THE FAILURE OF THE LABOR MANAGEMENT RELATIONS
ACT TO PROTECT BARGAINING RIGHTS
OF NEWLY CERTIFIED UNIONS

THESIS

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By

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Denton, Texas
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CHAPTER I

INTRODUCTION

The purpose of the Labor Management Relations Act as it is set forth in its statement of findings and policies is to eliminate the causes of certain substantial obstructions to the free flow of commerce . . . by encouraging the practice and procedure of collective bargaining and by protecting the exercise by workers of full freedom of association, self-organization, and designation of representatives of their own choosing, for the purpose of negotiating the terms and conditions of their employment or other mutual aid or protection.1

The present national labor law is the end result of numerous legislative attempts, even prior to World War I, to promote collective bargaining. Before 1930 the law was weighted against trade union activities.2 The prevailing judicial principles undermined efforts by the federal government or states to protect the workers right to organize. Court decisions on both the state and federal level restricted union conduct and activities by the regulation of strikes, picketing, and boycotts. The power of the courts was used to assist in defeating many of the more important strikes, including the Pullman strike of 1894, the coal


strike of 1919, and the shopmen's strike of 1922. 3 Supreme Court rulings supported discharge for union membership by the railroads, 4 the right of employers to require their workers to sign "yellow-dog" contracts, 5 and injunctions restraining unions from organizing employees who had executed such contracts. 6

During the first World War, because of the importance of avoiding strikes, several tripartite bodies were established by the national government. The National War Labor Board, established in 1918 by President Woodrow Wilson, was the most important single agency during this period in the field of industrial relations. The Board's primary function was the settlement by mediation and conciliation of controversies in fields that were directly or indirectly vital to the war effort. 7 One of its basic aims was, "The right of workers to organize in trade unions and to bargain collectively, through chosen representatives. . . . This right shall not be denied or abridged or interfered with by

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5Coppage v. Kansas, 236 U. S. 1 (1915).


7Millis and Montgomery, op. cit., p. 138.
the employers in any manner whatsoever." Labor, on the other hand, agreed to maintain the existing conditions with reference to the closed or open shop. Finally, the principle was established that strikes and lockouts should be abandoned during the war period, but no penalties were provided in the case of breaches of the rules by either labor or management. This public policy proved favorable to unionism and trade union growth was unprecedented during this period, increasing from 2,582,600 in 1915 to 5,047,800 in 1920.

After the close of the war, employers returned to the use of court supported methods of fighting unionism. The growth of trade unionism was retarded by a series of adverse court decisions. The culmination of these was the Bedford case of 1927 which ruled that for employees to refuse to work upon unfinished goods produced under open-shop conditions in another state was conspiracy in restraint of trade.11

However, the passage of the Railway Labor Act of 1926 foreshadowed a change in congressional policies. Because of

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9Ibid.


essential nature of the railroad industry, it long had been subject to governmental intervention for the settlement of disputes. The Act was passed by Congress, ". . . in the form agreed upon by a conference of railway executives and union officials who wished to emphasize collective bargaining instead of the settlement of disputes by a national board, as under the previous law [the Transportation Act of 1920]."\(^\text{13}\) It made it the duty of both ". . . the railroads and the employees to exert every reasonable effort to arrive at and maintain agreements through representatives chosen by each party free from interference from the other."\(^\text{14}\) It established a United States Board of Mediation to assist in the settlement of disputes and provide for voluntary arbitration.

With the mass unemployment of the Great Depression of the 1930's, union membership fell to its lowest point since before the war, under three million.\(^\text{15}\) Unemployment and insecurity faced not only manual wage-earners but white-collar workers and others in all walks of life. The serious curtailment of the standard of living caused public attitude and economic thinking to become increasingly skeptical about the beneficence of the system of free private enterprise and

\(^{13}\)Millis and Brown, op. cit., pp. 18-19.


\(^{15}\)Wolman, op. cit., pp. 33-34.
to become considerably more tolerant of the objectives of organized labor. With the workers' demands in 1933 for protective labor legislation came a new governmental policy relating to collective bargaining, Section 7(a) of the National Industrial Recovery Act.

The underlying theory of the National Industrial Recovery Act was that the control of production and prices by groups of businessmen would provide balance and promote recovery in the economy. Businessmen were encouraged to form industry groups for the purpose of executing a "code" pertaining to production and price control. About five hundred and fifty of such codes were adopted; they provided for industrial self-government by businessmen. The antitrust laws were relaxed during this period to permit these agreements within industries. Congress provided that two provisions pertaining to labor be included in every code, a minimum wage for the workers it covered, and Section 7(a) of the Act.

Section 7(a) of the National Industrial Recovery Act stated:

Every code of fair competition, agreement, and licence approved, prescribed, or issued under this title shall

16Millis and Montgomery, op. cit., pp. 189-190.
19Millis and Brown, op. cit., p. 21.
contain the following conditions: (1) that employees shall have the right to organize and bargain collectively with representatives of their own choosing, and shall be free of the interference, restraint or coercion of employers of labor, or their agents, in a designation of such representatives or in self-organization or in other concerted activities for the purpose of collective bargaining or other mutual aid or protection; (2) that no employee and no one seeking employment shall be required as a condition of employment to join any company union or to refrain from joining, organizing, or assisting a labor organization of his own choosing. . . .

President Franklin D. Roosevelt established a National Labor Board, which had as its purpose the administration and enforcement of the provisions of Section 7(a). Senator Robert Wagner was chairman of the three member Board whose major work was to settle labor disputes by mediation, conciliation, or arbitration. The Board was very successful for the first few months in settling strikes. After this period non-compliance with its decisions became widespread and unions had to resort to the organizational strike to enforce Section 7(a). The Board's major sources of difficulty stemmed from its attempt to combine the function of mediation of disputes with that of obtaining compliance with the law and from its lack of effective means of forcing an unwilling employer to comply. However, despite its failure adequately to protect the rights of workers, the Board in its case-by-case interpretation of Section 7(a) began to

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21Millis and Brown, op. cit., p. 23.
lay the groundwork for a permanent statute which would effectively protect the right to organize and bargain collectively.\textsuperscript{22}

To remedy the defects apparent in the National Labor Board, Senator Wagner introduced into Congress in early 1934 the so-called Wagner Labor Disputes Act.\textsuperscript{23} The purpose of the bill was to "... clarify and fortify the provisions of Section 7(a) of the Industrial Recovery Act and to provide means of administering through the legislative establishment of a National Labor Board with adequate enforcement powers."\textsuperscript{24} However, this bill was not adopted and Congress provided for the replacement of the ineffective National Labor Board by passing a stop-gap measure known as Public Resolution No. 44.

Under the authority of this joint resolution, President Roosevelt established what is known as the old National Labor Relations Board in 1934. The Board was given the authority to:

- investigate disputes involving or affecting commerce,
- to order elections, conduct hearings and issue findings of fact in cases of alleged breach of statute, issue

\textsuperscript{22}Ibid., p. 24.

\textsuperscript{23}Witney, \textit{op. cit.}, p. 203, citing S. 2926, 73rd Congress, 2nd Session (1943).

\textsuperscript{24}National Labor Relations Board, \textit{Legislative History of the National Labor Relations Act, 1935} (Washington, 1949), I, 15.
regulations subject to Presidential approval, arbitrate
the disputes voluntarily submitted, and subpoena in
election cases.25

Because this Board was tied to Section 7(a) of the National
Industrial Recovery Act, it was to expire with the Act on
June 16, 1935. However, the Board expired ahead of schedule
on May 27, 1935, after the Supreme Court found the National
Recovery Act unconstitutional.26 This Board, as had the
previous one, found that it was, "... powerless to en-
force its decisions. In the ultimate analysis its findings
and orders [were] nothing more than recommendations."27 De-
spite the ineffectiveness of the two boards established to
promote the Board's objectives, labor unions gained over
900,000 members during the two year life span of Section
7(a).28

In view of the coming expiration of the National In-
dustrial Recovery Act and the breakdown in enforcement of
Section 7(a), Senator Wagner introduced a new bill, S. 1958,
in February of 1935. In the opening paragraphs of the major
explanation of his bills, Senator Wagner stated:

Mr. President, the national labor relations bill
does not break with our traditions. It is the next

25 Irving Bernstein, The New Deal Collective Bargaining
Policy (Berkeley, 1950), p. 84.

26 Schechter Poultry Corp. v. United States, 295 U.S.
495 (1935). The Supreme Court held that there had been an
unconstitutional delegation of legislative power and that
the interstate commerce power had been exceeded.

27 Lewis L. Lorwin and Arthur Wubnig, Labor Relations

28 Wolman, op. cit., p. 147.
step in the logical unfolding of man's eternal quest for freedom. For twenty-five centuries of recorded time before the machine age he sought relief from nature's cruel and relentless tyranny. Only 150 years ago did this country cast off the shackles of political despotism. And today, with economic problems occupying the center of the stage, we strive to liberate the common man from destitution, from insecurity, and from human exploitation.

In this modern aspect of a time-worn problem the isolated worker is a plaything of fate. Caught in the labyrinth of modern industrialism and dwarfed by the size of corporate enterprise, he can attain freedom and dignity only by cooperation with others of his group. This truism has been paid at least the lip service of universal opinion.

The bill as originally submitted did not include the duty to bargain collectively; this duty was added by the Senate Committee on Education and Labor in subsection five of Section 8 after Lloyd K. Garrison, chairman of the old National Labor Relations Board, insisted that it was necessary in order to make the right of self-organization effective. The bill encountered only small opposition in Congress and was signed into law on July 5, 1935. In approving the National Labor Relations Act of 1935, commonly referred to as the Wagner Act, President Roosevelt stated:

This act defines, as a part of our substantive law, the right of self-organization of employees in industry for the purpose of collective bargaining, and provides methods by which the Government can safeguard that


legal right. It establishes a National Labor Relations Board to hear and determine cases in which it is charged that this legal right is abridged or denied, and to hold fair elections to ascertain who are the chosen representatives of employees. A better relationship between labor and management is the high purpose of this act. By assuring the employees the right of collective bargaining it fosters the development of the employment contract on a sound and equitable basis. By providing an orderly procedure for determining who is entitled to represent the employees, it aims to remove one of the chief causes of wasteful economic strife. By preventing practices which tend to destroy the independence of labor, it seeks, for every worker within its scope, that freedom of choice and action which is justly his.32

The National Labor Relations Act did not undertake to regulate wages, hours, and working conditions. This relatively simple, short, and clear law had as its purpose to "... declare and protect the right of employees to organize and to bargain through representatives chosen by the majority and to be free of interference by employers with these rights."33 It defined and outlawed five types of employer unfair labor practices. They are

(1) any interference, restraint, or coercion of employees in the exercise of the rights guaranteed; (2) domination or interference with the formation or administration of a labor organization or contributing financial or other support to it; (3) discrimination to encourage or discourage union membership, except that closed-shop contracts were not illegal if made with a union representing the majority of the employees in an appropriate bargaining unit and without illegal assistance by the employer; (4) discrimination against an employee for filing charges or testifying under this Act; (5) refusal to bargain collectively with the legal representative of employees in an appropriate bargaining unit.34

32 National Labor Relations Board, op. cit., II, 3269.
34 Millis and Brown, op. cit., p. 32.
Because the Act attempted to outlaw many employer practices which had been widely and effectively used in fighting unionism there was widespread opposition and defiance of the law by employers. Their refusal to voluntarily comply with the law prevented the successful operation of the National Labor Relations Board. Not until the Supreme Court declared the Act constitutional in five key decisions, on April 12, 1937, did massive employer non-compliance cease and employer opposition change to a campaign to amend the Act. During the twelve years of its operation, employers, to a large extent, came to accept collective bargaining. Union membership under the Act grew from less than four million in 1935 to nearly sixteen million in 1948.

Despite the hundreds of bills introduced in Congress to repeal or amend it, the National Labor Relations Act remained unchanged for twelve years. The Republican victory in the 1946 election, coupled with the wave of strikes following the end of World War II, provided the background for the passage of the Labor Management Relations Act of


36Witney, op. cit., p. 254.

