The Taft-Hartley Act – Twenty Years After

John H. Fanning
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HON. JOHN H. FANNING**

When the Taft-Hartley Act1 was passed twenty years ago, it was a subject of major controversy, as was much legislation in the labor field. Opponents called it a slave labor law, and President Truman vetoed it. Looking back to the record of the Institute's first conference on Labor Law, held in 1948, shortly after the passage of the Act, there was a discussion by Senator Wayne Morse embodying all the fears of the opponents and expressing the belief that the Act would shortly be amended.2

That did not happen. Amendments did not come for twelve years, when the Landrum-Griffin Amendments3 were passed in 1959. Nor have the fears of the opponents materialized. Labor is not enslaved. The labor movement is still vigorous.

But the Act is not what it was twenty years ago. This does not refer to the fact that there have been amendments. Taft-Hartley changed both the structure and, to an extent, the functions of the Board. It established the new category of union unfair labor practices; it empowered the Board to hear and determine jurisdictional disputes; and it made available injunctive relief. These provisions have caused the growth of a new body of law interpret-

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** Mr. Fanning is a member of the Rhode Island and United States Supreme Court Bars and a graduate of Providence College (A.B.) and the Catholic University of America School of Law (LL.B.). He has been a Member of the National Labor Relations Board since December, 1957. He is happy to acknowledge the assistance of Richard Brownstone in the preparation of this article. Mr. Brownstone is a member of the District of Columbia Bar, and an attorney with the National Labor Relations Board.


ing the new amendments. And while the unfair labor practices that were carried over from the Wagner Act were not substantially changed in language, they have, in this period, acquired new content. This is not surprising. The past twenty years have seen four presidents in office; we have had the cold war, the Korean War, the New Frontier, and the Great Society. With the ever-rising standard of living we have not only the affluent society, but also the war on poverty and the civil rights movement. The Board itself has had four chairmen during this period and its membership has periodically changed as four presidents made their appointments to it. All these circumstances must affect an agency whose work is so closely entwined with the economy as a whole.

When the Board began to administer Taft-Hartley, it was in Volume 75 of its reports. After twenty years, it has reached Volume 167. Merely to summarize all that has happened would take far too much time, thus only the major developments will be discussed.

Some things may be dealt with rapidly. There was an enormous body of law built up interpreting Section 9(f), (g), and (h), the non-communist affidavit section. In its first full year under Taft-Hartley, the Board conducted some 15,000 union authorization elections. The repeal of these Sections has made much of that law of little more than historical interest. Section 8 (b)(6), dealing with featherbedding practices, was interpreted so narrowly that it has about as much function as an appendix. Similarly, there has been little under Section 8 (b)(5) dealing with unreasonable union dues. The administrative separation of the Board and the General Counsel, a source of some friction in the early days of the Act, has settled down into a satisfactory working arrangement. The determination of jurisdictional disputes is also something new. But it is sufficient to note here that the Board, although at first reluctant to make affirmative awards, has been persuaded by the Supreme Court that it is proper to do so, and has developed suitable criteria.

Having determined what cannot be considered here, we may now move to what is worth mentioning. It appears that the major developments are those that are, in fact, still developing—those issues that not only have been important in the past, but continue to be so in the major fields of the Board's activity, specifically, the Board's concern with the holding of representation elections and the remedying of unfair labor practices. I shall consider what the Board has done in the field of contract bar, unit determinations, and the regulation of election campaigns. Among employer unfair labor practices, the discussion will center principally on the implications of the Darlington, 7

Fibreboard,8 American Ship,9 Brown Food,10 and Wiley11 cases. In the area of union unfair labor practices, consideration will be given to the law as it is developing under Section 8 (b) (1) (A), the law of secondary boycotts as reflected in the impact of common situs and reserved gate cases, and the state of the law as to work preservation clauses. Finally, I shall consider the administration of the Act generally, including, but not limited to, the problems that arise from our increasing caseload.

**Representation Cases**

Representation cases are a natural starting point for this discussion, since that is where the collective bargaining process begins. The ceremonies earlier this year in Washington and many other cities, together with the casting of the 25 millionth ballot in an NLRB election, are a measure of the importance of this function.

What is most important in these cases is the speed with which they are handled. One factor important in achieving this speed is to have clear and easily applicable standards that will not only facilitate decision but also furnish guidance to employers and unions. The doctrine of contract bar12 is one such standard, as to which the Board, after careful study, spelled out the rules it would apply in a series of cases beginning with Deluxe Metal.13 Reflecting the change in industrial practice, the Board, in General Cable,14 has extended to three years the time within which a contract can be a bar. In Montgomery Ward,15 however, it was decided that, as between the parties, a contract will be a bar for its entire term. In Leonard Wholesale Meats16 the period, with respect to a contract, during which a petition can be filed, was narrowed because the speed in handling cases had increased. But not every contract can serve as a bar. In Pioneer Bus17 the Board held that a contract that divides the representation of employees on racial lines cannot act as a bar.

12. Originally developed by the Board without specific statutory warrant, the contract bar doctrine has now been approved by Congress in the provisions of Section 8 (b) (7) (A), which speaks of the time when a question concerning representation may not appropriately be raised, and Section 8 (f), which provides that pre-hire construction industry contracts shall not bar petitions filed pursuant to Section 9 (c) or 9 (e).

