181] Transparent as that decision seemed, however, it was not without precedent. Prior decisions of both the Board and the courts of appeals had turned on whether the transaction was characterized as subcontracting, relocating, or a partial closing[182] (bargainable, at least until *First National Maintenance*) or as a complete termination or sale (not bargainable).[183] Although not unanimous, the Board's recent decision in *Otis* apparently rejects a test based on labels and purports to resolve the question of which disputes are "amenable to the bargaining process" by focusing on the motivation for the decision.

At issue in *Otis* was the employer's decision to centralize its research and development facilities. The decision involved the transfer of seventeen employees represented by the UAW from Mahwah, New Jersey, to East Hartford, Connecticut. The Board found that the company had acted because

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177. *Id.* at 686.
178. *Id.* at 678.
179. *Id.* at 686 n.22.
180. *See* Bob's Big Boy Family Restaurants, Inc., 264 N.L.R.B. 1369 (1982).
181. The case involved an employer's decision to close its shrimp processing operation. The Board decided that the change was not a partial closing, because the employer continued to process other foods. *Id.* at 1371. Rather, the majority characterized the change as subcontracting (because the employer purchased processed shrimp from other businesses after eliminating its processing capability) which was bargainable under *Fibreboard. Id.* at 1371-72. It is clear, however, that the case did not involve the type of subcontracting at issue in *Fibreboard,* because in that case the Court noted that the subcontractor's employees would do the same work previously done by the terminated employees, in the same place, under essentially the same employment conditions. *Fibreboard,* 379 U.S. at 213.
182. *See, e.g.,* Ozark Trailers, Inc., 161 N.L.R.B. 561 (1966) (partial closing is bargainable); Kroneuberger, 206 N.L.R.B. 534 (1973) (subcontracting decision bargainable).
183. *See, e.g.,* International Union, UAW v. NLRB, 470 F.2d 422 (D.C. Cir. 1972) (sale not bargainable); NLRB v. Royal Plating & Polish Co., 350 F.2d 191 (3d Cir. 1965) (partial closing not bargainable).

the Mahwah facility was outdated and its work was duplicated elsewhere. Also, the company's technology had failed to keep pace, causing it to sell its products at a loss. As a part of the transfer, the company constructed a new 2.5 to 3.0 million dollar research center in East Hartford. The company hoped that the new facility would revitalize its research and development effort.[184]

The Board initially decided the case in 1981, before the Supreme Court's decision in *First National Maintenance.*[185] Rejecting employer claims that an order to bargain would significantly abridge its "freedom to invest its capital and manage its business,"[186] the Board said that the investment was not "the type of shift of assets we have found to be outside the scope of mandatory subjects for bargaining" and concluded that there was no "basic capital reorganization."[187] Although it did not decide the case expressly on the basis of the transaction label, the Board's analysis was similar to cases that had. It quoted from a previous case that had held a transaction bargainable because it did not involve a "termination, relocation, liquidation," a sale or a "significant" capital transaction.[188] The Board did not explain why the employer's consolidation of its research facility and its $2.5 to $3 million expenditure was not a significant capital investment, although it conceded that such a sum was a "fairly large amount" of money. It seemed most concerned that there had been neither a conveyance of assets nor a termination of activities.[189]

The Board's recent decision in *Otis* resulted from a remand by the court of appeals to reconsider the case in light of *First National Maintenance.* The four members produced three opinions. Chairman Dotson and Member Hunter asserted that the "critical factor" in determining whether a management decision is bargainable is the "essence of the decision itself."[190] They argued that the effect on the employees is not conclusive (thereby implicitly rejecting the broad rationale of *Fibreboard*), but that the determinative question is whether the decision is a "change in the nature or direction of the business or turns on labor costs."[191] Only decisions which are motivated principally by management's desire to reduce the cost of labor are bargainable.

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184. *Otis,* 269 N.L.R.B. at 892.

185. The prior opinion is reported at 255 N.L.R.B. 235 (1981). The Board asked the D.C. Circuit to remand the case for reconsideration. *Otis,* 269 N.L.R.B. at 891.

186. *Otis (I),* 255 N.L.R.B. at 236.

187. *Id.*

188. *Id.* (quoting International Harvester Co., 236 N.L.R.B. 712 (1978)).

189. The Board wrote: "Respondent has not . . . undergone a basic capital reorganization whereby it has conveyed any portion of its assets or operations to some other entity. Nor is there evidence that Respondent has terminated any of its holdings in achieving its objectives." 255 N.L.R.B. at 236.

190. *Otis,* 269 N.L.R.B. at 892.

191. *Id.* The plurality placed particular emphasis on the rationale of Justice Stewart's concurring opinion in *Fibreboard,* quoted in part *supra* text accompanying note 169.