1947, commonly called the Taft-Hartley Act. The Act which emerged from Congress, was vetoed by President Harry S Truman, and then passed over his veto. While substantial parts of the National Labor Relations Act were retained, "... the amendments were far-reaching as to legal rights, controls, and administrative machinery and procedure." 

The Labor Management Relations Act brought the government to an unprecedented extent into regulation of collective bargaining and restricted the freedom of employers and unions to work out their own problems in previously acceptable ways. The "terms and conditions of employment" over which an employer must bargain with the union have been expanded substantially. However, there does not appear to be a real problem of encroachment upon basic employer rights when seeking to protect the worker's rights to bargain collectively. Both the employer and the employees' representatives are required by Section 8(d) of the Act "... to meet at reasonable times and confer in good faith with respect to wages, hours, and other terms and conditions of employment. ... " But the statute goes on to state that "such obligation does not compel either party


39 Millis and Brown, op. cit., p. 395.


to agree to a proposal or require the making of a concession. . . ."42 Thus, although an employer is required to bargain concerning many issues which were once considered management prerogatives, he does not have to reach an agreement concerning them.

Furthermore, an employer confronted with unfair labor practice charges is given full procedural protection. If he feels that he has been unjustly charged or that his rights have been encroached upon, he is assured a full hearing of his objections before the Board. If dissatisfied with the Board ruling, he may then appeal the Board order to a circuit court of appeals and then to the Supreme Court. Thus, the Act fully protects the employer from unjust or erroneous charges. Unfortunately, these procedures are time consuming and can be used to create potentials for frustrating the organizational rights of the worker.

The Labor Management Relations Act retained basically the same five employer's unfair labor practices that were contained in the National Labor Relations Act and added a list of eight union's unfair labor practices. Charges of employer unfair labor practices have been increasing rapidly since 1958.43 The Board's caseload has increased from

42Ibid.

16,750 in 1958 to over 29,000 in 1966. With the increase in intake of workload has come an increase in the percentage of cases where, after investigation by a Board regional office official, a violation is found to have occurred.

Eighty-two percent of the cases in 1965, which were heard before a Board trial examiner, involved employer unfair labor practices. This constitutes a fourteen percent increase over 1964. About this increase, Chairman of the National Labor Relations Board Frank W. McCulloch stated:

The additional employer unfair labor practice cases in large measure involve charges of refusal to bargain—usually the most complicated, sophisticated, and hardest to prove of all employer unfair labor practices. I should note that at the same time the percentage of charges against unions has dropped off slightly in all categories.

With the increase in employer unfair labor practice cases has come an increase in the amount of time required to process them.

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47 Ibid.

In order to insure that employees would be allowed to bargain collectively through representatives of their own choosing and to eliminate costly organizational strikes, both the National Labor Relations Act and the Labor Management Relations Act provided in Section 9 for Board conducted representation elections.49 The results of these secret-ballot elections are considered binding on the parties involved.50 For this reason, most people assume that once the union has won a representation election the battle is over. This assumption is erroneous. Despite the fact that a union has won a representation election and been duly certified by the Board, many employers resort to a variety of tactics to avoid their statutory duty to bargain with the union.

The most important provision contained in both the Labor Management Relations Act and the National Labor Relations Act is the duty to bargain collectively. "The Board and the courts have always taken the view that the duty to bargain is the heart of the Act."51 The Supreme Court emphasized its importance when it stated that, "... the other rights guaranteed by the Act would not be

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49Millis and Brown, op. cit., p. 129.


meaningful if the employer was not under an obligation to confer with the union in an effort to arrive at the terms of an agreement."\(^{52}\) The Court stated on another occasion that, "Enforcement of the obligation to bargain collectively is crucial to the statutory scheme."\(^{53}\)

Collective bargaining has been defined as "... the joint determination by employees and employers of the problems of the employment relationship."\(^{54}\) Such problems include wages, hours, overtime, pensions, sick leave, vacations, layoff, discipline, work loads, and the like. The duty to bargain collectively is contained in Section 8(a)(5) of the Labor Management Relations Act. This section states that "It shall be an unfair labor practice for an employer to refuse to bargain collectively with the representatives of his employees subject to the provisions of Section 9(a)."\(^{55}\)

The purpose of this study is twofold. First, it will examine employer techniques used to thwart the rights of newly certified unions. Second, this study will attempt to determine the effectiveness of the Act's remedies. Some


\(^{54}\)Witney, op. cit., p. 3.

statistical characteristics of cases and firms involved in violations of the duty to bargain collectively will be evaluated. Statistics from the Board's annual reports as well as from a recent study by Philip Ross will be used. The increase of Board cases dealing with violations of refusal to bargain, the average number of violations per case, and the prevalence of other unfair labor practices will be examined. The size of firms committing the majority of violations of collective bargaining will be compared with the size of firms involved in the majority of Board certification elections.

National Labor Relations Board, circuit court of appeals, and Supreme Court cases will be used to investigate the effectiveness of three of the most prevalent violations of the duty to bargain collectively used by employers to circumvent the purposes of the Act. They are (1) refusal to meet with the newly certified union, (2) engaging in unilateral activity, and (3) refusal to bargain in good faith. No attempt will be made to discuss the entire range of unfair labor practices that are used by employers to combat unionism and avoid bargaining.

This study will also examine the effectiveness of the remedies of the Labor Management Relations Act in protecting the worker's right to bargain collectively with his employer through representatives of his own choosing. Much of the information pertaining to the effectiveness of Board
remedies will be obtained from Congressional records. Four of the standard Board remedies will be examined—(1) posting of notices, (2) reinstatement of employees discriminated against, (3) payment of back pay, and (4) a Board order to bargain in good faith.
CHAPTER II

SOME STATISTICAL CHARACTERISTICS OF FIRMS
AND CASES INVOLVING REFUSAL TO BARGAIN

Statistical information on the operation of the National Labor Relations Board, with regard to employer violations of the duty to bargain, would be most logically obtained from the Board itself. However, the annual reports of the Board, on its operational activities, contain only a minimum of information on this subject. The format of these reports was worked out in the late 1930's and since then has not been significantly updated. The annual reports consist of a general restatement of the provisions of the national labor law, cases which set new decisional trends, and a short statistical appendix.

For fiscal 1966 there were twenty-two tables of statistics in the appendix.¹ Only one of these tables bears

¹The tables suppoed the following information: (1) total cases received, closed, and pending; (2) types and number of unfair labor practices alleged; (3) formal action taken; (4) remedial action for cases closed; (5) industrial distribution of unfair labor practice and representation cases docketed and their geographic distribution; (6) breakdown of the stages of disposition of the cases closed; (7) types of elections concluded; (8) results of elections held; (9) a breakdown of elections held according to industrial and geographic distribution and size of unit; and (10) record of injunction litigation.
directly on employer violations of the duty to bargain (Section 8(a)(5) of the Act), and it contains only the number of alleged violations filed during a particular fiscal year. There is no information concerning (1) the number of violations found to have "merit"; (2) the number of cases containing 8(a)(5) violations; (3) whether the union involved was newly certified; (4) the stage at which the case was closed; or (5) the number of contracts entered into as a result of Board action. Because of the lack of statistical information in the annual reports on these and other aspects of the duty to bargain, an attempt was made to secure the needed statistics from the Board; however, the information was not available.

Much of the existing evidence on the effectiveness of the duty to bargain with newly certified unions, as well as other sections of the Act, is contained in testimony before

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2 Philip Ross, The Labor Law in Action (Washington, 1966), p. 3, ("... a merit case is one where there was (1) a determination, after investigation by NLRB regional office officials, that a violation had occurred, or (2) a finding by a trial examiner, after hearing, that a violation had been committed, or (3) a finding by the Board, or (4) a finding by a Circuit Court of Appeals of the Supreme Court to this effect. If at any one of these stages a charge was finally dismissed, the case was deemed non-meritorious.

3 A request was made in person at the Board's Regional office in Fort Worth. With the help of Sultan Boyd of the Regional office, a written request was sent to the National Labor Relations Board in Washington, D.C. Letter from Harry Brickman, Chief of the Operations Analysis Section, Office of the Executive Secretary, National Labor Relations Board, Washington, July 8, 1968. In part it stated, "The statistical tabulations presently available to us do not answer the needs expressed in your letter."
Congressional committees. The hearings before these committees usually consist of statements and testimony by employers and union leaders on a particular provision of the Act. Frequently, Board officials assemble and present statistics on the subject in question. These Congressional investigations are extremely valuable in assessing the impact of the Board with respect to the duty to bargain, but the statistics presented at the hearings are as a rule general in nature and limited in scope.

Until 1966, perhaps the best empirical study made on Board activities was by Emily Clark Brown. The Brown study was limited to the years 1941 and 1942 in six regions of the Board. It studied the effectiveness of the Act in cases where employer violations were found. The test used in judging the success of the Board was the extent to which collective bargaining followed the closing of a case. Collective bargaining was considered in effect "where there was a contract, negotiations were under way for a contract, or a dispute as to contract provisions was before the War Labor Board. . . . " The usefulness of the statistics contained in this study is limited by the time period covered, since the war and the scarcity of labor created unusual conditions.

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5Ibid., p. 6.
Because of the importance of the duty to bargain and the lack of statistical data concerning it, the Board in 1963 asked Philip Ross of the University of Pittsburgh to "... examine the effect and impact of Section 8(a)(5) of the National Labor Relations Board upon employers and labor organizations." The Ross study was completed in 1966 and covers a five-year period from fiscal 1958 through fiscal 1962. It includes data on all employers who, during this period, have been found in Board cases to have violated the duty to bargain. This lengthy study contains over thirty statistical tables. These tables break down the material concerning the 8(a)(5) violations according to the size of the bargaining units involved; the duration of collective bargaining, if any; the nature of the 8(a)(5) violation, that is, whether the issue was recognition, bad-faith bargaining, refusal to sign a contract, and so on; whether any other unfair labor practices accompanied the violation of good-faith bargaining; the stage of disposition of the case, that is, at what stage prior or during litigation was the case closed; the state and industry involved; the number firms that won Board certification elections; and many other issues. The 1,008 merit cases, which were filed in the five fiscal years 1958 through 1962, involving a violation of the duty to bargain were identified and their characteristics examined.

The bulk of the material for this chapter came from the available statistics contained in the Board's annual reports on violations of Section 8(a)(5) and from a small portion of the extremely detailed statistics contained in the Ross study.  

During the twelve years (1935-1947) of the National Labor Relations Act, employees and their representatives filed 45,649 charges of unfair labor practices against employers.  

This represents an average of 3,804 charges filed each year. The greatest number of cases to come before the Board in one year was 6,807 in 1938. This great flood of cases was a result of the Supreme Court ruling in 1937 which held the Act constitutional. During this period about thirty-two percent, or almost 15,000 charges were filed against employers for refusal to bargain. 

In the first ten years under the Labor Management Relations Act, the number of employer unfair labor practices filed with the Board remained fairly constant with about three to four thousand charges being filed annually. 

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7 Letter from Brinkman, op. cit. (Neither the Board nor Ross have attempted to keep the statistical tabulations in this report up to date.).