A possibly significant development in this area is what might be called the doctrine of non-contract bar that stems from *Keller Plastics*, a complaint case in which it was held that a recognition agreement valid when entered into could not be attacked on the ground that between recognition of the union and execution of a contract the union had lost its majority. This doctrine has since been extended to representation cases, where a recognition agreement that has not yet resulted in a contract has been held sufficient to bar a petition for a reasonable time. That the doctrine must be applied with care may be seen from the Board's recent decisions in *Rheingold* and *Sound Contractors*.

In *Rheingold*, the employer had recognized the intervenor on the basis of a state-conducted cross-check of union authorization cards. The petitioner, however, although it had a possible interest in the employees involved, was not given an opportunity to participate in the state board proceeding. The Board held that it would not apply *Keller Plastics* where the recognition agreement was entered into at a time when the petitioner had a substantial claim of interest, and was not afforded prior opportunity to demonstrate the extent of its interest by an election or other appropriate procedures. In *Sound Contractors*, the Board refused to apply *Keller Plastics* because it did not affirmatively appear that the employer had recognized the intervenor in good faith on the basis of a previously demonstrated majority and at a time when only the intervenor was actively engaged in organization. What the limits of *Keller Plastics* will be is not yet entirely clear, but the case does represent a change of possibly far-reaching significance.

In determining the unit appropriate for collective bargaining, the Board has a great deal of latitude. Subject to certain specific statutory provisions, such as those relating to guards and professional employees, the only requirement is that the unit be appropriate for collective bargaining. What this means, broadly, is that the unit sought should constitute a group of employees with a separate and identifiable community of interests. That can only be determined in the light of constantly changing circumstances. The structure of the industry, the content of jobs, the impact of changing technology—these and other factors will, and should, affect the Board's unit determinations, because the practice of collective bargaining, which the Act seeks to promote, is not encouraged by unit determinations that do not comport with reality. For this reason, the trend has been toward greater flexibility in unit determinations, and case-by-case decisions, as in the treatment of truck-

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21 drivers,22 driver salesmen,23 and technical employees.24 And although the Board may agree that in a given situation there is an optimum unit, it need not find only that unit appropriate. The history of bargaining, the patterns of bargaining that in fact develop, the possibly different nature of jobs included, the existence of separate and distinctive groups within what might be an optimum unit, all may impel a finding that a different unit is also appropriate. This appears most clearly in the Board's decisions in the cases involving department stores,24 insurance companies,25 and retail chains.26

A significant issue in unit questions is craft severance. The Taft-Hartley Act included, in Section 9(b)(2), the proviso that the Board should not find a craft unit inappropriate on the ground that a different unit had been established by a prior determination of the Board. In National Tube,27 the Board indicated that this meant precisely what it said. The Board then went on to consider all relevant factors and dismissed the craft severance petition that had been filed. Thereafter, in American Potash,28 the Board decided, in effect, that Section 9(b)(2) virtually compelled severance. It, therefore, held that whenever a true craft group was sought by a union that traditionally represented that craft, a severance election would be directed.29 The Board has now reconsidered the American Potash doctrine in Mallinckrodt.30 It has now returned to the National Tube interpretation of Section 9(b)(2), rejected the requirement that the union seeking craft severance must be a traditional representative, and established a list of illustrative factors to be considered whenever severance is sought.31 Such factors are: (1) whether the employees sought are skilled journeymen craftsmen, or a functionally distinct department; (2) whether there has been a history of bargaining at the plant and in the industry; (3) to what extent the employees have established or maintained their separate identity; (4) integration of the production process; and (5) the qualifications of the union that seeks severance.

Once the election is directed, the critical issue becomes the scope of campaign propaganda. The goal is an election in which the employees can express a reasoned choice. This is not an area in which it is possible to establish clear rules, permitting mechanical decision, apart from such matters as the Peerless Plywood32 rule, regulating the time of massed assemblies. The distinction between statements that are no more than predictions and those

29. The Board also decided, in American Potash, not to extend the practice of denying severance on an industry-wide basis, but it continued in effect the particular exemptions that had theretofore been established.
31. Supra note 29. The Board also unanimously rejected the industry exemptions.
that are in fact threats is extremely difficult to make. One line that the Board has attempted to draw involves appeals to racial prejudice. In \textit{Sewell Manufacturing},\textsuperscript{33} the Board stated that it would not tolerate as election propaganda, appeals that could have no other purpose than to inflame the racial sentiments of the voters. Recognizing, however, that information concerning racial matters could be relevant, the Board stated that it would not set aside an election where a party limited itself to truthfully setting forth another party's position on matters of racial interest and did not deliberately seek to exacerbate racial feelings.\textsuperscript{34}

A development of perhaps greater significance is the Board's establishment, in \textit{Excelsior},\textsuperscript{35} of the requirement that a union be furnished a list of eligible voters, after an election has been directed, in order to insure—to the greatest possible extent—that all parties to the election will be able to present their arguments to the voters. The emphasis in this approach is in affording the employees a better opportunity to make a reasoned choice. This is not to suggest that \textit{Excelsior} will eliminate the other criteria that must be applied in judging campaign utterances, but it does suggest that full discussion may minimize some problems.

\textbf{Unfair Labor Practices by Employers}

Employer unfair labor practices, Section 8 (a), are still the bulk of unfair labor practice cases, and the discriminatory discharge, Section 8 (a) (3), is still the bulk of our business. But these Sections of the Act, although not much changed by either Taft-Hartley or Landrum-Griffin, have absorbed much new meaning over the years, and it is to some of those developments that I now turn.