In a concurring opinion, Member Zimmerman agreed that the decision to relocate Otis' research facilities was not bargainable. His statement of the test, however, was broader than that of Dotson and Hunter: "I will find bargaining over an employer's decision to relocate work to be mandatory when the decision is amenable to resolution through the collective bargaining process."[192] Whether that test is met depends on an analysis of the employer's reseasons for its action. A decision based on the efficiency criteria in *Otis* is not bargainable because the union could not reasonably expect to offer concessions that would meet the employer's needs. A decision motivated by labor costs, on the other hand, *is* amenable to resolution through collective bargaining because the union can offer concessions to alleviate the problem.[193] Unlike Dotson and Hunter, however, Zimmerman did not limit his decision to labor costs: "A decision may be amenable to resolution through bargaining where the employer's decision is related to overall enterprise costs not limited specifically to labor costs."[194] In those situations, presumably the union might be able to offer cost savings that would alleviate an employer's financial problems. Member Dennis concurred in the result, but adopted a test based on her reading of *First National Maintenance.*[195]

Although Dotson, Hunter and Zimmerman agree on the result in *Otis,* and although the tests they apply are similar, there are significant differences. In addition to their narrower interpretation of "amenability," Dotson and Hunter venture far beyond the facts of *Otis.* Relying on the language quoted above from *First National Maintenance* and on Justice Stewart's concurring opinion in *Fibreboard,* they "hold" that there is no obligation to bargain about decisions that "affect the scope, direction, or nature of the business," including:

> [d]ecisions to sell a business or a part thereof, to dispose of its assets, to restructure or to consolidate operations, to subcontract, to invest in labor-saving machinery, to change the methods of finance or of sales, advertising, product design, and all other decisions akin to the foregoing.[196]

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192. *Otis,* 269 N.L.R.B. at 900.

193. *Id.*

194. *Id.* at 900-01.

195. The longest opinion was produced by Member Dennis, who expressly rejected the Dotson-Hunter approach and relied on her own analysis of *First National Maintenance* which she reviewed in considerable detail. *Id.* at 895-900. Dennis fashioned a two-part test. First, like her colleagues, she asked whether the decision is amenable to resolution through the collective bargaining process. The answer, she said, depends on whether some factor over which the union has control is "a significant consideration" in the decision, a criterion which is met if some union concession could make a difference to the employer's decision. If the answer is no, bargaining is not required. *Id.* at 897. Thus far, the test appears identical to that proposed by Zimmerman, and therefore similar to the Dotson-Hunter formulation. If the answer is yes, however, Dennis carries the analysis a step farther and weighs the "benefit" of bargaining against the "burden" that such negotiations would place on the conduet of the business. *Id.*

196. *Id.* at 893 n.5.

What is bargainable are those decisions that turn on "direct modification of labor costs." It is that single inquiry which is crucial, and not whether the transaction is characterized as "subcontracting, reorganization, eonsolidation, or relocation. . . ."[197]

This plurality "holding" creates some confusion. On one hand, the plurality asserts that the reason for a decision, not the label applied to a transaction, settles the bargaining issue. At the same time, however, the opinion lists a number of transactions that are excludable from bargaining because they affect the direction of the business. Presumably, the list merely includes transactions in which the motive may have been (or typically would be) other than to save labor costs. For example, subcontracting and consolidations are included in the list, but are also mentioned as situations where bargaining can be required if the decision turns on labor costs. The opinion is not clear, however, because the list of nonbargainable transactions includes matters such as advertising and methods of financing or sales which are universally agreed to be management prerogatives beyond the pale of collective bargaining.[198] It seems unlikely that those decisions would ever be bargainable, thereby creating the inference that all of the decisions on the plurality's list are non-bargainable. However, because Dotson and Hunter profess to be guided by analysis rather than labels, at least *some* of the decisions they list appear to be bargainable if they are motivated by labor costs, although it is not clear which ones.

The plurality opinion is also narrower than it may first appear. Dotson and Hunter believe decisions are bargainable if they "turn on" labor costs. That criterion is not satisfied if labor costs are merely one factor in the decision. The opinion recognizes that "these decisions do not fit neatly into categories" and that labor costs may merely be among the considerations that motivate management decisions.[199] Noting that in *First National Maintenance* the Court said "if labor costs are an important factor . . . management will have an incentive to confer voluntarily with the union to seek concessions" during effects bargaining, the plurality said, "[w]e discern no substantial reason why this analysis is not equally applicable to other decision[s] which turn upon a significant change in the nature or direction of a business."[200] Although not free from ambiguity, this statement appears to mean that if labor costs are merely among the concerns prompting a managerial decision, discussion of them is voluntary, undertaken in effects bargaining. However, if the decision actually "turns on" labor costs (apparently

197. *Id.*

198. *See, e.g., First National Maintenance,* 452 U.S. at 676-77, where, in discussing the range of bargainable decisions, the Court said: "[S]ome management decisions, such as choice of advertising, product type or design, and financing arrangement, have only an indirect and attenuated impact on the employment relationship."

199. *Otis,* 269 N.L.R.B. at 894.

200. *Id.*

to the exclusion of other considerations), it is amenable to the bargaining process and is therefore a mandatory subject for bargaining.[201]

Although the case has not received a warm reception from labor,[202] the actual holding in *Otis* is not unreasonable. The test adopted by the Supreme Court in *First National Maintenance* is whether management's decisions are amenable to the bargaining process. As all four members of the Board concluded, given the employer's motivation in *Otis,* bargaining was unlikely to have produced a compromise. The factors prompting the decision were beyond the control, or even the influence, of the union. *Otis,* however, is not free from controversy. The plurality's interpretation that managerial decisions are amenable to the bargaining process only if they depend almost exclusively on labor costs is much too narrow. An employer might be motivated to relocate a plant, consolidate operations, or purchase labor saving machinery because of production inefficiencies unrelated to the actual cost of labor. All the unions ask is the opportunity to explore with management the possibility of concessions or other contract modifications that might ease the employer's financial problems and change, or at least postpone, a decision that eliminates jobs. Although such matters *can* be discussed in effects bargaining,[203] the option rests with the employer and, in any event, the union's opportunity to affect the decision might be lessened significantly after it has been made and implementation begun.