9 Millis and Brown op. cit., p. 79.

10 National Labor Relations Board, Thirteenth (1948) through Twenty-second (1957) Annual Reports.
### TABLE I

INCREASE IN EMPLOYER UNFAIR LABOR PRACTICE CHARGES FILED

<table>
<thead>
<tr>
<th>Year**</th>
<th>Total Unfair Labor Practice Charges</th>
<th>Employer Unfair Labor Practice Charges</th>
<th>Employer ULP*** Charges as % of Total</th>
</tr>
</thead>
<tbody>
<tr>
<td>1958</td>
<td>9,260</td>
<td>6,068</td>
<td>65.5%</td>
</tr>
<tr>
<td>1959</td>
<td>12,239</td>
<td>8,266</td>
<td>67.5%</td>
</tr>
<tr>
<td>1960</td>
<td>11,357</td>
<td>7,723</td>
<td>68.0%</td>
</tr>
<tr>
<td>1961</td>
<td>12,132</td>
<td>8,136</td>
<td>67.1%</td>
</tr>
<tr>
<td>1962</td>
<td>13,479</td>
<td>9,231</td>
<td>68.5%</td>
</tr>
<tr>
<td>1963</td>
<td>14,166</td>
<td>9,550</td>
<td>67.4%</td>
</tr>
<tr>
<td>1964</td>
<td>15,620</td>
<td>10,695</td>
<td>68.5%</td>
</tr>
<tr>
<td>1965</td>
<td>15,800</td>
<td>10,931</td>
<td>69.2%</td>
</tr>
<tr>
<td>1966</td>
<td>15,933</td>
<td>10,902</td>
<td>68.4%</td>
</tr>
</tbody>
</table>


**Data for unfair labor practice charges are computed by the Board for fiscal years ending June 30.

***The letters "ULP" are an abbreviation for "unfair labor practice."
However, since 1958 the trend has been toward a decidedly higher number of cases to be filed each succeeding year, with the exception of 1960 when the number of cases declined. An examination of Table I reveals that almost five thousand more employer unfair labor practice charges were filed in 1966 than were filed in 1958. During this nine-year period, the percentage of charges filed against employers has exhibited a slight upward trend with variations from year to year. Employer violations constituted 65.5 percent of all charges in 1958, and 68.4 percent in 1966. This means that during this same period the percentage of unfair labor practice charges filed against unions has decreased. Thus, the great majority of unfair labor practice charges are filed against employers and the number and percentage of these charges is increasing.

An important characteristic of refusal to bargain violations revealed by Table II is that, since 1958, they have increased rapidly. Not only have they increased in number, but also they have increased as a percentage of the total number of unfair labor practice charges filed against employers. In 1958 17.1 percent of all charges filed against employers were for violations of the duty to bargain. By 1966, this percentage had increased to 35 percent. Thus, during this nine-year-period, the number of refusal to bargain charges have increased more than three and one half times and the percentage of these charges have more than doubled. The duty to bargain is such a basic tenet of
TABLE II

INCREASE IN REFUSAL TO BARGAIN CHARGES FILED

<table>
<thead>
<tr>
<th>Year</th>
<th>Total Employer ULP Charges</th>
<th>Number of Refusal to Bargain Charges</th>
<th>Refusal to Bargain Charges as % of Total</th>
</tr>
</thead>
<tbody>
<tr>
<td>1958</td>
<td>6,068</td>
<td>1,039</td>
<td>17.1%</td>
</tr>
<tr>
<td>1959</td>
<td>8,266</td>
<td>1,311</td>
<td>15.9</td>
</tr>
<tr>
<td>1960</td>
<td>7,723</td>
<td>1,753</td>
<td>22.7</td>
</tr>
<tr>
<td>1961</td>
<td>8,136</td>
<td>1,676</td>
<td>20.6</td>
</tr>
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<td>1962</td>
<td>9,231</td>
<td>2,294</td>
<td>24.9</td>
</tr>
<tr>
<td>1963</td>
<td>9,550</td>
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<td>1964</td>
<td>10,695</td>
<td>3,088</td>
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<tr>
<td>1965</td>
<td>10,931</td>
<td>3,815</td>
<td>34.9</td>
</tr>
<tr>
<td>1966</td>
<td>10,902</td>
<td>3,811</td>
<td>35.0</td>
</tr>
</tbody>
</table>

the Act that the great increase in both the number and percentage of violations of this section seems to indicate that employers, faced with unionization, are attempting in increasing numbers to avoid their duty to bargain collectively with representatives of their employees by violating this section of the Act. Commenting on the growth of employer unfair labor practices since 1958, Frank W. McCullock, chairman of the National Labor Relations Board stated before a 1966 Congressional hearing that:

The doubling of our caseload in the short span of 8 years, much of it relating to clearly understood provisions of the law, evidences a regrettable unwillingness of some to accept the basic tenents of the law. In addition the analysis of this rising caseload and this rising merit factor in those cases which are filed indicates a growth in violations of the act which is beyond that ascribable to our expanding economy.11

In addition to the sharp increase in the number of employers refusal to bargain charges filed since 1958, Table III indicates that there has been a similar, but accelerated growth of refusal to bargain cases. During the five-year period of the study, employer refusal to bargain cases nearly quadrupled.

<table>
<thead>
<tr>
<th>Year</th>
<th>Total Merit Refusal to Bargain Cases</th>
<th>Refusal to Bargain Violations**</th>
<th>Refusal to Bargain Violations as % Total</th>
</tr>
</thead>
<tbody>
<tr>
<td>Total</td>
<td>1,008</td>
<td>1,559</td>
<td>1.55</td>
</tr>
<tr>
<td>1958</td>
<td>87</td>
<td>146</td>
<td>1.68</td>
</tr>
<tr>
<td>1959</td>
<td>112</td>
<td>162</td>
<td>1.45</td>
</tr>
<tr>
<td>1960</td>
<td>208</td>
<td>285</td>
<td>1.37</td>
</tr>
<tr>
<td>1961</td>
<td>258</td>
<td>441</td>
<td>1.71</td>
</tr>
<tr>
<td>1962</td>
<td>343</td>
<td>525</td>
<td>1.53</td>
</tr>
</tbody>
</table>

*Source: Ross, Labor Law in Action, based on Table 7, p. 72.

**The number of violations involved is higher than the total number of cases because a typical case contained more than one refusal to bargain violation.
Another important characteristic of meritorious refusal to bargain cases shown in Table III is that most of them exhibited more than one violation of refusal to bargain. During the period of the study each of the cases contained on the average 1.55 violations of the duty to bargain. The number of these violations tended to vary up and down slightly from year to year, yielding a horizontal trend during the period as a whole. That on the average more than half of the employers who violate the duty to bargain commit violations of more than one refusal to bargain issue seems to indicate that employers who violate this section of the Act do so as part of a broader program with the goal of denying to their workers their statutory right to collective bargain.

Table IV indicates that fully half of the meritorious refusal to bargain cases contain other unlawful employer behavior. Thus, in half of the cases where an employer was found to have violated his duty to bargain, he was found also to have committed another type of unfair labor practice. The percentage of other violations of the Act was extremely stable during the period of the study. This table suggests

12Among the major refusal to bargain issues that an employer might violate are (1) recognition, (2) refusal to sign a contract, (3) unilateral action, (4) bad-faith bargaining, (5) refusal to bargain concerning a mandatory bargaining subject, (6) bargaining unit contested, (7) by-passing the union, and (8) refusal to supply requested information.
### TABLE IV

**AVERAGE NUMBER OF OTHER EMPLOYER UNFAIR PRACTICES IN ALL MERIT REFUSAL TO BARGAIN CASES**

<table>
<thead>
<tr>
<th>Year</th>
<th>Total Merit Refusal to Bargain Cases</th>
<th>Other Employer Unfair Labor Practices**</th>
<th>Other Employer ULP as % of Total</th>
</tr>
</thead>
<tbody>
<tr>
<td>Total</td>
<td>1,008</td>
<td>508</td>
<td>.50</td>
</tr>
<tr>
<td>1958</td>
<td>87</td>
<td>39</td>
<td>.45</td>
</tr>
<tr>
<td>1959</td>
<td>112</td>
<td>61</td>
<td>.54</td>
</tr>
<tr>
<td>1960</td>
<td>208</td>
<td>108</td>
<td>.52</td>
</tr>
<tr>
<td>1961</td>
<td>258</td>
<td>126</td>
<td>.49</td>
</tr>
<tr>
<td>1962</td>
<td>343</td>
<td>174</td>
<td>.51</td>
</tr>
</tbody>
</table>

*Source: Ross, Labor Law in Action, based on Table 7, p. 72.

**The distribution of the other violations is between Section 8(a)(1), (2), and (3).
that another often used employer method of thwarting unionism is to commit other unfair labor practices along with a refusal to bargain in good faith.

In columns (1), (2), and (3) of Table V, the refusal to bargain cases are broken down according to the number of production workers in the bargaining unit. The table indicates that the vast majority of employer refusal to bargain cases occurred in small bargaining units. For the five-year period, about 75 percent of all cases involved bargaining units of less than one hundred employees. Units of less than ten employees made up almost twelve percent of the merit cases. Almost sixty percent of all cases involved bargaining units of less than fifty employees. On the other hand, units of over 250 production employees were involved in 11.4 percent of the cases, and less than four percent of the cases concerned employers with more than one thousand employees.

That employers with small bargaining units are involved in the vast majority of refusal to bargain cases is not to imply that small firms are more prone to refuse to bargain in good faith than are large ones. An examination of columns (4) and (5) in Table V, indicates, not surprisingly, that the majority of firms in the United States are small. According to the 1962 census of manufacturing firms, over ninety percent of all firms contained less than one hundred employees. Eighty-three percent of the firms employed less
TABLE V

REFUSAL TO BARGAIN MERIT CASES AND MANUFACTURING FIRMS IN THE U.S. BY NUMBER OF PRODUCTION WORKERS IN UNIT

<table>
<thead>
<tr>
<th>Number of Production Workers in Unit</th>
<th>Refusal to Bargain Cases</th>
<th>Refusal to Bargain Cases as % of Total</th>
<th>Manufacturing Firms in U.S.*</th>
<th>Firms as % Total in U.S.</th>
</tr>
</thead>
<tbody>
<tr>
<td>(1)</td>
<td>(2)</td>
<td>(3)</td>
<td>(4)</td>
<td>(5)</td>
</tr>
<tr>
<td>Total</td>
<td>1,008</td>
<td>100.0%</td>
<td>299,017</td>
<td>100.0%</td>
</tr>
<tr>
<td>1-9</td>
<td>120</td>
<td>11.9</td>
<td>156,301</td>
<td>52.3</td>
</tr>
<tr>
<td>10-19</td>
<td>231</td>
<td>22.9</td>
<td>46,320</td>
<td>15.5</td>
</tr>
<tr>
<td>20-49</td>
<td>248</td>
<td>24.6</td>
<td>46,307</td>
<td>15.5</td>
</tr>
<tr>
<td>50-99</td>
<td>154</td>
<td>15.3</td>
<td>21,764</td>
<td>7.3</td>
</tr>
<tr>
<td>100-249</td>
<td>140</td>
<td>13.9</td>
<td>16,732</td>
<td>5.6</td>
</tr>
<tr>
<td>250-499</td>
<td>57</td>
<td>5.6</td>
<td>6,640</td>
<td>2.2</td>
</tr>
<tr>
<td>500-999</td>
<td>23</td>
<td>2.3</td>
<td>2,957</td>
<td>1.0</td>
</tr>
<tr>
<td>1,000-2,499</td>
<td>16</td>
<td>1.6</td>
<td>1,463</td>
<td>.5</td>
</tr>
<tr>
<td>2,500 and Over</td>
<td>19</td>
<td>1.9</td>
<td>533</td>
<td>.2</td>
</tr>
</tbody>
</table>

*Source: Ross, Labor Law in Action, based on Table 8, pp. 73-74.

than fifty workers and over 52 percent contained less than ten employees. Thus, one reason more small firms refuse to bargain in good faith with the representatives of their employees is the preponderance of small firms in the United States.

Columns (1), (2), and (3) in Table VI indicate that the employers with the very smallest bargaining units, those with 1-39 employees, are faced with a majority (64 percent) of National Labor Relations Board certification elections. Eighty-five percent of the Board elections occur in bargaining units of less than one hundred employees. While employers with units containing over three hundred production workers were involved in only four percent of the elections, and those with over one thousand employees were involved in less than one percent of the total elections held during the five year period. As the number of production workers in the unit increased the number of certification elections held decreased.