The most interesting development under Section 8 (a) (3) arose in the \textit{Darlington}\textsuperscript{36} case, in which the Supreme Court held that a complete and total closing of a business, whatever the reason, was not violative of the Act. A partial closing, however, would be violative, if motivated by a desire to chill unionism in other parts of the enterprise. It is unclear how far the par-


\textsuperscript{34} Compare Allen-Morrison Sign Co., 138 N.L.R.B. 73 (1962), in which the Board did not set the election aside.


\textsuperscript{36} Textile Workers of America v. Darlington Mfg. Co., \textit{supra} note 7. The Board's supplemental decision on remand is reported at 165 N.L.R.B. No. 100 (1967). The Board held that a purpose to chill unionism, at least in part, lay behind this decision to close the Darlington Mill; that those exercising control over Darlington had other business interests of sufficient substantiality to give promise of their reaping benefits from the discouragement of unionization in those businesses; that the relationship of the persons closing Darlington to the other businesses was such as to make it realistically foreseeable that employees of the latter would fear that their mills also would be closed if they engaged in organizational activity; that the persons exercising control over Darlington did, in fact, foresee and intend this effect; and that a number of these employees were, in all likelihood, so affected.
tial closing argument will be carried. In *Adams Dairy*, the Eighth Circuit, in a refusal-to-bargain case, held that an employer's decision to discharge its driver-salesmen and replace them by independent contractors was an economically motivated decision to shut down part of the business within the meaning of *Darlington*, and not subject to collective bargaining.

There have been various interpretations as to what constitutes discriminatory motivation. In *Radio Officers*, the Supreme Court held that there need not be specific proof of a violation where the type of discrimination employed inherently encourages or discourages union membership. In such cases, motivation is presumed. In *Local 357*, the Court agreed that there were circumstances in which the Board could infer discrimination, but held that the inference could not be drawn in the face of specific contrary language in the hiring hall agreement. In *Erie Resistor*, the Court dealt with an employer's grant of superseniority to replacements for strikers and to strikers who returned to work during the strike. The Court held that the employer's conduct clearly evidenced discriminatory intent and would be protected only by a showing of an overriding business purpose justifying the invasion of employee rights. In the lockout cases, the Court once again stressed the need to show a specific motive to discriminate.

The lockout cases thus rejected the Board's view that only defensive lockouts are lawful. The heart of the Court's rationale is that the Board must consider the specific motivation for the lockout. This is demonstrated by the circumstances in *American Ship*, where the Court found that a bargaining impasse had been reached; the purpose and effect of the lockout were to bring pressure on the union to modify its demands and to accept the employer's legitimate demands. In the Court's view, it could not be said that the natural tendency of such a lockout was to discourage union membership severely without serving a significant employer purpose.

*American Ship* involved one employer. *Brown Food* involved multi-employer bargaining. A whipsaw strike against one employer was called. The other employers in the unit locked out their employees, and then, acting exactly as the struck employer did, they resumed operations with temporary replacements. The Court could not find any hostile motivation, any more than in the lockout itself, and held that all of the respondents' conduct was

42. American Ship Bldg. Co. v. NLRB, supra note 9.
43. NLRB v. Brown, supra note 10. The Board's decision is reported at 137 N.L.R.B. 73 (1962). Members Rodgers and I dissented, and would have dismissed the complaint. The Supreme Court did affirm the court of appeals' refusal to enforce the Board's order.
part of the defensive measures taken to preserve the integrity of the multi-employer unit in the face of the whipsaw strike. The Court did not decide whether in all circumstances the non-struck employers could do exactly what a struck employer could do. It specifically noted that it did not decide whether, if the struck employer did permanently replace (as he could), the non-struck employers could take similar action. It is obvious that these decisions will cause considerable reevaluation of lockout problems.

*Acme Markets*\(^{44}\) presented an interesting lockout problem. Acme was part of a multi-employer bargaining unit, but not all its stores were included in the unit. Some of the excluded stores, which were not represented, were in close proximity to stores operated by other employers in the unit. There was an agreement among the employers that in the event of a whipsaw strike, all other members would close their stores in a defensive lockout. The union struck Acme's unit stores, and the other employers closed. That conduct is not questioned. But Acme then closed its non-unit stores, and this was alleged to be violative of Section 8 (a) (1) and (3). The Board, however, was of the view that the Acme lockout was necessary to preserve the unit, since otherwise, because of the proximity of Acme stores to unit stores that had shut down, the whipsaw effect would have obtained in Acme's favor at those locations. The Board, therefore, viewed the Acme lockout as necessary to preserve the integrity of the multi-employer unit—a legitimate business end. Accordingly, the Board was satisfied that the employer's conduct was not so demonstrably destructive of employee rights as to eliminate the need for specific evidence of hostile motivation or discriminatory intent. Since there was no such evidence in the record, the Board dismissed the complaint.