As a practical matter, one must also question whether the plurality test will often result in an order to bargain. As previously noted, bargaining is necessary only in those situations where labor costs are the primary motivation of management. Little imagination is required to characterize a decision as depending on factors other than, or in addition to, labor costs. Any consolidation of operations, for example, can be cast as a decision designed to promote management efficiency or to effect cost savings unrelated to actual labor costs. In such cases, even if labor costs are one factor, the decision becomes a permissive bargaining subject. Ironically, then, the *Otis* opinion purportedly avoids the manipulation of transaction labels to create a bargaining obligation but creates the opportunity to achieve the same result by manipulating motive.[204]

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201. Zimmerman did not expressly enter the debate about application of his test to other transactions. He merely concluded that the employer's decision to "relocate work" was bargainable. *Id.* at 900. In theory, however, his test would apply to other transactions that are motivated by cost savings and that affect the employment security of employees.

202. *See, e.g.,* Logothetis, *Summary of Recent Significance Decisions of the National Labor Relations Board: The Union Perspective,* 1984 Course Manual, Midwest Labor Law Conference (copy on file with author).

203. Even if employers are not required to bargain about business decisions, the Board has interpreted the Act to require bargaining over the effect of these decisions on employees. *See First National Maintenance,* 452 U.S. at 681 ("There is no dispute that the union must be given a significant opportunity to bargain about these matters of job security as part of the 'effects' bargaining mandated by § 8(a)(5)").

204. Interestingly, Dotson and Hunter joined the majority opinion in *Milwaukee Springs (II),* 268 N.L.R.B. 601 (1984), which predicted that if employers were prohibited from midterm relocations of work when based on labor costs, they would be unlikely to admit that such costs were part of their motivation. *Id.* at 605. It is hard to understand why employers would be more likely to admit that labor costs prompted a decision when the consequence will be an obligation to bargain.

The test proposed by Zimmerman is better designed to accommodate the interests of both employees and employers. It recognizes that union concessions might satisfy the financial concerns of management, even if labor costs did not precipitate the problem. Zimmerman's test is also harder to evade—it is more difficult to disguise a decision based on cost than it is to attribute the cost problem to some factor other than, or in addition to, labor. Finally, Zimmerman's test accommodates the concern for certainty voiced by the Court in *First National Maintenance.* Either decisions are motivated by cost or they are not. If they are, the bargaining obligation is as readily apparent under Zimmerman's test as under the test promulgated by the plurality.[205]

B. Milwaukee Springs

As was true with *Otis,* the Board's decision in *Milwaukee Springs Division of Illinois Coil Spring Co. (Milwaukee Springs (II))*[206] reversed a previous decision issued in the same case.[207] The employer's only unionized division (Milwaukee) was party to a contract with the United Auto Workers (UAW) from April, 1980 until March, 1983. In early 1982, the employer asked the union to give up a wage increase scheduled for April and to make certain other concessions. By March, the employer's financial condition had worsened, due in part to the loss of a major customer. At that time, the employer proposed transferring its Milwaukee assembly operation to a nonunion facility in McHenry, Illinois, a move that would affect approximately one third of the bargaining unit employees. Alternatively, the employer proposed a document entitled "terms upon which Milwaukee assembly operations will be retained in Milwaukee," detailing significant wage and benefit cuts. The union refused to make any concessions, and the company announced its decision to relocate.[208]

The parties stipulated that the employer's decision was not motivated by anti-union animus, but rather was prompted solely by comparatively higher labor costs under the collective bargaining agreement. They also stipulated that the employer had satisfied its obligation to bargain over the decision and was willing to bargain over the effects of the decision.[209]

In 1982, a three-member Board panel, including an early Reagan appointee, decided that the employer's transfer of work during the term of the contract violated sections 8(a)(1), 8(a)(3) and 8(a)(5). The principal holding was the section 8(a)(5) violation, which was premised on the Board's

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205. For the General Counsel's interpretation of *Otis,* see Office of the General Counsel Memorandum GC-12 (June 14, 1984) 116 LAB. REL. REP. 186 (July 9, 1984).

206. 268 N.L.R.B. 601 (1984) (supplementing 265 N.L.R.B. 206).

207. The first opinion, *Milwaukee Springs (I),* is reported at 265 N.L.R.B. 206 (1982). As was true in *Otis,* the court of appeals remanded the case at the Board's request. *Milwaukee Springs (II),* 268 N.L.R.B. at 601.

208. *Milwaukee Springs (II),* 268 N.L.R.B. at 601.

209. *Id.*

conclusion that the employer had unlawfully modified the collective bargaining agreement contrary to the terms and policy of section 8(d).[210] That section of the Act defines the duty to bargain in good faith and provides, in part:

> The duties so imposed shall not be construed as requiring either party to discuss or agree to any modification of the terms and conditions contained in a contract for a fixed period, if such modification is to become effective before such terms and conditions can be reopened under the provisions of the contract.[211]

Under section 8(d), the Board has held unilateral midterm modifications of provisions "contained in" a contract to be unlawful, even though the employer has offered to bargain about the change and even though the parties have actually bargained to impasse.[212]

The Board found such an unlawful modification in *Milwaukee Springs (I),* although it did not specify exactly which term "contained in" the contract had been modified. The inference is strong, however, that the Board viewed the case as a modification of the contract's wage schedules since it noted that the collective bargaining agreement had not expired and that the employer was motivated to act because of higher wage levels in Milwaukee than in McHenry.[213] The Board also relied on *Los Angeles Marine Hardware Co.,*[214] where, as in *Milwaukee Springs,* the employer had relocated operations from a unionized plant to a nonunionized plant for economic reasons during the term of the contract.