Column (4) indicates that the smaller the bargaining unit the greater the number of certification elections won by the union. Column (5) reveals an interesting pattern. Union success in representation elections, during the period of the study, was greatest at the extremes in size of firms and was least successful in the intermediate size firms. The lowest percentage of election victories, 51.8 percent, occurred in firms with bargaining units containing from 300
TABLE VI

RESULTS IN N.L.R.B. CERTIFICATION ELECTIONS,
FISCAL YEARS 1958-1962

<table>
<thead>
<tr>
<th>Number of Production Workers in Unit</th>
<th>Number of Elections</th>
<th>Percent of Total Elections</th>
<th>Number of Elections Where Representation Chosen</th>
<th>Elections Where Representation as % of Number of Elections</th>
</tr>
</thead>
<tbody>
<tr>
<td>Total</td>
<td>29,854</td>
<td>100.0%</td>
<td>17,654</td>
<td>59.1%</td>
</tr>
<tr>
<td>1-39</td>
<td>19,120</td>
<td>64.0</td>
<td>11,827</td>
<td>61.9</td>
</tr>
<tr>
<td>40-99</td>
<td>5,830</td>
<td>19.5</td>
<td>3,235</td>
<td>55.5</td>
</tr>
<tr>
<td>100-299</td>
<td>3,591</td>
<td>12.0</td>
<td>1,880</td>
<td>52.4</td>
</tr>
<tr>
<td>300-599</td>
<td>851</td>
<td>2.8</td>
<td>441</td>
<td>51.8</td>
</tr>
<tr>
<td>600-999</td>
<td>246</td>
<td>.8</td>
<td>131</td>
<td>53.3</td>
</tr>
<tr>
<td>1,000-2,999</td>
<td>191</td>
<td>.6</td>
<td>111</td>
<td>58.1</td>
</tr>
<tr>
<td>3,000 and over</td>
<td>25</td>
<td>.1</td>
<td>19</td>
<td>76.0</td>
</tr>
</tbody>
</table>

*Source: Ross, Labor Law in Action, based on Table 9, p. 75.*
to 599 employees. The highest percentage of union election victories, 76 percent, occurred in the very largest units, three thousand employees and over. The next highest percentage of union certification election victories, 61.9 percent, occurred in firms with the smallest number of workers, less than forty.
CHAPTER III

TACTICS UTILIZED BY EMPLOYERS TO AVOID BARGAINING WITH NEWLY CERTIFIED UNIONS

After a union has won a Board conducted election and has been certified as the majority bargaining representative, the employer has a legal duty to bargain collectively with it. Rather than comply with this duty, some employers resort to the use of many tactics in their efforts to deny to the workers their statutory right to bargain collectively. This chapter will discuss some of the more effective techniques used by employers to avoid bargaining and thus discourage and destroy unionism.

Refusal to Meet With the Union Representative

Among the most basic devices used by employers, to avoid their duty to bargain with the majority representatives, is the refusal to meet with them. An employer who is determined to break a union may refuse to meet with it, even though the union enjoys a majority status, in the expectation that the lengthy court proceedings which follow will give him time to weaken and eventually destroy it.

The Senate Committee on Education and Labor in a report preceding the enactment of the National Labor Relations Act recognized the fundamental importance of this issue:
It seems clear that a guarantee of the right of employees to bargain collectively through representatives of their own choosing is a mere delusion if it is not accompanied by the correlative duty on the part of the other party to recognize such representatives as they have been designated . . . and to negotiate with them. . . . Furthermore, the procedure of holding governmentally supervised elections to determine the choice of representatives of employees becomes of little worth if after the election its results are for all practical purposes ignored.  

Both the National Labor Relations Act\textsuperscript{2} and the Labor Management Relations Act\textsuperscript{3} which followed it require that employers bargain with the representatives of their employees chosen by a majority in an appropriate unit as their exclusive representative. Thus, in order for an employer to fulfill his duty to bargain, he must first fulfill his duty to meet with the union.

The duty to meet with the majority representatives is so basic that it was raised in some of the earliest cases that came before the Board,\textsuperscript{4} and was upheld in the first

\textsuperscript{1}U.S. Congress, Senate, Committee on Education and Labor, National Labor Relations Board, Report No. 573, 74th Congress, 1st Session (Washington, 1935), p. 3.

\textsuperscript{2}National Labor Relations Board, Statutes and Congressional Reports Pertaining to the National Labor Relations Board (Washington, June, 1943), pp. 46-49.


\textsuperscript{4}Suburban Lumber Company, 3 NLRB 194 (1937); Bradford Dyeing Association, 4 NLRB 604 (1937); Omaha Hat Corporation, 4 NLRB 878 (1938); The Jacob Brothers Company, Inc., 5 NLRB 620 (1938); Missouri Coach Lines, Inc., 7 NLRB T86 (1938).

Supreme Court decision on the National Labor Relations Act. As the Board concluded in an early case, "... the procedure of collective bargaining requires that the employer make his representatives available for conferences at reasonable times and places and in such a manner that personal negotiations are practicable."6

Occasionally an employer's refusal to meet with a union after it has been certified by the Board is based on the claim that the union no longer represents a majority of the employees. The employer's duty to bargain with a newly certified union for a reasonable period was approved by the Supreme Court in its Ray Brooks7 decision. Under this ruling an employer is required to bargain with the certified representative of his employees for at least a year after the representation election, in the absence of unusual circumstances.

The employer's refusal to meet and bargain with the newly certified union may be intended to force the union to file a refusal to bargain charge. The employer realizes that the time involved in the resulting litigation ordinarily works to strengthen his bargaining position and weaken the union's hold upon its members. By exercising

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5N. L. R. B. v. Jones and Laughlin Steel Corp., 301 U.S. 1, 45 (1937).
his right to full hearing and to appeal to the courts for
review of the Board order, he can delay the commencement
of bargaining for many months. In 1960 a Senate Advisory
Panel on the Act reported that:

A major weakness in the labor-management rela-
tions law is the long delay in contested NLRB pro-
ceedings. . . . A contested unfair labor practice
case consumes an average of 475 days from the filing
of the charge to the Board decision; it takes an
additional 396 days for the typical case to reach
the stage of an effective judicial decree compel-
ing compliance with the Act. The total time lapse
is 2 years, 4 months, and 20 days.

Thus, on the average, nearly two and one-half years will
pass between the time of the first refusal to bargain and
the court order that requires the employer to bargain.

As Jacob Sheinkman, General Counsel of the Amalgamated
Clothing Workers of America, said in his statement before
a 1967 House hearing on the effectiveness of the Board's
remedies:

. . . in almost every case delay in processing unfair
labor practice charges . . . works only to the em-
ployer's advantage. Until a collective bargaining
relationship is established, the employer effectively
controls the conditions of employment and, thus, is
in an excellent position to quietly subvert union
strength over a period of time. . . .

Under existing law, even the most outrageous and
flagrant violations of the Act by employers often go

\[8\] Millis and Brown, op. cit., p. 120.

\[9\] U.S. Congress, Senate, committee on Labor and Public
Welfare, Report by the Advisory Panel on Labor-Management
Relations Law (Cox Report), Document No. 81, 86th Congress,
unchecked pending the normal, drawn-out period for processing of the case by the Board.\textsuperscript{10}

A local union only rarely will be able to build a functioning organization during the years required to obtain a final Board order and court decree requiring the employer to bargain. Often its strength will be completely sapped by the time a decision is rendered because "The employees who joined the union not only have been discouraged but may have been induced in the interim to desert the union."\textsuperscript{11}

Through the use of this delaying strategy, the employer in White Construction and Engineering\textsuperscript{12} was able to delay the commencement of bargaining for two and one-half years. The employer's first refusal to meet with the union occurred on the day the union won a Board conducted election. The employer stalled the actual certification of the union six months by lengthy post-election proceedings. When the Board finally certified the union, the company, asserting that the union no longer represented a majority of its

\textsuperscript{10}U.S. Congress, House of Representatives, Special Subcommittee on Labor of the Committee on Education and Labor, Hearings, To Amend the National Labor Relations Act, To Increase Effectiveness of Remedies, 90th Congress, 1st Session (Washington, 1967), pp. 238-239.


\textsuperscript{12}N.L.R.B. v. White Construction and Engineering Company, 5 Cir., 1953, 204 F. 2d 950.
employees, again refused to meet with it. After two years additional delay a circuit court approved the Board order to bargain and stated that an employer

... cannot decide for [himself] whether a duly certified union has lost its bargaining status by reason of a failure to retain a majority representation, and decided that it has, refuse to deal with it further.\footnote{Ibid., p. 253.}

The effectiveness of this strategy of delay in breaking a union is shown in the recent \textit{Schneider Mills} case.\footnote{\textit{Schneider Mills, Inc.}, 159 NLRB No. 87 (1966); 5 Cir. 390 F. 2nd 275.} The union won the certification election by a wide margin in November, 1965. The employer filed objections to the election which were dismissed and the union was certified two months later. The employer refused all requests by the union to meet and forced it to file a refusal to bargain charge with the Board. The Board's decision was handed down seven months later. It found that the employer had unlawfully refused to bargain and ordered him to bargain on request. However, the employer continued in his refusal to meet and sought review of the Board order by the Court of Appeals for the Fourth Circuit. The resulting litigation caused an additional seven months delay. Unfortunately, by January, 1968, when
the Circuit Court upheld the Board decision ordering the employer to bargain, the union had been dead for several months.\footnote{15}

Moreover, a court decree does not always conclude the matter. The employer may choose to delay bargaining for a few more years by violating the court decree and being charged with contempt of court. Contempt proceedings usually involve a lengthy investigation and trial preparation followed by protracted hearings. The following case, involving the \textbf{Wieriton Steel Company} before the Third Circuit Court of Appeals, illustrates the legal complexities involved and the delays possible in contempt proceedings. The initial charges in this case were filed in 1937; six years passed before a court decree was issued in 1943.\footnote{16} The long delay involved in obtaining a court decree was due to the inadequate appropriations and staff members during the early years of the Act.\footnote{17} The subsequent events were

\begin{itemize}
  \item \textbf{August 12, 1944}: Contempt petition filed.
  \item \textbf{October 16, 1944}: Argument before the court.
  \item \textbf{December 22, 1944}: Court issued decision that special master be appointed.
  \item \textbf{January 17, 1945}: Court entered order appointing special master.
\end{itemize}

\footnote{15}{\textit{Textile Workers Union of America, AFL-CIO, Conspiracy in Southern Textiles, Report to the Special Subcommittee on Labor of the House of Representatives Committee on Education and Labor} (New York, August, 1967), p. 31.}

\footnote{16}{\textit{N.L.R.B. v. Wieriton Steel Company}, 3 \textit{Cir.}, 1943, 135\textit{F.} 2\textit{d} 494.}

March, 1945 to August, 1947: Hearings conducted before special master, with a number of recesses during hearings.

February 1, 1950: Special master issued report.

February 21, 1950: Court entered order directing that report to special master stand confirmed unless exceptions thereto were filed. Subsequently exceptions were filed.

June 12, 15, and 16, 1950: Argument before court.

July 28, 1950: Court entered order adjudging respondents in contempt.18

The Supreme Court ordered that the respondents free themselves from the charge of contempt

(1) by withdrawing recognition, from and disestablishing the company-dominated union;

(2) by refraining for three months from recognizing any labor organization unless it is certified by the Board;

(3) by fully reinstating six employees to the positions which they held prior to their demotion;

(4) by fully reinstating twelve employees to their former or substantially equivalent positions;

(5) by making whole each of the eighteen individuals previously named for any losses in pay which they suffered because of their respective demotions, discharges, or layoffs;

(6) by affording all employees reasonable protection in their plants from physical assaults or threats of physical violence directed at discouraging membership or activities in a labor organization;

(7) by notifying all employees through notices (a) posted for sixty days in the plant, (b) distributed to all employees individually, (c) published in the Wierton Steel Employees Bulletin, that respondents have been adjudged in contempt;

(8) by filing with the clerk of the Supreme Court and with the Board, within thirty days, a sworn statement showing the steps taken to comply with the order;

(9) by granting the Board access to the plants and records of the respondent companies to verify compliance with the order.19


In addition, the Supreme Court ordered the respondents to pay the Board $38,750.00 to reimburse it for the cost of the litigation, and to pay the special master $10,000.00 as compensation for his services and $709.85 to reimburse him for his expenses. The significance of this case lies in that the Act was unable to induce compliance, and the employer was able to successfully frustrate the purposes of the Act for thirteen years at a relatively modest cost in penalty. In purely pecuniary terms this may represent a tremendous saving to the employer over the benefits an effective union might have obtained during the thirteen years.

A resourceful employer not only can use the refusal to meet as a method of delaying the commencement of bargaining, but also may use this device to provoke a strike.\textsuperscript{20} Realizing that a newly certified union may be unable to hold its members together during a strike, the employer hopes to break the union during the course of the dispute.\textsuperscript{21} Moreover, if the union survives an unsuccessful strike and files refusal to bargain charges with the Board, the time consumed in litigation will further weaken the union, or cause it to disintegrate from ineffectiveness.