The law pertaining to the establishment of a bargaining relationship and the obligation of an employer to recognize the union that is organizing his employees has been the subject of much development and of recent discussion. A leading case in this area is *Joy Silk Mills*,\(^{45}\) in which the Court of Appeals for the District of Columbia affirmed the Board's finding that when an employer denies a request for recognition and then uses the time he has gained for the purpose of undermining the union's majority status, a bargaining order is warranted.\(^{46}\) The union's majority, in such circumstances, must be established, if at all, by the authorization cards it has secured from employees during its campaign, because the employer's conduct, in this kind

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46. Questions related to whether or not an employer has a good faith doubt of union majority, when he refuses a demand for recognition supported by an apparently sufficient number of cards, have presented much difficulty. See, e.g., Hammond & Irving, Inc., 154 N.L.R.B. 1071 (1965); Scrpa, Inc., 155 N.L.R.B. 99 (1965), revd and remanded sub nom. Retail Clerk's Union, Local 1179 v. NLRB, 376 F.2d 186 (9th Cir. 1967); Aaron Bros. Co., 158 N.L.R.B. No. 108 (1966); H & W Constr. Co., 161 N.L.R.B. No. 77 (1967).
of case, has made a fair election impossible. The *Joy Silk* doctrine has been universally accepted by the courts that have passed on it.

Related to the *Joy Silk* issue is the recent *Bernel Foam* case. *Bernel* reversed *Aiello*, which reversed *Davidson*, showing that reasonable men may differ as to what is a reasonable way to do things. In *Bernel*, the Board held that a majority union, which participates in an election with knowledge of the employer's unlawful refusal to extend recognition and to bargain, and then loses the election, is not thereby precluded from filing Section 8 (a) (5) charges based on the employer's pre-election misconduct. I am persuaded that the *Bernel* decision is a proper one. The Board is not involved in game playing. We are dealing primarily with the rights of employees, and in furthering the national policy of encouraging collective bargaining. We agree that an election is the best way to determine, under the appropriate safeguards, what the employees want. The union's resort to an election is therefore to be encouraged. But if the election turns out to be unfair because of campaign misconduct by the employer, there is no warrant for depriving the employees of the benefits of collective bargaining, simply because an attempt has been made to use an election. That was the effect of *Aiello*, an excessively technical application of the doctrine of election of remedies. If there is to be any election of remedies, it should be the Board's election to decide what will best effectuate the policies of the Act.

With respect to the subject matter of bargaining, Taft-Hartley, in Section 8 (d), spelled out some of the requirements. The Supreme Court, in *Borg-Warner*, set out the distinction between mandatory and non-mandatory subjects of bargaining and indicated the rights of the parties with respect to them. But mandatory subjects constantly change, as the Board's decisions reflect the changing state of labor relations. There is no doubt today, for instance, that pension plans are a mandatory subject. Nor is there any doubt that the union is entitled to information that will permit it to function in its representative capacity. This not limited to the simple situation where there is a refusal to supply information substantiating a plea of economic inability to grant a wage increase. The more sophisticated problem arises in cases such as *Fafnir Bearing*. There, the refusal to bargain charge involved the

50. The Board later made clear that it would not grant relief under *Bernel Foam* unless the election was set aside upon meritorious objections filed in the representation case. *Irving Air Chute Co.*, 149 N.L.R.B. 627 (1964).
52. *Inland Steel Co. v. NLRB*, 170 F.2d 247 (7th Cir. 1948).
54. *Fafnir Bearing Co.*, 146 N.L.R.B. 1582 (1964) (Member Leedom dissenting, Member Jenkins not participating), enforced, 362 F.2d 716 (2d Cir. 1966).
company's refusal to allow the union to have its own time-and-motion man make an independent study of rates. The union wanted to use those studies to decide whether grievances it was processing should be taken to arbitration. The company refused on the ground, among others, that the study was not necessary to permit the union to decide whether to arbitrate and the arbitrator would, as he had in the past, make his own study. The Board held that the information sought was necessary to permit the union to police and administer the agreement. It was within the company's power to make such information available, and compliance with good faith bargaining required the company to cooperate, unless the union's request was improper for another reason or imposed an unreasonable burden on the company. As the latter conditions were not shown, the Board entered an affirmative bargaining order which the Second Circuit enforced.\(^5\)

Clearly, however, the major development in this area is the *Fibreboard* decision.\(^6\) The Supreme Court there held that the contracting-out of unit work was well within the literal meaning of the phrases "terms and conditions of employment," and that, therefore, contracting-out is a mandatory subject of collective bargaining. The Court also enforced the Board's order, which required the restoration of the status quo ante and the reinstatement of the displaced employees with backpay. The Court did not purport to cover all forms of subcontracting—a term that has many meanings. The extent of the Court's decision is one of those matters that must be left to litigating elucidation. The Board has not adopted a hard and fast rule to be mechanically applied whatever the situation involved.\(^7\) The *Fibreboard* doctrine is not limited to situations that result in the permanent elimination of a department, a unit, or a job. It is, however, limited to those situations in which the contracting-out involved a departure from previously established practices, effected a change in conditions of employment, or resulted in a significant impairment of job tenure, employment security, or reasonably anticipated work opportunities for those in the unit. When the employer, therefore, has had a practice of subcontracting, that practice could itself be considered a condition of employment, and continuation of it would not

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55. A somewhat similar issue had been before the Board in Hercules Motor Corp., 136 N.L.R.B. 1648 (1962). The Board there held that the union's proper remedy was through arbitration and dismissed the complaint. I dissented on the basic ground that the information sought was necessary to permit the union to decide whether to take a grievance to arbitration. I note that one commentator has stated that a quick summary of cases in this area would be: How the Board has tried to differentiate its *Hercules* decision. Harris, The National Labor Relations Board and Arbitration—The Battle of Concurrent Jurisdictions, 16 SYRACUSE L. REV. 545, 554 (1965).