In *Los Angeles Marine,* the Board upheld the decision of an administrative law judge finding the relocation to violate the policy of section 8(d) and, therefore, the terms of section 8(a)(5). Concluding that section 8(d) does not permit an employer to "in effect, tear up"[215] a contract that has proved unprofitable, the ALJ said, in part:

> This mandate [of section 8(d)] is not excused either by subjective good faith or by the economic necessity of maintaining viability of an em-

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210. 29 U.S.C. § 158(d) (1982). Although the Board also found a violation of § 8(a)(3), it reasoned that the employer's violation of § 8(a)(5) was inherently destructive of employee rights and therefore, under the rationale of NLRB v. Great Dane Trailers, Inc., 388 U.S. 26 (1967), violated § 8(a)(3) as well. *Milwaukee Springs (I),* 265 N.L.R.B. at 208. The § 8(a)(3) violation, then, depended on the Board's conclusion that the employer's transfer of work also violated § 8(a)(5).

211. 29 U.S.C. § 158(d) (1982).

212. *See, e.g.,* Oakcliff-Golman Baking Co., 207 N.L.R.B. 1063, 1064 (1973), *enforced,* 505 F.2d 1302 (5th Cir. 1974), *cert. denied,* 423 U.S. 826 (1975); C & S Industries, Inc., 158 N.L.R.B. 454 (1966); Boeing Co., 230 N.L.R.B. 696 (1977).

Although employers are required to bargain about "wages, hours, and other terms and conditions of employment," section 8(d) (the mandatory bargaining subjects), the bargaining requirement is satisfied if the employer, in good faith, negotiates to impass. Stated differently, employers are free to act unilaterally with respect to mandatory bargaining subjects if they first bargain to impasse. *See generally* R. GORMAN, *supra* note 4, at 445-50.

213. *Milwaukee Springs (I),* 265 N.L.R.B. at 208-09.

214. 235 N.L.R.B. at 720 (1978), *enforced,* 602 F.2d 1302 (9th Cir. 1979).

215. 235 N.L.R.B. at 737.

> ployer's operation and perserving the jobs of the employees in the bargaining unit. . . . [A]n employer is not free, without union consent, to make midterm modifications in wage rates . . . nor to replace all unit employees. . . . [T]o permit relocation alone to vary this result would mean that employers would be permitted to achieve by indirection that which [they are] denied the opportunity to achieve by direct means. . . .[216]

The Board found this same analysis controlling in *Milwaukee Springs (I).*[217]

In addition, the Board rejected the employer's contentions that the union had waived its right to object to the move, or that the employer was free to relocate (after bargaining) where such action was not expressly prohibited by the contract.[218] The Board noted that contractual waivers must appear in clear and unmistakable terms,[219] a requirement it found lacking. Neither the management's rights clause (which the Board called a "general reservation" of rights to decide "whether, and how, its product will be manufactured") nor the recognition clause (which recognized the union as representative of employees located at a particular address in Milwaukee) were sufficient to constitute a valid waiver.[220] Interestingly, the Board discounted the effect of the recognition clause, saying that it was merely descriptive of the employer's location at the time the contract was executed. It did not, as the employer contended, mean that the contract terms bound the employer only if it decided to remain in Milwaukee; and, therefore, was not a waiver of the union's right to object to the move.[221]

In August, 1983, following oral argument before the Seventh Circuit, the Board asked the court to remand the case for reconsideration. Given its request for remand and the significant change in membership, the Board's reversal of position in *Milwaukee Springs (II)* was no surprise.

The majority (comprised of all three Reagan appointees) focused on the precise language of section 8(d) which prohibits unilateral modification during the contract term of specific provisions "contained in" the contract. It also observed that a party may demand negotiations over a mandatory bargaining subject not "contained in" the contract and may even act unilaterally once the bargaining obligation has been satisfied. Applying those principles, the Board criticized *Milwaukee Springs (I)* for never identifying which specific term "contained in" the contract the employer had changed.[222] The majority said that the employer had not changed the wage provisions even though it had proposed modifications. When the union refused to bargain, the employer simply abandoned its wage proposals and transferred the work elsewhere, leaving the wage and benefit levels at Milwaukee un-

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216. *Id.* at 735.
217. 265 N.L.R.B. at 208.
218. *Id.* at 209-10.
219. *Id.* at 209. Concerning contractual waiver of § 7 rights, see Timken Roller Bearing Co. v. NLRB, 325 F.2d 746 (6th Cir. 1963), *cert. denied,* 376 U.S. 971 (1964).
220. *Milwaukee Springs (I),* 265 N.L.R.B. at 209-10.
221. *Id.* at 210.
222. *Milwaukee Springs (II),* 268 N.L.R.B. at 602.

disturbed.[223] Nor did the employer's action modify the recognition clause, which could not be interpreted to mean that the work performed by the Milwaukee unit had to remain in Milwaukee.[224] The only contract provisions that could have been modified unilaterally by the employer's action was a work preservation clause requiring that the assembly operations remain in Milwaukee, a requirement for which the majority said it searched "in vain."[225]