\textsuperscript{20}Textile Workers Union, \textit{op. cit.}, p. 49.

\textsuperscript{21}Philip Ross, \textit{Government as Source of Union Power}, p. 259.
In a case which illustrates the use of this anti-union device, the employer refused to bargain in good faith with the newly certified union. After two years' delay, the Fifth United States Circuit Court of Appeals sustained a Board order requiring the employer to bargain. Despite the order the company refused, dodged, or avoided all requests by the union to meet and bargain collectively. Finally, the employer's adamant refusal to meet with the certified union caused a majority of the employees to go out on strike in protest. Within two months the union was forced to abandon the strike because of loss of support. Since the union was too weak to remain on strike, its only recourse was to file refusal to bargain charges with the Board. Three years passed before the same circuit court sustained a Board order requiring the employer to meet with the certified union for the purposes of collective bargaining. The court stated in its decision that:

... a more flagrant case would be difficult to imagine. The company has not even gone through the motions of bargaining. ... Since April 27, 1959, the company has not had a single meeting with the union though repeated requests have been made. ... 23

Although the preceding cases dealt with unions that had been newly certified as bargaining representatives by

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the National Labor Relations Board, the Labor Management
Relations Act does not require that a union prove its
majority status in a Board-conducted election as a condition
precedent to bargaining.\(^2^4\) Thus, an employer, legally, may
not condition bargaining on the conduct of a Board election
unless he entertains a good-faith doubt of the union's
majority in the appropriate unit. These principles were
clearly set forth in a 1949 Board decision:

We have previously held that an employer may in
good faith insist on a Board election as proof of the
Union's majority but that it "unlawfully refuses to
bargain if its insistence on such an election is mo-
tivated, not by any bona fide doubt as to the union's
majority, but rather by a rejection of the collective
bargaining principle or by a desire to gain time
within which to undermine the union." In cases of
this type the questions of whether an employer is
acting in good or bad faith at the time of the re-
fusal is, of course, one which of necessity must be
determined in the light of all relevant facts in the
case, including any unlawful conduct of the employer,
the sequence of events, and the time lapse between
the refusal and the unlawful conduct.\(^2^5\)

Occasionally, an antiunion employer will refuse to
meet with a union that enjoys a majority status or may
condition meeting on the conduct of a Board election, and
immediately embark on a campaign designed to undermine and
eliminate the union. In Viking Bag,\(^2^6\) the union's first

\(^2^4\)National Labor Relations Board, Twenty-seventh (1962)

\(^2^5\)Joy Silk Mills, Inc., 85 NLRB 1263 (1949).

\(^2^6\)Viking Bag Division, Surfine Central Corporation,
161 NLRB No. 51 (1966); 63LRRM 1360.
request for recognition and offer to prove its majority by card check was made after it had received signed union authorization cards from thirty-six (72 per cent) of the fifty employees in the bargaining unit. The employer agreed to meet with the union and then deliberately failed to keep the appointment. Thereafter, he ignored all union approaches and communications. The union filed a refusal to bargain charge with the Board. During the year required to obtain a Board order the employer engaged in various unfair labor practices aimed at discouraging union membership. He changed work rules and vacation schedules and in the words of the Board,

. . . systematically interrogated employees, instilled in them the impression that their activities were under surveillance, requested and encouraged them to report on the activities of their fellow employees, threatened them with discharge, plant closure, stricter working conditions, loss of privileges, and loss of the benefit of company-paid insurance, and threatened to integrate the plant. 27

Unilateral Employer Activity

The duty to bargain is violated not only where an employer refuses outright to bargain collectively with the majority representative of his employees, but also where he unlawfully interferes with the bargaining process by unilaterally changing terms and conditions of employment. 28

27 Ibid.

Once a union has been certified as the employees' bargaining representative, an employer cannot lawfully change any term of employment or working condition. The Board has said that the vice in "... unilateral action is that it undermines the authority of the bargaining representative and indicates a lack of good faith in entering into or pursuing bargaining negotiation." However, not every unilateral employer change is an unfair labor practice. The Board has stated that ordinarily a good-faith bargaining impasse leaves the employer "... free to take certain economic steps not dependent upon the mutual consent of the union..." but it does not relieve him from "... the continuing duty to take no action which the employees may interpret as a 'disparagement of the collective bargaining process' or which amounts in fact to a withdrawal of the union's representative status or to an undermining of its authority." The employer's statutory obligation to bargain in good-faith includes the duty to notify the employees' bargaining representative of any contemplated changes in terms or conditions or employment in order to afford the representatives an opportunity to bargain with respect to the


31 Central Metallic Casket Co., 91 NLRB 572 (1951).
proposed changes. Employers will unilaterally improve or worsen terms and conditions of employment during collective bargaining negotiations in an attempt to belittle the union and discourage unionism.

Because employees often are seeking higher compensation when they unionize, an employer many times will increase wages unilaterally as a means of demonstrating to his employees that collective bargaining is neither desirable nor necessary. In a recent case in which this tactic was used, the employer unilaterally announced, one month after the union won a certification election, that he would put a ten-cent wage increase into effect immediately and that he "... would do so whether the union agreed or not.” The Board held that the employer had clearly evaded his duty to bargain with the newly certified union, since the union had not been allowed to negotiate concerning the wage increase.

In another case the employer announced new and additional employee benefits shortly before a representation election for the purpose of inducing the employees to vote against the union. The Supreme Court ruled that the

33 Cloverleaf Cold Storage Co., 160 NLRB No. 116 (1966), 63 LRRM 1203.
34 Ibid.
"... danger inherent in well-timed increases in benefits..."," even where they are conferred permanently and unconditionally,"... is the suggestion of a fist inside the velvet glove. Employees are not likely to miss the inference, that the source of benefits now conferred is also the source from which future benefits must flow and which may dry up if it is not obliged." 36

Occasionally an employer will choose to unilaterally decrease wages or discontinue normal wage increases as a means of discouraging unionism. This type of unlawful conduct is usually motivated by a desire to penalize employees for voting for a union. In the May Aluminum case, 37 the employer strenuously opposed the organization of his employees and warned them that they would suffer if the union was voted in. Shortly after the union filed a representation petition the employer decided to postpone his policy of regularly scheduled wage increases, that had been in effect for several years, "until after the election." However, when the union won the election, the employer decided not to resume his former wage policy. In the bargaining sessions which followed the certification of the union, agreement was reached on many noneconomic clauses, but the employer flatly refused to make any wage concession.

37 May Aluminum, Inc., 160 NLRB No. 48 (1966); 63 LRRM 1019.
The Board found that the employer's over-all conduct indicated bad-faith bargaining in violation of the Labor Management Relations Act.

Employees seek union representation not only as a means of improving wages, but also as a means of improving existing working conditions. Realizing this, an antiunion employer faced with unionization of his employees will sometimes begin making unilateral improvements in working conditions in the hope that once the workers' grievances are satisfied they will lose interest in unionization, and he will not be forced to bargain with the union.

In a typical case in involving unlawful unilateral improvements in working conditions, the employer was operating in a new plant in which the installation of fans and drinking fountains was anticipated, but had not been accomplished. Water was supplied to the employees out of two galvanized cans. The employer was well aware that his employees were dissatisfied and suffering discomfort from the lack of adequate ventilation and drinking facilities.

On a hot June day, the employer discharged Lady Maria Ramos for presenting a grievance concerning these plant conditions to him on behalf of herself and other employees. The following day, when the employer refused to rescind the

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discharge of Lady Ramos, a majority of the employees went out on strike and signed union representation cards. During the month-long strike, the employer unilaterally improved conditions in his plant by installing fans and a drinking-water system. Although the employer met with the union representatives, he refused to recognize or bargain collectively with them as representing his employees. When the strikers asked for reinstatement the employer refused to take them back unless they signed applications as new employees.

The Board held that Lady Ramos was engaged "... in a protected concerted activity within the meaning of Section 7 of the Act," when she presented the grievance, and thus was unlawfully discharged. It also found that the union was the majority representative of the employees "on the basis of a card-showing" on the day of the strike and was unlawfully refused recognition. Because of the discharge of Lady Ramos, the unilateral improvement of working conditions, the refusal to recognize the majority union, and other unlawful acts, the strike was found to be an unfair labor practice strike. The Board ordered that the employer reinstate the strikers and reimburse them for any loss of pay.

Sometimes, employers also will attempt to discourage union membership by unilaterally worsening working conditions.

39 Ibid., p. 740.
as a reprisal for union activity. This action is taken in the hope that it will induce the workers to abandon the union, and thereby eliminate the necessity of having to bargain collectively with it.

The Homer Gregory case demonstrates the use of this unlawful tactic. Three weeks after the union won a National Labor Relations Board-conducted election, the employer unilaterally announced a change in operation from two eight-hour shifts to two five-hour shifts. Under the new work assignments, all workers that the employer thought had voted for the union were cut from eight to five hours per day while all those whom he thought had voted against the union were increased from eight to ten hours per day. When putting these changes into effect, the employer completely disregarded seniority. A few days after this unilateral change in working conditions was put into effect, the employer commented that he "... had cut the union men down to five hours per day and ... if that didn't starve them out he was going to cut them to two hours per day, just enough so they couldn't draw unemployment ... [because he] meant to starve them out."41

It is evident that this employer's objective in changing working conditions was to punish union adherents and reward nonunion ones. He hoped that his actions would result in the weakening and eventual destruction of the union.

41 Ibid.
An employer will sometimes unilaterally subcontract or relocate part or all of his operation in order to avoid bargaining with the statutory representatives of his employees.

The Board has ruled that an antiunion employer cannot circumvent the law by simply subcontracting away an unwanted union. He has a duty to bargain with the majority representative of his employees about his decision to eliminate a unit job or the entire unit by subcontract.\(^4\) This principle was clearly stated in a recent case\(^3\) in which the employer solicited bids in a local newspaper for an owner-operator to contract part of his hauling operation when he learned of the union's organizational drive. He told his employees that the operation was too small for a union, and threatened to subcontract it if the union won the election. The employer sought to induce his employees to sign petitions which he drafted and which were designed to call off the election. When, after intensive efforts, only two of his employees signed the petitions, the employer subcontracted out part of his hauling operation. One month after the union's victory in the Labor Board election, the employer laid off two drivers and both mechanics purportedly for lack

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\(^3\)M. Swank Iron and Steel Co., 146 NLRB No. 125 (1964).
of work. The Board found that the subcontract was unlawful because it was aimed "... at undermining and disparaging the Union as the newly chosen bargaining representative."\(^4^4\)

In recent years the Board has held that the elimination of jobs by subcontracting, even for economic reasons, is a mandatory subject for bargaining.\(^4^5\) The first specific Board ruling to this effect occurred in *Town and Country*,\(^4^6\) in which the Board held that the employer violated the Labor Management Relations Act, when he sought to eliminate or undermine the union as majority bargaining agent, by terminating his trailer hauling department, discharging his drivers, and subcontracting his hauling work one month after the union was certified. Although the Board found that the employer was motivated by economic motives as well as by antiunion motives, it ruled that

\[... \text{even if Respondent's subcontract was impelled by economic or I.C.C. considerations, we would nevertheless find that Respondent violated Section }\]

8(a)(5) by failing to fulfill its mandatory obligation to consult with the Union regarding its decision to subcontract.\(^4^7\)

If an employer is motivated solely by economic considerations, he still has a duty to bargain about his decision to

\(^4^4\)Ibid., p. 1069.
\(^4^6\)Town and Country Manufacturing Co., 136 NLRB 1022 (1962); 5 Cir., 1963, 316 F. 2d 846.
\(^4^7\)Town and Country, 136 NLRB 1022, 1027-1028.
subcontract. In the important Fibreboard case\textsuperscript{48} the employer decided to subcontract his entire maintenance operation, for economic reasons. This case contained no antiunion element. The Board held that the employer's failure to negotiate with the union concerning his decision to subcontract constituted a violation of Section 8(a)(5) of the Act.