56. *Fibreboard Paper Prods. Corp.* v. NLRB, *supra* note 8. The Board had originally dismissed the complaint, 130 N.L.R.B. 1558 (1961). I dissented. Upon reconsideration the Board adopted my dissenting position, 138 N.L.R.B. 550 (1962), and it is this decision that was affirmed by the Supreme Court.

be a violation.\textsuperscript{58} And when there has been no significant detriment to the employees in the unit, the Board has refused to find a violation.\textsuperscript{59} One court, however, has apparently decided that the Board's interpretation of \textit{Fibreboard} is too narrow. In \textit{General Motors},\textsuperscript{60} the Board had found that a change in the method of parking completed cars before shipment was not within \textit{Fibreboard} because this was a change which did not involve layoffs or discharges and was one which was permitted under the management provision of the national agreement between company and union. The Board also viewed as minimal the reassignment of drivers which resulted from the change. The Court of Appeals for the Ninth Circuit did not agree. In reversing the Board's decision, it viewed the elimination of six unit jobs—even though the men were given similar jobs elsewhere in the plant—as having an adverse effect on the unit that was more than de minimis.

Clearly, therefore, much remains to be elucidated. The interrelationship between \textit{Fibreboard} and \textit{Darlington} remains unexplored. \textit{Adams Dairy},\textsuperscript{61} \textit{Royal Plating},\textsuperscript{62} and \textit{Ozark Trailers},\textsuperscript{63} are probably not the last word. The relationship between \textit{Fibreboard} and work preservation clauses under Section 8(e) may be explained by the pending Supreme Court decision in the \textit{Woodwork} cases.\textsuperscript{64}

I have discussed the manner in which a bargaining relationship is established and what is the proper subject matter of bargaining. An equally important question concerns how long the relationship lasts and the circumstances in which the relationship survives a change in the ownership of the employer. In \textit{Wiley v. Livingston},\textsuperscript{65} the Supreme Court held that when a successor took over a business whose employees had been covered by a contract which included an arbitration clause, the obligation to arbitrate survived the termination of the contract and devolved upon the successor, even though the new owner had not been a party to the contract. Because the Court's rationale demonstrated concern for the protection of employees' rights—which would not usually be considered in the sale of a business—and with the effort to provide some stability for these rights, the question has arisen whether or not the entire contract should be held binding upon a suc-

\textsuperscript{58} See, e.g., Shell Oil Co., 149 N.L.R.B. 283 (1964).
\textsuperscript{59} American Oil Co., 151 N.L.R.B. 421 (1965).
\textsuperscript{60} General Motors Corp., 149 N.L.R.B. 396 (1964), \textit{supp. decision and order}, 158 N.L.R.B. No. 24 (1966), rev'd, 65 L.R.R.M. 3103 (9th Cir. 1967).
\textsuperscript{61} NLRB v. Adams Dairy, Inc., \textit{supra} note 37.
\textsuperscript{62} Royal Plating & Polishing Co., 160 N.L.R.B. No. 72 (1967).
\textsuperscript{63} Ozark Trailers, Inc., 161 N.L.R.B. No. 48 (1967).
\textsuperscript{64} United Bhd. of Carpenters, 149 N.L.R.B. 646 (1964), \textit{aff'd in part and in part set aside and remanded with directions}, 354 F.2d 594 (7th Cir. 1965). Subsequent to the preparation of this text, the \textit{Woodwork} cases were decided by the Supreme Court. National Woodwork Mfrs. Ass'n v. NLRB, 386 U.S. 612 (1967). For discussion of the decision in those cases, see note 95 infra.
\textsuperscript{65} \textit{Supra} note 11.
cessor in certain circumstances. The courts of appeals have not answered the question uniformly, but at least one court has held that the entire contract must be taken over, even in the face of a contrary provision in the contract for sale.66 The Wiley question is, of course, to be distinguished from the obligation to recognize the collective bargaining representative of the employees when the employing industry is identical under a successor employer. It may be that the combination—exemplified by a case such as the recent decision of the Circuit Court of Appeals for the Fourth Circuit in Overnite Transportation,67 in which it held both that the representative must be recognized and that unilateral changes cannot be made—will by sufficient to safeguard the interests that the Supreme Court has tried to protect. Need I add that this is purely hypothetical and is in no sense to be construed as an expression of my own—not to say the Board's—view of the matter.

Unfair Labor Practices by Unions

We now turn to union unfair labor practices—Section 8 (b)—which might be considered to embody the major change that Taft-Hartley made in the law.

Section 8 (b) (1) (A) makes it an unfair labor practice for a labor organization to restrain or coerce employees in the exercise of the rights guaranteed in Section 7; a proviso adds that the Section does not impair the right of a labor organization to prescribe its own rules with respect to the acquisition or retention of membership.

The Board originally read this Section as an inhibition of union tactics involving violence, intimidation, reprisals, or threats of reprisal.68 In Curtis Brothers,69 however, a majority of the Board held the Section applicable to peaceful picketing by a union that did not represent a majority of the employees in the picketed establishment. Thereafter, the Supreme Court considered the issue, and held the Board's earlier construction of 8 (b) (1) (A) was correct. The Court interpreted the Section as not intended to reach peaceful picketing or organizational activity, even though that activity might have an unlawful object. The Landrum-Griffin Act had been passed between the time of the Board's decision and that of the Court, and the Court found support for its position in Section 8 (b)(7), which dealt specifically with the type of conduct involved in Curtis.