The lack of a work preservation clause (which the majority refused to imply from the mere existence of a wage scale) not only absolved the employer of any charge of unilateral modification of a term "contained in" the contract. Since there was no contract term forbidding relocation, the agreement did not waive the parties' obligation to bargain about any such proposal.[226] Thus, the employer was permitted to propose relocation, bargain to impasse, and then unilaterally move the work to another facility.[227] Not only was this result supported by case law, said the Board, but it was also consistent with the policy of the National Labor Relations Act favoring resolution of disputes by collective bargaining.[228] Calling *Milwaukee Springs (I)* a "radical departure" from the Board's previous approach to collective bargaining, two members charged that the decision had added a term to the contract without agreement from the parties and had foreclosed "the exercise of rational economic discussion" which would benefit both labor and management.[229]

The majority also overruled *Los Angeles Marine,* noting that the employer had not achieved by indirection what it could not do directly, but had done "directly and lawfully what can be done directly."[230] The majority said that *Los Angeles Marine* had actually been based on a misreading of a previous case that had dealt not with work relocations but with reassignments.[231] Two members, however, said that both relocations and reassignments should be treated the same:

> [U]nless transfers are specifically prohibited by the bargaining agreement, an employer is free to transfer work out of the bargaining unit if: (1) the employer complies with *Fibreboard Paper Products v. NLRB* . . . by bargaining in good faith to impasse; and (2) the employer is not motivated by anti-union animus. . . .[232]

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223. *Id.* at 602.
224. *Id.*
225. *Id.*
226. *Id.* at 603.
227. *Id.* at 604.
228. *Id.* at 603.
229. *Id.* Member Dennis declined to join this part of the opinion, leaving Dotson and Hunter as the plurality. *Id.* at 603 n.11.
230. *Id.* at 604 n.13.
231. The majority referred to University of Chicago, 210 N.L.R.B. 190, *enforcement denied,* 514 F.2d 942 (7th Cir. 1975), which had been relied on in *Los Angeles Marine. Milwaukee Springs (II),* 268 N.L.R.B. at 604.
232. *Milwaukee Springs (II),* 268 N.L.R.B. at 604. Member Hunter did not join this analysis, although he did agree that *Los Angeles Marine* should be overruled. *Id.* at 604 n.14.

Finally, the majority claimed that its decision would promote "realistic and meaningful collective bargaining." It asserted that *Milwaukee Springs (I),* which prohibited mid-term relocations based on labor costs, would encourage employers to conceal the reason for their action as a way of escaping the contours of the decision.[233] Interestingly, the same Board members decided *Otis,* which mandates bargaining over certain decisions (including relocations) *only* if prompted by labor costs, without mentioning the likelihood that employers might conceal their motive.[234] Nonetheless, the Board said that its new decision would give employers incentive to disclose both their intentions and their true motive, thereby making it more likely that real concession bargaining could occur.[235]

More than half of Zimmerman's dissenting opinion explains his reason for holding the employer's relocation decision to be a mandatory subject for bargaining, a requirement assumed by the majority.[236] Although he found such decisions bargainable, Zimmerman said that when an employer's motives are economic, it can relocate during the contract term only with union consent. Zimmerman's rationale echoed the Board's analysis in *Los Angeles Marine.* Thus, he concluded that an employer could not lawfully change a wage rate during the contract term without the union's consent, even if the parties had bargained on the matter to impasse. However, "respondent's decision to relocate the assembly work . . . would achieve the same result, albeit indirectly: its employees would continue to perform the assembly work but at reduced wage rates."[237] Zimmerman argued that having voluntarily agreed to pay a specified wage rate for assembly workers during a specified term, the employer could not avoid that obligation either by unilaterally reducing the wage or relocating the work. He scoffed at the majority's assertion that the employer had not disturbed the assembly wage rates in Milwaukee, observing that because there were no longer any assembly employees there, the matter was "without legal significance."[238]

Zimmerman also denied the majority's charge that the effect of his decision would be to imply a work preservation clause in all contracts. Zimmerman argued that section 8(d) prohibited unilateral mid-term work relocations only when the employer's motive was to avoid a contractual term, such as the wage schedule.[239] Work preservation clauses, on the other hand, would

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233. *Id.* at 605.

234. *See supra* note 204.

235. *Milwaukee Springs (II),* 268 N.L.R.B. at 605.

236. *Id.* at 605-09. *Milwaukee Springs (II)* was decided before *Otis Elevator.* The majority found it unnecessary to reach the issue of whether the relocation was a mandatory bargaining subject, relying instead on the parties' stipulation on the issue. *Id.* at 601 n.5.

237. *Id.* at 610.

238. *Id.* at 611.

239. Moreover, Zimmerman said that the mere fact that the employer's reasons for a work transfer are economic does not necessarily mean that the employer was motivated to avoid a contract term. Only if the motivation is contract avoidance is the employer prohibited from unilateral action under Zimmerman's analysis. *Id.* at 611 n.19.

prohibit the transfer of work for *any* reason during the term of the contract. However, Zimmerman agreed with his colleagues that a mid-term relocation did not violate a recognition clause, which he viewed as merely a description of the physical location of the employer's plant.[240] Finally, Zimmerman denied that his approach would encourage employers to disguise their motives. He speculated that employers would bargain willingly, as the employer had done in *Milwaukee Springs,* in order to achieve concessions. However, even if the majority's prediction is correct, Zimmerman said that section 8(d) prohibits unilateral mid-term relocation and "the Board may not undermine the statutory scheme merely because some violators of the Act may not be brought to justice."[241]

Each of the opinions in *Milwaukee Springs* appears to have been influenced by a different characterization of the facts. From the union's standpoint, there is no obligation to bargain about contractual wage rates during the contract term. Nor can management unilaterally impose wage cuts. A relocation of work that accomplishes the same thing, therefore, violates the policy of section 8(d). The majority, however, characterized the case not as an attempt by management to force bargaining over wage rates, but as a proposal to relocate certain work. Because there is no contract clause prohibiting a relocation and because such matters are bargainable if based on labor costs, the employer *can* force bargaining during the contract term and, failing agreement with the union, can unilaterally implement its decision.