Plant relocation also is considered an unfair labor practice if it "... unduly interferes with employees' rights to unionize, involves discrimination because of union activity, or operates as an improper failure to bargain with the union representing the employees."\textsuperscript{49} Thus, an employer cannot lawfully relocate because of antiunion bias.

Although relocation for economic motives is permissible, the employer still is required to bargain with the established employees' representative about the conditions of relocation and give sufficient notice of his decision to allow the union an opportunity to bargain.\textsuperscript{50}

The Board held in a 1953 case\textsuperscript{51} that the employer's decision to relocate his plant was motivated solely by

\begin{itemize}
\item \textsuperscript{48} Fibreboard Paper Products Corporation, 138 NLRB 550 (1962); D.C. Cir., 1953, 322 F. 2d 411.
\item \textsuperscript{49} "Labor Law Problems in Plant Relocation," Harvard Law Review, LXXVII, No. 6 (April, 1964), 1100.
\item \textsuperscript{50} Ibid., p. 1103.
\item \textsuperscript{51} Brown Truck and Trailer Manufacturing Company, Inc., 106 NLRB 999 (1953).
\end{itemize}
economic considerations. However, the employer violated the Labor Management Relations Act when he advised the majority union that he meant to close the plant in the near future, but failed to mention that he planned to reopen the plant at a new location. Because the employer did not mention his relocation plans to the union and deliberately created the impression that he was about to abandon the operation completely, he did not allow the union an opportunity to bargain, and thus committed an unfair labor practice.

In a case\textsuperscript{52} which was described by the Board as a "traditional runaway shop situation," the plant was moved to a distant city to avoid dealing with the newly certified union. The remedial policy for such situations was re-examined by the Board, and it designated a remedy which it felt more effectively accomplished the objectives of the statute. Normally in cases where an employer relocates a plant in order to avoid his statutory bargaining obligation, the Board does not impose an obligation to bargain until the union re-establishes its majority status at the new location. However, in this case, the Board stated, that because of the particular situation the

\textsuperscript{52}Garwin Corp., S'Agaro, Inc., 153 NLRB No. 59 (1965).
illegal objective, i.e. to escape bargaining. In the circumstances, the interests of newly hired employees whose very jobs and hence statutory protection, exist by virtue of: (1) Respondents unfair labor practices, (2) the Board's unwillingness to order the return of the plant to the original location, and (3) the failure of discriminatees to displace them by accepting reinstatement, should not be preferred at the expense of a bargaining order which will dissipate and remove the consequences of a deliberate violation of statutory obligations.

Thus we shall ... require Respondents to recognize and bargain with the Union, on request, whenever Respondents ultimately decide to locate.53

Under this order the employer was not allowed to benefit from his unlawful conduct, but was obligated to bargain with the union as the representative of his employees.

Refusal to Bargain in Good Faith

In its early decisions under the National Labor Relations Act, the Board held that an employer must do more than just meet with the employees' representatives; he must negotiate with a sincere desire to reach an agreement.54 In 1936 the Board stated:

Collective bargaining is something more than the mere meeting of an employer with the representatives of his employees; the essential thing is rather the intent to adjust differences and to reach an acceptable common ground ... The Board has

53 Ibid.

54 Sands Manufacturing Co., 1 NLRB 546 (1936); Atlas Mills, 3 NLRB 10, 21 (1937); Highland Park Manufacturing Co., 12 NLRB 1238, 1243-1249 (1939); 4 Cir., 1940, 110 F. 2d 632.
repeatedly asserted that good faith on the part of the employer is an essential ingredient of collective bargaining. 55

The duty of an employer or a labor organization to bargain in good faith was formally settled with the passage of the Labor Management Relations Act which contained a new section, 8 (d), which stated:

For the purposes of this section, to bargain collectively is the performance of the mutual obligation of the employer and the representative of the employees to meet at reasonable times and confer in good faith with respect to wages, hours, and other terms and conditions of employment, or the negotiation of an agreement, or any question arising thereunder, and the execution of a written contract incorporating any agreement reached if requested by either party, but such obligation does not compel either party to agree to a proposal or require the making of a concession. . . . 56

In general, an employer's good faith is determined by "... a fair appraisal of the circumstances and particular facts of a case." 57 Thus, although the bargainer's state of mind is the decisive factor, it is determined by the totality of his conduct. 58 Some employer practices which have been found by the Board to indicate bad faith are

57 Associated Unions of America, 7 Cir., 1952, 200 F 2d 52.
failing to participate actively in bargaining, merely listening to and rejecting union proposals; unwillingness to seek compromise or make concessions; and engaging in surface bargaining.

In Montgomery Ward\textsuperscript{59} the company negotiators listened politely to each of the newly certified union's demands, rejected them, and sat back to wait for the next demands. The company's defense for this type of behavior was that since it had recognized the union, met with it, and participated in discussions to avoid mutual misunderstandings, it felt that it had fulfilled its duty to bargain. The Board held that the employer was not bargaining in good faith because it was not making a sincere effort to reach an agreement. It ruled that an employer must participate actively in deliberations if a basis for agreement is to be found.

The union in the Reed Prince case\textsuperscript{60} was certified in 1950. During collective bargaining negotiations the employer rejected all union proposals even those dealing with the inclusion of language taken directly from the Act itself. Judge Magruder, speaking for the First Circuit Court, said:

\textsuperscript{59}Montgomery Ward v. N.L.R.B., 9 Cir., 1943, 133 F. 2d 676; 12 LRRM 508.
\textsuperscript{60}N.L.R.B. v. Reed and Prince, 1 Cir., 1953, 205 F. 2d 131.
... if an employer can find nothing whatever to agree to in an ordinary current-day contract submitted to him, or in some of the union's related minor requests, and if the employer makes not a single serious proposal meeting the union at least halfway, then certainly the Board must be able to conclude that this is at least some evidence of bad faith, that is, of a desire not to reach an agreement with the union. In other words, while the Board cannot force an employer to make a "concession" on any specific issue or to adopt any particular position, the employer is obliged to make some reasonable effort in some direction to compose his differences with the union, if Section 8 (a)(5) is to be read as imposing any substantial obligation at all.61

In a 1952 case62 dealing with good faith bargaining, the employer was willing to negotiate with the union at any time; however, he was unwilling to compromise or modify his proposals. The employer's clause-by-clause counter-proposal to the union's contract insisted on unilateral control over every aspect of the employment relationship. The Board commented that the employer's offer

... proposed shackles for the Union, while reserving unrestrained freedom for itself. Such a contract, if entered into, would have amounted to a formal negation of the collective bargaining principle. The Respondent's president ... must have known that no union, let alone the certified bargaining representative, could possibly have agreed to such a contract.63

In finding a violation of the duty to bargain the Board stated:

61 Ibid., p. 133.
63 Ibid.
The stigma of bad faith introduced by the submission of this counterproposal could have been removed by engaging in the "give and take" of collective bargaining. Thereafter, however, the respondent showed no inclination to modify its proposal. The record is quite clear that throughout the three bargaining conferences it steadfastly refused to make a single change.64

The employer in the Aldora Mills case65 was able to break the union by means of surface bargaining. In regard to an employer's use of this unlawful tactic, the Eighth Circuit Court of Appeals stated:

... to sit at a bargaining table or sit almost forever, or to make concessions here and there, could be the very means by which to conceal a purposeful strategy to make bargaining futile or fail. Hence, we have said in more colorful language it takes more than mere "surface bargaining" or "shadow boxing to a draw," or "giving the union a runaround while purporting to be meeting with the union for purposes of collective bargaining."66

A union was certified at the plant in April, 1946. Four months passed before the union could arrange an initial bargaining session with the company. The employer made counterproposals and minor concessions during the sixteen bargaining sessions which took place over a seven month period. However, no contract was ever agreed to and the union filed refusal to bargain charges. Four years after

64Ibid.


66Herman Sausage Company, 5 Cir., 1960, 275 F. 2d 229; 45 LRRM 2830.
the union was certified the Fifth Circuit Court of Appeals upheld the Board's refusal to bargain decision, but the union had ceased to exist. The lack of tangible bargaining results and the long delay involved in litigation had worked together to kill it. Thus, although the national labor laws provide newly certified unions with a great deal of protection, an employer can still break a union by committing unfair labor practices and by delaying his compliance with the law until he is faced with a circuit court decree.
CHAPTER IV

THE EFFECTIVENESS OF STANDARD BOARD REMEDIES IN PROTECTING THE WORKER'S RIGHTS

The National Labor Relations Board is a quasi-judicial agency. Like most such agencies, it does not possess any punitive powers; it cannot fine, imprison, or blacklist an employer for violating the labor laws.¹ The Board is empowered to hold hearings and issue decisions and orders. However, its orders are not self-enforcing; it must petition a circuit court of appeals for the enforcement of an order. The Act's review provisions were patterned on the original Federal Trade Commission Act of 1914.² The inadequacy of this statute's enforcement machinery, "... resulted in an amendment in 1938 which made violators of Commission orders subject to severe penalties unless they petitioned for review of the order within sixty days."³

The remedial orders issued by the Board are contained in Section 10(c) of the Act. They are, "... designed to make the position of wronged parties the same as before

³Fahy, op. cit., p. 43.
the commission of the wrong."^4^ The Board has several standard remedies which may be used singly or in combinations depending on the number and nature of unfair labor practices committed. As regards employers unfair labor practices, the most widely used remedies include the posting of notices for sixty days promising discontinuance of the practices, reinstatement of employees discriminated against, the payment of back wages, and an order to bargain collectively in good faith. These remedies contain no special penalties for the employer. Beyond the requirement of back pay there are no fines or restrictions. The labor laws seek restitution, not punishment.

To deter employer opposition to the right of employees to self-organization and collective bargaining, the Board's remedies should be prompt. Unfortunately, as we have already observed, the nearly two and one half year delay in the typical contested unfair labor practice case is far too long; "... in Labor-Management Relations justice delayed is often justice denied. A remedy granted more than two years after the event will bear little relation to the human situation which gave rise to the need of government intervention."^5^ Furthermore, delays of over

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ten years in obtaining employer compliance with the labor laws are not unknown. Because the Board's remedies are so long delayed, it is possible for an employer to stall a union into extinction. Therefore, employers who wish to avoid their duty to bargain collectively with a newly certified union are encouraged to commit unfair labor practices in an attempt to rid themselves of an unwanted union.

Because the effectiveness of the Board's remedies is seriously undermined by the problem of delay, "no change in the substantive provisions of the Taft-Hartley Act is more important than speeding up the processes of decisions in unfair labor practice cases." Much of the delay in contested unfair labor practice cases could be avoided if the Board did not have to petition a circuit court of appeals for enforcement of its orders. It takes time to print records and briefs; some circuit courts have heavy dockets or do not sit during the summer months; thus, generally all appellate litigation is slow. To eliminate

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this source of delay, a statutory change should be made in the Act so that all orders issued by the Board under Section 8 would become final unless a petition for review is filed within thirty days. Once the order is final, the respondent can be found in contempt if he violates it.

The Board's remedies must not only be prompt, they must be strong and realistic in order to discourage employers from committing unfair labor practices as a means of avoiding their duty to bargain with a newly certified union. As Dennis M. Flannery stated, "The detection of unfair labor practices means little if the only sanction is social embarrassment." Many individuals in the field of labor relations feel that the Act is "... working well without undue hardships upon labor organizations, employers, or employees." Roman C. Pucinski recently stated that he was "... under the impression that the NLRB has been doing a pretty good job," and that "...

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generally, they have been giving very efficient and expeditious service." Other authorities consider the present Board remedies ineffective. As Derek Bok recently stated,

As matters now stand, many remedies of the Board are trifling enough that an employer ... can often profit from violating the law even if he is eventually brought to book. By encouraging violations in this manner, inadequate remedies may not only work hardship on the other parties involved; they may also increase the workload of the Board unnecessarily.