Curtis was decided by the Board before I was appointed to it. I considered the issue in Local 1232, AFL-CIO, 120 N.L.R.B. 1425 (1958), and rejected, as the Supreme Court did thereafter, the majority position in Curtis.
After deciding *Curtis*, but prior to its reversal by the Supreme Court, the Board decided *Bernhard-Altman*. Although denying that it relied in whole or in part on its *Curtis* decision, a majority of the Board (I dissented) again interpreted 8 (b) (1) (A) broadly and found it to have been violated by the grant of exclusive recognition to a minority union. The majority held that nothing could be a clearer deprivation of Section 7 rights than to impose upon employees a collective bargaining representative that they had not chosen. The Supreme Court affirmed the decision. It now held that the intent of Congress was to impose upon unions the same restrictions that the Wagner Act had imposed upon employers with regard to employee rights.

In *Miranda Fuel*, a majority of the Board (Chairman McCulloch and I dissented) extended 8 (b)(1)(A) further, and held that it prevented a labor organization, when acting as a statutory representative, from taking action against any employee upon considerations or classifications that are irrelevant, invidious, or unfair. The majority, therefore, held unlawful the union's action in causing the reduction of an employee's seniority in response to unjustified pressures from some unit employees. The dissenting opinion agreed that under Section 9 there was a duty to represent fairly; it pointed to the availability of relief such as the revocation of a certificate of representation. But the dissent could not find any warrant for the extension of this duty to Section 8 (b).

On review, the Court of Appeals for the Second Circuit denied enforcement. There were three opinions. Judge Medina was in substantial agreement with the dissenting opinion. Judge Lumbard did not rule on the validity of the majority's theory, because he thought the evidence insufficient to show that the union's action fit the majority's description of it. Judge Friendly dissented; he thought that a case had been made under Section 8 (a)(3) and 8 (b)(2), however, and therefore did not consider the 8 (b)(1) (A) theory.

*Miranda Fuel* involved union action that may only have been arbitrary. In *Hughes Tool*, the same issue of fair representation arose in the much more sensitive area of racial discrimination. The alignment of the Board was the same as in *Miranda Fuel*, with respect to the question of whether unfair labor practices under 8 (b) (1) (A) could be established. The Board was unanimous, however, in revoking the certification issued to the locals because their contracts were racially discriminatory.

There is little doubt that the question raised by these and similar cases is

of great significance. In Humphrey v. Moore, the Supreme Court indicated that it is an open question whether a breach of the duty to represent fairly is to be considered an unfair labor practice. Recently, in Vaca v. Sipes, the Court's majority once again left the issue open, but three Justices indicated that they thought the Board majority in Miranda Fuel reached the proper conclusion. We have not heard the last of this issue.

Section 8 (b)(1)(A) includes a proviso that exempts a labor organization’s rules for the acquisition and retention of membership from the proscription of this Section. How far does the proviso extend?

In Wisconsin Motor, the union had a rule that set production ceilings, thus limiting the amount of incentive pay a member could earn. Members who violated this rule were subject to fines and might be suspended or expelled from membership, but in no case was their employee status affected. It also appeared that the company had cooperated in enforcement of the rule. The charging parties were union members who were found to have exceeded their quotas. Following a hearing before the union's trial board, they were penalized by being fined and suspended from membership. Their job status was unaffected. It was for this reason, in essence, that a majority of the Board found no violation of 8 (b) (1) (A).

The Board applied this rationale to a somewhat different set of facts in Allis-Chalmers. In that case, the union imposed a fine on members who crossed a picket line it had established. The Board majority held that in a situation where both the strike and picket line were lawful, the union could take this step to preserve its own integrity. In a divided opinion, the Court of Appeals for the Seventh Circuit denied enforcement and the case is now before the Supreme Court.

These cases are to be compared and contrasted with Skura and Wellman-Lord, in which the Board has refused to countenance any union action that would place an impediment in the way of a member's access to the Board's processes. The Board has also extended the rationale of Skura to apply to

73. 375 U.S. 335 (1964).
74. Vaca v. Sipes, 386 U.S. 171 (1967). Recently, the Supreme Court denied a petition for review in Local 12, United Rubber Workers v. NLRB, 368 F.2d 12 (5th Cir. 1966), cert. denied, 36 U.S.L.W. 3135 (U.S. Oct. 10, 1967), in which the court of appeals enforced a Board decision holding that a union had breached its duty of fair representation in violation of Section 8 (b) (1) (A) by refusing to process Negro members' grievances over back wages and segregated plant facilities.
75. Wisconsin Motor Corp., 145 N.L.R.B. 1097 (1964), Member Howard Jenkins concurring. Member Leedom dissenting.
77. Local 248, UAW (Allis-Chalmers Mfg. Co.), 149 N.L.R.B. 67 (1964), enforcement denied, 358 F.2d 656 (7th Cir. 1966). Subsequent to the preparation of this text, the Supreme Court reversed the court of appeals and upheld the Board's decision. 388 U.S. 175 (1967).
78. Local 138, AFL-CIO, 148 N.L.R.B. 679 (Skura) (1964); Roberts, 148 N.L.R.B. 674 (1964), enforced as modified, 350 F.2d 427 (D.C. Cir. 1965). These cases also involved fines.
The situation where a union expels a member because he has filed charges with the Board, taking the position that expulsion from membership is coercive.\textsuperscript{79}

Section 8 (b)(4) deals with much more than secondary boycotts, but it is its application to secondary boycott situations that has presented the most difficult problems.