Although the majority's syllogism appears unassailable, its underlying premise is specious. The facts do not justify the conclusion that the employer merely exercised its right to force bargaining and then acted unilaterally over a subject not "contained in" the contract. Management did propose a relocation, a matter not "contained in" the collective bargaining agreement. However, management did not desire to relocate merely for the sake of efficiency or for some other reason over which it had retained entrepreneurial control. It stipulated that its sole motivation was avoidance of the contractual wage rates, a matter over which it did not have unilateral control or entrepreneurial freedom. The proposed relocation, then, was a bargaining chip played against the union and, ultimately, cashed in. The employer proposed the relocation in an effort to force contract wage concessions from the union and, after the negotiations failed, it implemented the proposal. Merely characterizing management's action as a proposal over a matter not "contained in" the contract obscures what actually happened.

Even the majority opinion concedes that no party to a collective bargaining agreement need bargain during the contract term over any mandatory bargaining subject contained in the contract. The union, then, was free to reject

240. *Id.* at 611.

241. *Id.* at 612. If the employer's reasons are both related to and unrelated to contract avoidance, Zimmerman would find a violation only if the contract avoidance reasons are dominant. *Id.* at 612 n.21.

any discussion of wage concessions without fear of violating either section 8(d) or section 8(b)(3). Moreover, while management had the right to suggest voluntary negotiation, it had no right to force the union into wage negotiations.[242] However, that is exactly what it did. Recognizing that it could not force renegotiation of wages, the employer proposed a relocation based on economic concerns. The union's only means to dissuade the employer from its proposal was to modify wages, thus requiring it to discuss a subject "contained in" the contract, the same discussion the employer had been unable to force directly.

The Board's myopic view of the facts obscured the real issue. Rather than having asked what "specific term" the employer modified, the majority should have considered the motive of the employer in proposing the relocation. Although the employer did not "change" the terms of the contract at the Milwaukee plant, it used the threatened relocation to force the union to bargain over proposed concessions. After not being able to achieve success in those negotiations, the employer moved. Because the move was motivated by union invocation of its right to refuse negotiations, there is no clearer example of a violation of the policy of section 8(d). Although the majority's decision in *Milwaukee Springs (I)* rested on some erroneous arguments, its result was clearly correct. The Board's retreat in *Milwaukee Springs (II)* undermines the stability of contracts by giving employers the unfettered right to force mid-term contract renegotiations.

IV. DISTRIBUTION AND SOLICITATION

Our Way, Inc.

Among the other recent decisions reversing prior Board doctrine is *Our Way, Inc.*,[243] a case which presents a peculiar anomaly. All four members of the Board agree that employees have the right to distribute union literature and engage in union solicitation during non-work periods such as break or mealtime.[244] What they disagree about is how to inform the employees of these rights.

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242. On the issue of the duty to bargain during the contract term, see generally R. GORMAN, *supra* note 4, at 455-66.

243. 268 N.L.R.B. 394 (1983).

244. Detailed discussion of the Board's distribution and solicitation rules are beyond the scope of this Article. For a thorough review, see R. GORMAN, *supra* note 4, at 179-94. *See also* Republic Aviation Corp. v. NLRB, 324 U.S. 793 (1945); Peyton Packing Co., 49 N.L.R.B. 828 (1943).

Employers often promulgate rules providing that employees may not solicit each other or distribute literature on working time or during working hours.[245] In 1974, the Board said, in *Essex International, Inc.*,[246] that rules that restrict solicitation and distribution during "working hours" are presumptively invalid, while rules that apply similar restrictions during "working time" are presumptively valid.[247] The Board's rationale was that "working hours" connotes all the hours in the workday, but that employees would understand "working time" to mean only those periods when they were actually engaged in duties, and to exclude such non-work time as meals and breaks.[248] In 1981, however, the Board overruled *Essex International* in *TRW, Inc.*,[249] saying that there was "no inherent meaningful distinction" between the two terms and that both, without more explanation, were ambiguous and susceptible to misinterpretation by the employees.[250] In order to promulgate a valid rule, the Board said employers needed "a clear statement that the restriction on organizational activity contained in the rule does not apply during break periods, meal periods, or other specified periods during the workday when employees are properly not engaged in performing their work tasks."[251]

In *Our Way,* the Board overruled *TRW* and returned to the standard of *Essex International.* The Board criticized *TRW* as inconsistent with a long line of precedent preserving the distinction between "working time" and "working hours," which had been understood and relied on by unions and employers in fashioning workplace rules. The Board concluded that the rationale of *TRW* was not "compelling" and that the primary effect of the case had been "a string of nonproductive litigation."[252] Member Zimmerman

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245. In *Our Way,* for example, the employer had rules that provided:

> [T]he following are *prohibited:* . . . Soliciting . . . for any purpose during the working time of the soliciting employee or the working time of the employee being solicitated.

and:

> SOLICITATION/DISTRIBUTION—In order to prevent disruption in the operation of the plant, interference with work and inconvenience to other employees, solicitation for any cause, or distribution of literature of any kind, during working time, is not permitted. Neither may an employee who is not on working time, such as an employee who is on lunch or on break, solicit an employee who is on working time for any cause or distribute literature of any kind to that person.