This chapter will examine the existing evidence of the effectiveness of the Board's standard remedies most of which is contained in testimony before Congressional committees. A refusal to bargain with a newly certified union does not exist in isolation, and employers will sometimes use unfair labor practices as a means of avoiding their duty to bargain. As a report by the Textile Workers Union stated,

... in recent years a new phenomenon has arisen--the employer who deliberately commits unfair labor practices as part of a conscious, carefully-calculated anti-union policy. This cynical employer, in total disregard of the law, has coldly decided that it is cheaper to fire and later reinstate union adherents than it is to recognize a union; that coercion and intimidation are acceptable methods of thwarting...
unionism because the remedies of the National Labor Relations Board . . . are innocuous; that the processes of the Board, rather than deterring anti-union activity can be used as a tool in furthering his attack. 14

Therefore, we will begin with a discussion of Board remedies for unfair labor practices in general.

Posting of Notices

For all violations of the Act and specifically for threats, intimidation, and surveillance, and all activities which interfere with, restrain, and coerce employees the major remedy is the posting of a notice by the employer. The notices are designed to offset the effect of any unfair labor practices on the part of the employer and usually appear on the plant's bulletin boards. They contain statements of the unfair labor practices committed by the employer and his promise that they will not be repeated in the future. The notices also contain statements of affirmative actions which the employer will take to remedy the situation. Usually, the posting of the notice for sixty days constitutes full compliance with the Act. If the employer commits new unfair labor practices during the notice period, the only remedy normally will be an extension of the notice period. All violations of the Act that occur after the notice period must be filed with the Board as new charges.

14Textile Workers Union of America, op. cit., p. 2.
The effectiveness of this Board remedy has been particularly questioned. As Philip Ross states, "... the prevalence of recidivism and the nature of the remedy itself raise grave doubts of its effectiveness. The universal opinion of experienced NLRB personnel is that it is almost useless as a deterrent."\(^{15}\) In the Appendix is a typical Board notice, an examination of it immediately reveals one of the main factors which weakens its effectiveness. The legalistic language in which it is written cannot be readily understood by many employees.\(^{16}\) "In some cases the problem of comprehension is compounded by the fact that the employees do not read English."\(^{17}\) This is true not only in areas where there is a high illiteracy rate, but also in areas where the employees normally speak a language or languages other than English. However, even if the notices can be read and understood, they are often not noticed by the employees. Although the employer will almost always comply with the Board order to post the notice, employees will often fail to see it. Furthermore,


\(^{16}\) Textile Workers Union of America, *op. cit.*, p. 54.

the Board's notices are extremely impersonal in nature. In cases where the employer has committed widespread or repeated violations of the Act, it is difficult if not impossible for employees to have confidence in the fancy wording on a slip of paper. The Board in its official notice does not require that the company admit having committed an unfair labor practice, but neither will it allow the notice to contain a non-admission clause. But the employer is allowed to post his own notice with a non-admission clause beside the Board's notice and in effect nullify the whole thing.

In order to make the remedy of posting of notices more effective the suggestion has been widely made that the language of the notices be made less legalistic for the benefit of the employees, employers, and unions who choose to read them. Notice language that is more easily understood could bring about wider understanding of the Board's objectives and remedies. In plants where there is a high illiteracy rate among employees, the employer should be required by the Board to read the


20Textile Workers Union of America, *op. cit.*, p. 54.
notices aloud to all employees. In plants containing a large number of non-English-speaking workers, the notices should be read aloud in all languages spoken in the plant and posted in these languages. In large plants where there is a great probability that the notices will be overlooked even though most employees would probably be able to read and understand them, the employer should be required to call attention to their presence on the bulletin boards. In clear-cut refusal to bargain cases which are accompanied by other flagrant unfair labor practices or in the context of repeated violations, the employer should be required to provide an opportunity on company time and property for a Board agent to read a copy of the notice to all employees and answer their questions. Finally, the Board's policy of allowing employers to post their own notice containing a non-admission clause should be discontinued.

Reinstatement

Where an employer has discriminatorily discharged or disciplined employees in order to discourage union activity the present remedy is reinstatement to the same or a substantially equivalent position. The discriminatory discharge is one of the most effective methods of destroying

21 Ross, Labor Law in Action, p. 32.

22 U.S. Congress, House of Representatives, Special Subcommittee on Labor of the Committee on Education and Labor, Hearings, to Amend the NLRA to Increase Effectiveness of Remedies, Aspin, p. 9.
a newly certified union. Nicholas A. Zonarich stated in a recent Congressional hearing:

The most common tool in effective union busting is the discriminatory discharge. A master craftsman handles the tool delicately. The discharge should be flagrant enough so that all employees are quite sure that the discharge is for union activity but with enough apparent justification that a sham defense can be raised when the Labor Board checks into the case.23

By discharging a few key union members, the employer can quickly and effectively chill the desire of his employees for collective bargaining. The discriminatory discharge has always been the most prevalent employer unfair labor practice.24

The remedy of reinstatement loses much of its effectiveness if there is a long delay in settling the case.

"Of what value is a provision in the law protecting an individual against discharge for union activity if he is to be without his job for 15 months before the Board can order his reinstatement?"25 Although the initial reaction of most individuals who have been discriminatorily discharged

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23U.S. Congress, House of Representatives, Committee on Education and Labor, Hearings, Administration of the NLRA, statement of Nicholas A. Zonarich, Organizational Director, Industrial Union Department, AFL-CIO, p. 32.


is to want reinstatement,26 less than half of them return to their jobs if the case is closed after a formal decision by the Board, as compared to three-fourths, if the case is settled informally and more promptly in the regional office. Of the employees who accept reinstatement, many are later discharged or quit. An employer who does not wish to reinstate an individual usually has little trouble in conveying this attitude to him through the assignment of distasteful jobs, constant surveillance, or harassment. Through the use of these methods an employer can be remarkably successful in forcing the reinstated individual to seek other employment. Because of fear of this type of company retaliation, many individuals who are entitled to reinstatement refuse it.28 Other discriminatees decide to waive reinstatement because during the lengthy delay involved in settling the case they have found a better job. In such cases the employer suffers no penalty for his unfair labor practices.

26U.S. Congress, House of Representatives, Special Subcommittee on Labor of the Committee on Education and Labor, Hearings, to Amend the NLRA to Increase Effectiveness of Remedies, Aspin, p. 4 ("As a matter of routine the NLRB agent usually asks the Discriminatees to state in their affidavits whether they want reinstatement and 82 percent of those asked responded in the affirmative.").


To make the remedy of reinstatement more effective, discharged employees should be reinstated immediately after a favorable Board decision while the company may be taking an appeal to the courts. This statutory change in the Act would dissuade employers from using discriminatory discharge as a method of breaking a newly certified union because it would lose much of its impact if the discriminatee is swiftly and rightfully returned to his former position. Furthermore, an employer would be less likely to retaliate against the individual while his appeal to the circuit court is pending.

Payment of Back Wages

An employee who is discriminatorily discharged or disciplined is often eligible for back pay as well as reinstatement. The amount of back wages due an individual who has been discriminated against is computed with six percent interest added. However, the earnings of a discharged person during the time between the discharge and the offer of reinstatement are deducted from the total amount of back wages due. Thus, the size of the penalty imposed on the employer depends on the initiative and success of the discharged worker in finding new employment rather than the nature of the employer's act. In spite of such shortcomings, there is widespread agreement that reinstatement with back

29Textile Workers Union of America, op. cit., p. 53.
pay is the most "... effective deterrent to the anti-
union employer from open violations of the Act..."30

The remedy of back pay is not as effective as it could
be because the back pay check does not fully compensate the
worker for the loss of steady earnings. An individual will
often need the money immediately to pay his bills, and he
probably cannot borrow funds at six percent.31 An undeter-
mined and uncertain sum of money after two or more years
delay will not recompense him for the deprivation suffered
during the intervening period. Frequently, he must seek
other employment, and expenses incurred as a result of his
discriminatory discharge are not paid back to him in the
back pay check. Employers often profit from this remedy
since if a discharged worker obtains other employment, any
back pay he may have coming will be decreased by the amount
of his earnings. Some employers even consider violations
of the law to be good business. Back pay is deductible from
the company's taxes and often "... represents only a frac-
tion of what the employer would have to pay in terms of the
improvement collective bargaining would bring."32

30Millis and Brown, op. cit., p. 89.
31Robert Evans, Jr., Public Policy Toward Labor
32U.S. Congress, House of Representatives, Special Sub-
committee on Labor of the Committee on Education and Labor,
Hearings, to Amend the NLRA to Increase Effectiveness of
Remedies, statement of William Pollock, General President,
Textile Workers Union of America, AFL-CIO, p. 58.
In order to make the backpay remedy more effective the employer should be required to do more than merely make the employees "whole" for any monetary loss resulting from their discriminatory treatment. A more realistic remedy would be to require the employer to pay the discriminatees double or triple backpay. This would not only help to compensate the discriminatees for any extra or unusual expenses incurred, but would also help take much of the profit out of deliberately breaking the labor laws as a means of discouraging unionism.

A Board Order to Bargain in Good Faith

The remedial power of the Board for violations of the duty to bargain, bearing more specifically on the subject of this thesis, ordinarily consists of an order to bargain in good faith. The order does not usually require an employer to do anything specific except in certain categories of cases. These include such conduct as refusal to recognize or meet, refusal to supply information upon request, refusal to sign a contract after an agreement has been reached, and so on. Where an employer has violated one of these categories, compliance with the duty to bargain is usually easily ascertainable. Where no specific acts are required, compliance with the labor law is more difficult to determine.

33U.S. Congress, House of Representatives, Special Subcommittee on Labor of the Committee on Education and Labor, Hearings, to Amend the NLRA to Increase Effectiveness of Remedies, Aspin, p. 11.
The weakness of the Board's remedy of an order to bargain in good faith lies in Section 8(d) of the Act. Because this section requires that the parties meet and discuss, but does not require that the parties come to an agreement, it tends to encourage employers to conform to the definition of good-faith bargaining only superficially. In 1953 Arthur J. Goldberg, then General Counsel of the CIO, testified in a Senate hearing that because of Section 8(d) the duty to bargain was being construed... both by the courts, the Board, and employers, ... to permit an employer to refuse really to bargain in good faith with the union. The essence of the collective bargaining process is and should be a complete, candid exchange on the part of both sides, and a willingness to attempt to make reasonable proposals and counterproposals in the effort to arrive at a mutual agreement.

While it is true that, under the collective bargaining process, neither party is compelled to make proposals that it does not believe in or to agree to concessions that it does not feel are warranted, nevertheless this provision, having been written into the law, has encouraged a great concert of action on the part of employers ... to refuse really to bargain in good faith and to refuse really to arrive at an agreement. This is one of the situations where, by writing into the law language which was unnecessary, language which only purported to codify what was in the law psychologically, encouragement has been given to intransigent employers not to arrive at an agreement.

Thus, this Board remedy is ineffective because an employer technically can comply with the affirmative portions of a

Board order to bargain in good faith without a collective bargaining contract ever ensuing. The Board order can force the employer to end any unilateral actions, meet with the union, offer counterproposals, cease threatening and discharging union adherents, and stop insisting on unlawful contract terms, but it cannot force the employer to observe the intent of the law. Nor can a Board order compel agreement. All the law requires is that the employer meet with the union representative and go through the motions of bargaining. Since the employer is not required to agree with the union, he can cease committing unfair labor practices begin an interminable series of meetings with the certified union, but never come to an agreement or sign a contract with it. "... these meetings are mere superficial maneuvers to satisfy the law's requirement of good-faith bargaining." Although the employer has been required to pay a certain price in litigation costs and must at least appear to be bargaining with the certified union, the delays and lack of results have also achieved a weaker union or perhaps destroyed the union altogether. Thus, "without question

36 Ross, Government as Source of Union Power, p. 259.

a sophisticated accommodation to the law may yield results inconsistent with the basic aims of the statute," and an employer who wishes to avoid his duty to bargain in good faith with the newly certified union can do so if he is willing to pay a not very heavy price.

Successful collective bargaining usually results in the execution of a collective bargaining agreement. Therefore, employers who have been found in Board, circuit court, or Supreme Court cases to have refused to bargain in good faith should be required to demonstrate good faith by bargaining with the majority union to a conclusion or an impasse. An unfair labor practice charge of refusal to bargain should be left pending until an impasse is reached, a strike occurs, or a contract is signed. Allowing the charge to remain pending rather than closing it would help to discourage any additional employer unfair labor practices from occurring during the negotiation of the contract.