Taft-Hartley does not offer any true definition of a secondary boycott.\textsuperscript{80} The Board, therefore, had to proceed cautiously and experimentally. By the time the General Electric case\textsuperscript{81} reached the Supreme Court in 1961, the Board had applied the law to a variety of factual situations. The Court approved the principles that the Board had enunciated in Moore Drydock.\textsuperscript{82} The precise issue in General Electric was whether Moore Drydock could be applied to make it unlawful for union members to picket at a gate which was used exclusively by the employees of independent contractors who worked on the struck employer's premises. The Court approached the problem by pointing out that the primary strike was protected, as specifically provided for by the Landrum-Griffin Amendments. This being so, an employer could not immunize himself from primary strike action by setting up separate gates for the use of employees whose functions were essential to the normal operations of his business. The key to the problem, therefore, was said to be the nature of the work done by the users of the separate gate—it must be unrelated to normal operations, and it must be such that it could be done without curtailing normal operations. Applying this test in Carrier,\textsuperscript{83} the Supreme Court agreed with the Board that picketing upon property owned by a railroad was in fact primary, where the railroad property was the delivery entrance to the struck plant.

I do not suggest that these decisions have settled the problem. It will be recalled that in Markwell & Hartz\textsuperscript{84} the Board split 3-2 (Member Howard Jenkins and I dissenting) as to what criteria to apply in dealing with picketing at a construction site.

Two other cases are to be noted in connection with 8 (b) (4). In Servette,\textsuperscript{85} the primary dispute was with a distributor. The union requested the managers of secondary stores to stop handling products supplied to them by

\textsuperscript{79} Cannery Workers' Union, 159 N.L.R.B. No. 47 (1966). In Industrial Union of Marine & Shipbldg. Workers v. NLRB, 379 F.2d 702 (3d Cir. 1967), the Court of Appeals for the Third Circuit recently indicated its disapproval of the Skura doctrine.

\textsuperscript{80} But note that the Landrum-Griffin proviso to 8 (b)(4)(B) accepts the dichotomy between primary and secondary action.

\textsuperscript{81} Local 761, IUE v. NLRB (General Electric), 366 U.S. 667 (1961).

\textsuperscript{82} Moore Drydock Co., 92 N.L.R.B. 547, 549 (1950).

\textsuperscript{83} Steelworkers v. NLRB (Carrier Corp.), 376 U.S. 492 (1964).

\textsuperscript{84} Markwell & Hartz, Inc., 155 N.L.R.B. 319 (1965), Member Howard Jenkins and I dissenting.

\textsuperscript{85} NLRB v. Servette, 377 U.S. 46 (1964), \textit{reversing} 310 F.2d 659 (9th Cir. 1962).
Servette, the distributor. The Board dismissed an 8 (b)(4)(i)(B) complaint on the theory that the managers were not individuals within the meaning of that Section. The Supreme Court held that they were individuals, but sustained the Board's dismissal on the ground that the union's action did not constitute inducement. The Court's view was that the union was not attempting to induce the managers to cease performing their duties to force a cessation of business with Servette. The managers were asked only to make a managerial decision within their authority. The court noted that if an appeal to managers to exercise their delegated authority to make a business decision to stop dealing with a primary employer violated clause (i), then clause (ii) would be almost superfluous. Servette also involved the scope of the publicity proviso to 8 (b)(4). The Board held that products produced by an employer included those distributed by a wholesaler, and for this reason the handbilling of stores that did not cease handling Servette products was protected. The Supreme Court agreed. It noted that the Senate was concerned with safeguarding the union's right to appeal for public support. To limit application of the provision only to those situations where the dispute is with a manufacturer or processor would not achieve that purpose. Since the handbilling was protected, the Court held further that the threat to engage in it was equally protected.

In Tree Fruits, the Supreme Court held that 8 (b) (4) (ii) (B) was not intended to ban all peaceful consumer picketing at secondary sites. The union had a dispute with fruit packers. It picketed stores selling their products with signs appealing to the consuming public not to buy those products. The Court held that a broad ban against peaceful picketing might conflict with first amendment guarantees. It therefore distinguished between picketing directed only at the struck product and that intended to persuade customers of the secondary employer to stop dealing with him in order to force the secondary employer to put pressure upon him. Here, the appeal to the public was limited to the product of the primary employer and the Court held it was not barred by 8 (b)(4)(ii)(B).

Section 8 (e) is generally thought of as the hot cargo provision of the Act, intended to close the loophole of the Sand Door decision, which left such clauses valid but unenforceable.

In some respects the Board has been more strict in its interpretation of this Section of the Act than have the courts. For example, in Colson & Stevens, the Board held that a union could not use economic force to compel an employer to enter into a contract valid under the construction

industry proviso to 8 (e). After that view had been rejected by the courts of appeals for three circuits, the Board, in Centlivre, adopted the court's view that secondary subcontracting clauses in the construction industry are lawful under the proviso to 8 (e) and economic force may be used to enforce them, notwithstanding 8 (b) (4) (A), because that Section incorporates the proviso by reference.