268 N.L.R.B. at 394.

246. 211 N.L.R.B. 749 (1974).

247. *Id.* at 750. The presumption of invalidity could be overcome if the employer could show that the rule was "communicated or applied in such a way as to convey an intent clearly to permit solicitation during breaktime or other periods when employees are not actively at work." *Id.*

248. *Id.*

249. 257 N.L.R.B. 442 (1981).

250. *Id.* at 443.

251. *Id.*

252. *Our Way,* 268 N.L.R.B. at 395.

dissented, saying that his colleagues were engaged in "the folly of attempting to draw useful distinctions between terms of equal ambiguity."[253]

Although *Our Way* does not change the substantive rights of employees (and is therefore probably less important than the Board's other recent cases) it displays the difficulty of resolving behavioral issues in litigation. Neither *Our Way* nor *TRW* is necessarily wrong. Whether the concept of "working time" needs to be explained to employees, and whether they can differentiate it from "working hours," is something the Board does not know and will not learn through a case-by-case approach. Unfortunately, the Board has shown a complete disdain for resolving behavioral issues based on anything but its own "experience," which certainly does not include talking to employees about their perception of employer rules.

Although former member Pennello once chastised his colleagues for treating employees like "retarded children,"[254] if the Board insists on deciding cases based on its own behavioral assumptions, there is little reason for it to assume that employees distinguish between "working time" and "working hours." The Board has simply repeated its argument so many times that it has convinced *itself* that the distinction has merit. It also may have caused employers to promulgate rules in reliance on the distinction. What employers think the Board means, however, is not the issue. The real question, left unanswered in *Our Way,* is why employees, unfamiliar with Board vacillation, will interpret a rule denying them the right to engage in concerted activity during "working time" to exclude breaks and meal periods. The standard of *TRW,* calculated only to resolve a possible ambiguity, ensures that employees understand their rights and poses no significant burden to employers who can easily modify their rules. The Board's retreat from *TRW,* based on its unverified assumptions about employee perception, was unwarranted.

V. CONSTRUCTIVE CONCERTED ACTIVITY

Meyers Industries

One of the more significant cases decided by the NLRB during the past year was *Meyers Industries,*[255] which narrowed considerably the Board's view of concerted activity. At issue in *Meyers* was constructive concerted activity,

253. *Id.* at 397.

254. "I submit that under the guise of maintaining laboratory conditions we are treating employees not like mature individuals capable of . . . making their own choices but as retarded children who need to be protected at all costs." Medical Ancillary Services, 212 N.L.R.B. 582, 585 (1974) (Penello, dissenting).

255. 268 N.L.R.B. 493 (1984). For a more detailed review of the issues raised by *Meyers,* see Bethel, *Constructive Concerted Activity Under the NLRA: Conflicting Signals From the Court and the Board,* 59 IND. L.J. 583 (1985). *See also* Gorman & Finkin, *The Individual and the Requirement of Concert Under the National Labor Relations Act,* 130 U. PA. L. REV. 286 (1981).

the Board's label for activity engaged in by one employee that nonetheless satisfies section 7's requirement of concert.[256] Interestingly, at about the same time the Board abandoned one form of constructive concerted activity in *Meyers,* the Supreme Court approved another form in *NLRB v. City Disposal Systems, Inc.*[257] In *City Disposal* the Court said that action by a single employee to enforce or claim the protection of a collective bargaining agreement is concerted activity and therefore eligible for the protection of section 7. The Court reasoned that such conduct is simply an extension of the concerted activity that gave rise to the labor contract in the first place.[258] There was no claim of protection under a collective bargaining agreement in *Meyers.* Rather, the decision overruled a line of cases that found protests by a single employee taken for the benefit of other workers to be concerted.

The constructive concerted activity case most often cited is *Alleluia Cushion Co.*[259] In that case, an individual employee filed a complaint with a state safety agency. Even though there was no evidence that other employees shared the same concern, the Board noted the "vital interest" that employees in general have in employment safety and, absent evidence to the contrary, said it would presume that such complaints had the support of other employees.[260] The fiction of coemployee interest allowed the Board to circumvent the language of section 7, which protects "concerted activity for mutual aid and protection." Unable to find real concerted action, the Board merely "presumed" its way around the statutory language.

Constructive concerted activity was not limited to individual attempts to enforce or preserve statutory rights, as had been the case in *Alleluia Cushion.* The doctrine was soon extended to protect action taken "for the benefit of" or "on behalf of" other employees, whether other employees joined in the action or not.[261] Although some of its decisions are hopelessly inconsistent,[262] all that was usually required to satisfy the concert requirement of section 7 was a matter that could be presumed to be of mutual employee concern.[263]

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256. Section 7, 29 U.S.C. § 157 (1982), 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 . . . . (emphasis added).

257. 104 S. Ct. 1505 (1984).

258. *Id.* at 1510-14. The branch of constructive concerted activity approved by the Supreme Court in *City Disposal* is popularly known as the *Interboro* Doctrine named after NLRB v. Interboro Contractors, Inc., 388 F.2d 495 (2d Cir. 1967), *enforcing* 157 N.L.R.B. 1295 (1966).

259. 221 N.L.R.B. 999 (1975).

260. *Id.* at 1000.

261. *See, e.g.,* Air Surrey Corp., 229 N.L.R.B. 1064, *enforcement denied,* 601 F.2d 256 (6th Cir. 1979).