38 Ross, Labor Law in Action, p. 16.
39 Taylor, op. cit., p. 147. 40 Ibid.
CHAPTER V

SUMMARY AND CONCLUSIONS

The national labor relations law, as expressed by both the original National Labor Relations Act and its amendment the Labor Management Relations Act, has as its purpose to encourage the practice and procedure of collective bargaining. In order to achieve this purpose, the Act provides machinery by which workers can make their choice of a bargaining representative known. Once a union has won a Board conducted election and been certified, the employer has a duty to bargain collectively with it as representing his employees. The duty to bargain with a newly certified union is such a basic and clearly understood tenet of the national labor law that it has long been considered "the crux of the Act."

Chapter II consists of a statistical analysis of firms and cases involving a refusal to bargain. The available Board statistics on the number of refusal to bargain charges filed annually revealed that since 1958 employer opposition to collective bargaining has been increasing at an alarming rate. Not only have the number of refusal to bargain charges doubled since 1958, but also the percentage of these charges has more than tripled.
The statistical information provided by the Ross study indicated that, during the five-year period of the study, the number of employer refusal to bargain charges, found to have merit, quadrupled. The number of violations of refusal to bargain indicated that over half of all cases included a violation of more than one bargaining issue. Furthermore, over half of all refusal to bargain cases were found to contain other unfair labor practices. The prevalence of more than one violation of the Act in each case suggests that employers who violate their duty to bargain do so deliberately. The vast majority of firms that violate the duty to bargain are small—containing less than forty employees in the bargaining unit. The size of these firms corresponds roughly with that of firms who were certified in National Labor Relations Board election during the period of the study. Thus, it appears that many firms of all sizes faced with a newly certified union are attempting to avoid their duty to bargain with it. The holding of certification elections is of little value where employers refuse to bargain.

Employer acts designed to avoid their legal obligation to bargain with newly certified unions frequently constitute violations of the Act. Many of the most effective unfair labor practices involve a refusal to bargain. Chapter III contains a study of three types of bargaining violations, committed by employers, which have been used successfully
to discourage unionism by weakening, and occasionally destroying the newly certified union. They are (1) a refusal to meet with the union representative, (2) unilateral employer activity, and (3) bad-faith bargaining.

Many employers who violate their duty to bargain, by refusing to meet with the newly certified union, do so in an attempt to force the union to file a refusal to bargain charge. Because collective bargaining is at a standstill while an unfair labor practice charge is being decided by the Board and the courts, the employer will exhaust every legal device at his disposal to increase the delay involved in litigating the case. Such employers hope that, by using all the avenues of litigation allowed to them under the law, they may subvert their employees' efforts to exercise their collective bargaining rights. Employees vote for unions because they feel that unionization can bring about an improvement in their wages and working conditions. The months and years of delay caused by the employers refusal to bargain frequently causes many employees to become discouraged and disenchanted with the union, and disillusioned with the ability of the law to protect their rights.

Some employers are not content to use merely the passage of time to discourage unionism. They will attempt to frighten their employees out of the union by committing, or threatening to commit, other unfair labor practices. In
this way, they hope to destroy the union before a court decree finally forces them to bargain.

An employer may refuse to meet with a newly certified union in an attempt to force it to call a strike which it is unable to win. If the union is unable to hold its members together and the strike is lost, its strength will be greatly diminished as a result. If the union survives the strike and the employer persists in his refusal to meet, the union is then forced to file a refusal to bargain charge with the Board. The delays consumed in litigation will serve to further weaken the union and perhaps destroy it before the employer can be ordered to bargain by the courts.

Other employers violate their duty to bargain with a newly certified union by engaging in various types of unilateral activity. One of the most common types of employer unilateral action is an increase in wages or an improvement in working conditions. Through an increase in wages an employer is often attempting to demonstrate to his workers that he, not the union, is the source of all benefits. An employer will unilaterally improve bad working conditions in order to show his employees that they have no need for a union. Occasionally, an employer will unilaterally decrease wages or worsen working conditions. Both of these actions are usually motivated by the employers desire to punish his workers for seeking unionization.
Some employers attempt to evade collective bargaining by unilaterally subcontracting out a portion of their operation or the entire bargaining unit. By subcontracting the portion of their operation which contains the strongest union adherents, the employer seeks to weaken the newly certified union. In an attempt to literally subcontract away the unwanted union, some employers unilaterally subcontract the work of the entire bargaining unit.

Another unilateral act designed to eliminate the necessity of bargaining with a newly certified union is moving the plant to a distant location. By moving his plant, the employer hopes that only a few union members will be willing or able to seek employment at the new location. Thus, the union will be weakened by its loss of membership.

Another method used by employers to evade their collective bargaining duty with a newly certified union is bad-faith bargaining under which they meet with the union representatives but never engage in a bona fide attempt to reach an agreement. Some employers listen politely to all union proposals and reject all of them. Others offer such undesirable proposals that no union could afford to agree to them. However, employers are finding that they can successfully destroy a newly certified union by engaging in "surface bargaining" in which they agree to a few minor proposals and submit an occasional acceptable proposal, but never reaching a final agreement on all proposals or signing a contract.
In Chapter IV the effectiveness of four standard Board remedies in encouraging employer compliance with the Act, and in remedying the unfair labor practices of employers was examined. They are (1) posting of notices for sixty days, (2) reinstatement of employees discriminated against, (3) payment of back wages, and (4) a Board order to bargain in good faith. The effectiveness of all remedies is substantially decreased by the delay involved in Board and court litigation. The ancient judicial dictum that "Justice delayed is justice denied," is especially true, since a remedy which is two years or more in arriving is often too late to save the union.

The Board remedy of posting of notices is ineffective for a variety of reasons. The legalistic language of the notices is often not understood by the employees. Some employees are unable to read English. The notices are often not seen by the employees. If an employer violates the notice, the only penalty is an extension of the posting period. An employer may post his own notice, next to the Board notice, containing a non-admission clause. Finally, employees often have little faith in the amount of protection that a piece of paper can provide them.

Employers often discharge workers for a minor infraction of company rules and in such a manner that all other employees are certain that the underlying motive is union activity. In this way, they attempt to intimidate other
workers from engaging in union activities. The Board remedy of reinstatement of employees discriminatorily discharged or demoted could be much more effective if the employees were reinstated to their former positions quickly. The long delay presently involved in reinstatement not only discourages the discriminatees, it also discourages other union members; and, furthermore, encourages employees to flout the law.

Although the payment of back wages has long been considered the most effective Board remedy, its effectiveness is limited by the fact that employees often need their wages immediately to pay current bills. Back pay, even with six percent interest added, does not fully compensate for the loss of steady wages. Furthermore, the amount of back pay paid by the employer to the worker is decreased by the wages earned at other employment during the period, thus making the severity of the employer's penalty dependent on the worker's success and initiative in obtaining other employment. Since the unfair labor practice of discriminatory discharge is such an effective method of discouraging unionism, many employers apparently consider the remedy of back pay merely a fee for "union busting."

The effectiveness of a Board order to bargain in good faith is limited because a bargaining agreement need not result. The Act requires that an employer bargain with a newly certified union, but it does not require the employer
to agree to any contract provisions. Thus, by a sophisticated accommodation to the technical requirements of the national labor laws, an employer can comply with a Board order to bargain in good faith yet never sign a bargaining contract.

Because of the long delays involved in litigation and the ineffectiveness of standard Board remedies, the Labor Management Relations Act has been unable to protect the bargaining rights of workers. All indications are that the opposition of employers to collective bargaining with a newly certified union will continue to increase unless immediate steps are taken to shorten the delays and strengthen the remedies. Employers will, in increasing numbers, continue to deliberately violate the national labor law as long as their efforts are rewarded by weakened or broken unions.

The Board remedy of posting of notices can be strengthened by using language which is less legalistic and more readily understood by the average worker. The notice should be read to all employees in a plant where any workers are illiterate, and translated into, read, and posted in all languages other than English spoken in a plant. Employers should be required to point out the existence and whereabouts of notices in large plants where they are likely to go unseen. Employers, who have committed massive or repeated violations of the Act, should be required to allow representatives of the Board to read the notices to all
employees and answer any questions that they might have on company time. These changes in the Board remedy of posting of notices will help increase worker understanding of their rights, and the employer's duties under the law.

The Board remedy of reinstatement should be made more effective through a statutory revision of Section 10 of the Act which would require an employer, found guilty of discriminating against an employee or employees in a Board decision, to reinstate the employee or employees to their former or to substantially equivalent positions while the employer's appeal to a circuit court is pending. In this way, much of the damage caused to discriminatees and their families by delays in reinstatement should be minimized and much of the erosion of union strength which frequently follows the discriminatory discharge of a worker for union activity would be prevented. Employers would be dissuaded from using this unfair labor practice as a means of discouraging unionism because the newly certified union would gain a psychological advantage by having its leading union adherents rightfully and quickly reinstated to their former positions.

To improve the back pay remedy, the employer should be required to pay all employees discriminated against double or triple the amount of wages they would normally have received during the period. In this way, the worker can be compensated for any expenses and inconveniences suffered
as a result of the employer's discrimination, and the employer will find violations of the law less financially profitable.

The Board remedy of an order to bargain in good faith can be made more effective by requiring employers who seek to avoid their bargaining duty to bargain either until an impasse is reached or until a collective bargaining agreement is signed. Because the case is left pending and the penalty undetermined until either condition is reached, an employer would be less likely to engage in any further unfair labor practices and the workers right to bargain collectively would be much more adequately protected.

However, even if all the recommendations for improving the standard Board remedies were adopted, the Act would still be unable to fully protect the workers' rights to bargain collectively unless there is a sharp reduction in the long delay which now separates the filing of a case from its final disposition. Board orders to not carry the force of law until they are enforced by a circuit court of appeals, this enforcement process is usually extremely slow requiring a year or more. By amending the Labor Management Relations Act to make the Board's orders self-enforcing, that is, that they no longer require circuit court enforcement, thirty days after their issuance, the long delays encountered by Board cases in circuit courts of appeal would be eliminated. After this period of time, if the employer has not taken
significant steps to comply with the order or filed a petition for its review, contempt of court proceeding can be begun. Because the delays in enforcement proceedings would be eliminated and employers could no longer use them to their advantage, fewer employers would contest Board orders and the right of workers to bargain collectively would be more swiftly and effectively protected.
APPENDIX

NATIONAL LABOR RELATIONS BOARD NOTICE

NOTICE TO ALL EMPLOYEES

Pursuant to the recommendations of a trial examiner of the National Labor Relations Board, and in order to effectuate the policies of the National Labor Relations Act, we hereby notify our employees that:

WE WILL NOT interrogate our employees relative to their union sympathies or the union sympathies of their fellow employees, or in any other manner interfere with, restrain, or coerce our employees in the exercise of their right to self-organization, to form labor organizations, to join or assist AMERICAN UNION, LOCAL LODGE 1000, or any other labor organization, to bargain collectively through representatives of their own choosing, and to engage in concerted activities for the purpose of collective bargaining or other mutual aid or protection, or to refrain from any and all of such activities except to the extent that such right may be affected by an agreement requiring membership in a labor organization as a condition of employment, as authorized in Section 8(a)(3) of the National Labor Relations Act.

WE WILL OFFER to John Doe, Richard Rowe, and Mary Smith immediate and full reinstatement to their former or substantially equivalent positions without prejudice to any seniority or other rights and privileges previously enjoyed, and make them whole for any loss of pay suffered as a result of our discrimination against them.

WE WILL make John Doe, Richard Rowe, Mary Smith, Tom King, and Sue Allan whole for any loss of pay suffered as a result of our discrimination against them.

All our employees are free to become or remain members of the above-named Union or any other labor organization except to the extent that this right may be affected by an agreement in conformity with Section 8(a)(3) of the amended Act. We will not discriminate in regard to hire or tenure of employment or any term
or condition of employment against any employee because of membership in or activity on behalf of any such labor organization

(Employer)

Dated ______________________ By ______________________

(Representative) (Title)

This notice must remain posted for 60 days from the date hereof, and must not be altered, defaced, or covered by any other material.
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