A similar problem has arisen with respect to work preservation clauses, which, while they may be thought to fall literally within the language of 8 (e), may well have the primary object of retaining work that had been done by unit employees. In Patton Warehouse, a clause limited subcontracting to employers who observed union standards. The Board held this to be violative of 8 (e), but the Court of Appeals for the District of Columbia Circuit disagreed. The court distinguished between clauses that permit subcontracting only to union signatories—which it held to be secondary—and those which only required that subcontractors adhere to union standards, which it considered primary.

In Wilson & Co., a clause provided that shipments by meatpackers to customers in Chicago be made from a Chicago distribution facility of the employer by employees covered by the agreement. The Board held that since this was not bargaining unit work, the clause dealt with work acquisition rather than work preservation, and was therefore secondary. Once again the Court disagreed. It held that this was work fairly claimable by the union, and therefore the union's effort was primary activity, valid under Section 8 (e).

A major problem that remains is the relationship between 8 (e) and the Fibreboard decision, which holds that subcontracting or contracting-out is a proper subject for bargaining. If that is so, it is difficult to see why the result of such bargaining should not be a valid contractual provision. As indicated above, there is support for such a view. The contrary view of the Seventh Circuit Court of Appeals is now before the Supreme Court in the Woodwork cases.

92. See also Drivers' Local 710, IBT v. NLRB (Wilson & Co.), 335 F.2d 709 (D.C. Cir. 1964).
93. Ibid.
95. The Supreme Court decided these cases after this article was prepared. The Board's holdings were affirmed; the courts of appeals, to the extent that they had denied enforcement, were reversed.

In National Woodwork Mfrs. Ass'n v. NLRB, supra note 64, the issue was the validity of a clause in a collective bargaining agreement which, in relevant part, provided that no member of the union would handle any doors that had been fitted prior to being furnished on the job. The Board held that this clause was designed to preserve for the employees work they had customarily done. The Court of Appeals for the Seventh Circuit held this clause unlawful under Section 8 (e) without regard to objective.

The Supreme Court reversed. Upon an exhaustive review of legislative history affecting
Conclusion

These are among the major developments of the last twenty years. There are, of course, others which easily come to mind. But I am in the position of the anthologist who is constantly criticized by reviewers who would have chosen differently. They may be right.

In conclusion, I shall deal with a matter that cuts across all areas of the law. The Board is an administrative agency. It administers a law that is not simple, that involves all of our society, and that seems to have set off a veritable explosion in litigation—particularly in the last decade. That justice delayed is justice denied is a truism. Remedies, however brilliantly developed and tailored to cure unfair labor practices, may be entirely irrelevant if delayed too long. One of the major developments of the past twenty years is the manner in which the Board manages to cope with so much work.

One way is to attempt to make the law clear enough so that resort to litigation, always undesirable, can be avoided. Precise jurisdictional standards and a clear set of contract bar rules are a Taft-Hartley development. We have made clear just when a petition can be filed, and what period will be considered in deciding whether pre-election conduct will suffice to set aside an election. We have indicated when speeches can be made, and what kinds of no-solicitation and no-distribution rules are valid. This is not to say that we eliminate litigation, but we do narrow its scope when it comes.

There is also the question of remedy in unfair labor practice cases. Can it be made less attractive to commit unfair labor practices, always bearing in mind that we can only remedy, not penalize? The discriminatory discharge remains, after thirty years, the most common unfair labor practice. During the past two decades we have made numerous changes in the way back pay is computed, always in an effort to make the wronged employee more truly
whole. Back pay is now computed quarterly; it is not tolled when the Board and trial examiner disagree, and interest is assessed. Despite this, we have the problem of the recurrent offender, and in the *J. P. Stevens* cases\(^9\) we have attempted to tailor our remedies to deal more successfully, we hope, with that problem.

Refusal-to-bargain cases involving plant closedowns and subcontracting of operations presented most difficult problems in framing suitable orders. It is not always possible to unscramble an egg, and once the employer has shut down part of his plant, or moved, or subcontracted, it may be difficult to reverse the process. We have had some success in court, but here the impact of the Supreme Court’s decision in *Darlington* raises substantial problems.

The best thing, of course, is not to get the cases. Voluntary agreements are often preferable. It is for this reason, I think, that the Board, since its *Spielberg* decision,\(^9\)\(^7\) has encouraged arbitration. Of course, we cannot abdicate our responsibilities, and arbitration is not a panacea. In fact, the difficulties inherent in this area, in the interrelationships between arbitration, the duty to represent fairly, to bargain, and to make use of the Board’s processes are indicated by the fact that they are involved in three of the most recent Supreme Court decisions in the labor field.\(^9\)\(^8\)

We are told, in the Eighteenth Chapter of *Exodus*,\(^9\)\(^9\) that Moses was advised—and he took the advice—that he should not try to decide all the cases himself. He was to set up lower judges who would settle small cases, and he would settle only the hard ones. We have been permitted to do this by delegating to regional directors the authority to decide representation cases as authorized by Landrum-Griffin. It has worked extremely well. We think that something similar would work well in complaint cases. The terms on which the Board takes appeals from regional directors are strikingly similar to those that the Cox Committee\(^1\)\(^0\)\(^0\) proposed for review of trial examiners’ decisions. No development in the law would be more significant than one that permitted the Board—as such a delegation would—to decide only the hard cases and to decide them with care.

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