262. *See, e.g.,* Capital Ornamental Concrete Specialties, Inc., 148 N.L.R.B. 851 (1980). *See also* Bethel, *supra* note 255, at 607-08.

263. *See, e.g.,* Ontario Knife Co., 247 N.L.R.B. 1288, *enforcement denied,* 637 F.2d 840 (2d Cir. 1980); Steere Dairy, Inc., 237 N.L.R.B. 1350 (1978). *See also* Bethel, *supra* note 255, at 587-90.

Under the rationale of *Alleluia Cushion* and its progeny, the employee's discharge in *Meyers* surely would have violated section 8(a)(1). The discharge resulted from safety complaints about a truck and a subsequent refusal to drive it based on the employee's fear of defective brakes. No other employee joined in the safety complaints, and no one voiced support for the discharged employee's refusal to drive.[264] Previously, however, another employee had claimed that he would no longer drive the truck because of its unsafe condition.[265]

For the Board majority, the case was not complicated: section 7 requires concerted action, and one employee acting alone cannot, by definition, act in concert.[266] The majority criticized *Alleluia Cushion* as having presumed group interest simply to protect protests over matters that the Board thought *should* have been of concern to a group.[267] In overruling *Alleluia Cushion,* the Board adopted an "objective" standard that finds concerted action only when an employee acts "with or on the authority of other employees."[268]

The narrowness of the Board's new rule is demonstrated by *Traylor-Pamco,*[269] a case cited with approval in *Meyers.* In *Traylor-Pamco,* the Board concluded that two employees who refused to eat lunch in a sewer were engaged in individual, not concerted, activity. The ALJ had found that although both employees took the same action at the same time, their conduct was not concerted because neither had consulted with or relied on the other.[270] The Board ignored the fact that one week earlier, *all* of the employees had refused to eat in the sewer and that, only the day before the discharge, all employees delayed the beginning of work over the same dispute.[271] Although not as extreme, similar facts existed in *Meyers.* When the discharged employee refused to drive the truck, he was aware that another employee had recently taken similar action. Nonetheless, the Board said that section 7 required purposeful concerted activity and that "*individual* employee concern, even if openly manifested by several employees on an *individual* basis, is not sufficient."[272]

If one considers only the literal language of the statute, it is not easy to quarrel with the Board's argument. The statute expressly protects concerted activity and, therefore, seems to exclude from its scope action taken by individuals. Moreover, an analysis that restricts protection to concerted activity is justified by the policy of the Act. The goal of the NLRA is to allow employees, if they choose to do so, to combine their power and designate

264. *Meyers,* 268 N.L.R.B. at 498.
265. *Id.* at 497.
266. *Id.* at 494.
267. *Id.* at 495.
268. *Id.* at 496-97.
269. 154 N.L.R.B. 380 (1965).
270. *Id.* at 388.
271. *Id.* at 385.
272. *Meyers,* 268 N.L.R.B. at 498 (emphasis original).

a representative to present their concerns to management. Selfish action by individual workers is not only not "concerted" in the literal sense, but it is also unlikely to spawn the kinds of employee organizational efforts that the Act was intended to foster.[273]

Even so, the new objective test is needlessly rigid. Although the Board refused to acknowledge the difference in *Meyers,* the facts of *Traylor-Pamco* are a long way from those at issue in *Alleluia Cushion.* In *Alleluia Cushion* and the cases that followed, the Board protected activity that it thought ought to be protected, regardless of employee concern. Unable to find real concert of action, the Board simply made it up. *Alleluia Cushion* had pushed the theory of constructive concerted activity too far and should have been overruled. In a case like *Traylor-Pamco* and, for that matter, *Meyers,* the Board did not have to "presume" the common interests of employees. Objective evidence of that interest was present, and protecting activity that manifests that concern falls within the policy of section 7. The Board's decision in *Meyers* places undue emphasis on form and leaves employees vulnerable to employer retaliation for expressing concerns that are, in fact rather than in fiction, shared by co-workers.

VI. Employee Interrogation

Rossmore House

The Board has consistently interpreted section 8(a)(1) to bar employers from coercively interrogating employees concerning their union sympathies, reasoning that such questioning prejudices the free exercise of section 7 rights.[274] The Board's members have sometimes differed, however, about what constitutes the interference, restraint, or coercion banned by the Act, particularly when the employee's support for the union is open and known to the employer. In *Rossmore House,*[275] the Board announced that it would apply a totality of the circumstances test to such interrogation and, in the process, overruled its previous decision in *PPG Industries.*[276] In *PPG,* the employer had directed inquiries to employees known to be union adherents; this activity, the Board said, violated section 8(a)(1):

> We have recently held . . . that inquiries of this nature constitute probing into employees' union sentiments which, even when addressed to employees who have openly declared their union adherence, reasonably tend

273. *See* Bethel, *supra* note 255, at 604-06.

274. *See, e.g.,* Struksnes Constr. Co., 165 N.L.R.B. 1062 (1967); Blue Flash Express, Inc., 109 N.L.R.B. 591 (1954). *See also* NLRB v. Lorben Corp., 345 F.2d 346 (2d Cir. 1965); R. Gorman, *supra* note 4, at 173-77.

275. 269 N.L.R.B. 1176 (1984).

276. 251 N.L.R.B. 1146 (1980). Also overruled were Anaconda Co., 241 N.L.R.B. 1091 (1979); Paceco, 237 N.L.R.B. 399 (1978); ITT Automotive Elec. Prods. Div., 231 N.L.R.B. 878 (1977). *Rossmore,* 269 N.L.R.B. at 1176 n.3.