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DEREGULATION AND LABOUR LAW IN THE UNITED STATES

Samuel M. Kaynard*

The inequality of bargaining power between employees who do not possess full freedom of association or actual liberty of contract and employers who are organized in the corporate or other forms of ownership . . . .**

Deregulation is the mood of the day. Deregulation now in Labor Law is not just a new and lively issue. It is about to become a

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The response of the United States to the “inequality of bargaining power” was to intervene and to regulate the labor relations between employer, labor organization and employees by the enactment of the National Labor Relations Act (“NLRA” or “Act”) in 1935. The “inequality of bargaining power” which was the concern of Congress was evident by the oftentimes turbulent history of labor relations during the years prior to direct intervention of the federal government by the NLRA.

Today, fifty years later, after a period of relative accommodation between employers and unions, there is evidence of renewed turbulence on the labor management scene in the United States. It appears, not in the form of strikes, violence and confrontations of years past, but in the call for a withdrawal of the federal government from the industrial scene — deregulation. One form of deregulation is a withdrawal by the federal government from the regulation of the economic aspects of industry and from direct involvement in the operations of private enterprises to permit the forces of free competition and economic forces to operate — economic deregulation. Such economic deregulation will, undoubtedly, have some impact upon the labor relations of the industries directly involved in the deregulation and on other satellite industries affected by the deregulation.

The other form of deregulation is a change in the role of the federal government in the establishment and the implementation of the collective bargaining relationships between employers and unions and employees — labor relations deregulation — a swing of the “pendulum” from rules which some say have favored unions to a position of “neutrality” to permit a free interplay between employers and unions.

Both forms of deregulation impact upon the labor relations of the nation and on the administration of the National Labor Relations Act.

DEVELOPMENT OF LABOR RELATIONS IN THE U.S.¹

“The history of the American worker is the history of the American Nation.”² Just as the nation enjoyed its good times and


¹ See, Silver and Kaynard, Labor Law, Confrontations and Agreements, Successes and Failure, New York Law Journal, May 31, 1988 at 23 Col. 4, (Centennial Supplement). Sections of this paper are in part based upon this article.

suffered through bad times, as it emerged from its agrarian beginnings to its current dominant position in the world of nations, so too, labor relations experienced its highs and lows.

Efforts by unions and employees to secure better working conditions and redress date back to colonial times. In 1776, the Continental Congress met and the Declaration of Independence was signed in Carpenters Hall in Philadelphia. The "pursuit of happiness" by employees and employers during the early years of the nation's history included the formation of unions by employees; efforts by employees and unions to improve working conditions; resistance at times and agreement at times by employers; strikes; the embracement by the courts of the doctrine of criminal conspiracy (a gift of the British common law of the times), resulting in the imposition of fines and imprisonment of strikers; the subsequent rejection of the doctrine (which had persisted in the United States long after England had departed from it) by the courts and the public. The growth of unions coincided with the growth and prosperity of the country and the economic reversals. It saw the violent exploits of the Ancient Order of Hibernians, popularly known as the Molly Maguires, in the anthracite regions of Pennsylvania; it saw the Chicago Haymarket Riot of 1886.

Labor organizations became a part of the political, economic and social scene of the United States. One of the most significant developments was the founding, on December 8, 1886, of the American Federation of Labor ("AFL"). Samuel Gompers, was elected its President and led the organization for four decades. Gompers set

Worker, at 296 (1976) (U.S. Dept. of Labor History).

3. Commonwealth v. Hunt, 45 Mass. (4 Met) 111 (1842). The decision by Chief Justice Shaw is considered the turning point in the history of unions and labor relations in the United States.

4. In 1835, a society of cordwainers in Geneva, New York, was prosecuted for conspiracy to raise wages. In 1836, when a society of tailors was found guilty of conspiracy, a mass demonstration of 27,000 people saw the judge burned in effigy and the juries returned verdicts of "not guilty." F.R. Dulles, Labor in America: A History at 65 (3rd ed. 1966).

5. For a short period of time, the labor scene was dominated, also, by the Order of the Knights of Labor which admitted to membership all wage earners, small business people, farmers, everybody except lawyers, bankers, stockbrokers, professional gamblers and anyone involved in the sale of alcoholic beverages U.S. Dept. of Labor History, supra note 2, at 69-70 (quoting Herbert G. Gutman). Equally short lived was the emergence and disappearance of the radical "class struggle" Industrial Workers of the World, known as the "Wobblies."

6. Mr. Gompers would have endeared himself to Prime Minister Churchill inasmuch as cigars figured in both their lives. Gompers developed his "unionism" as a worker and activist in the Cigar Makers Union; he started his career in the cigar-making shops of New York City as a "reader" - a worker who read books, newspaper stories, poetry and magazine articles to cigar workers to help break the monotony in the shop.

Labor got more, but sometimes it got more than it bargained for. It got increased membership; collective bargaining agreements; successes; failures; strikes and violence. It got the pitched battle with the Pinkertons in the barges at Carnegie’s Homestead steel plant; the disastrous Pullman Car railroad strike and the imprisonment of Eugene V. Debs. It got the “Bread and Roses” strike and violent confrontation in Lawrence, Massachusetts; the “Ludlow Massacre” near Ludlow, Colorado; “Bloody-Thursday,” on Beacon Hill. It got the Triangle Shirtwaist fire in New York City, where one hundred forty-eight employees, almost all of them young women, died as flames swept throughout the eight floors of the building or as they jumped to their deaths, because the doors had been bolted to safeguard employers from loss of goods by the departure of workers. It got “home industries,” a euphemism for “home work” and “sweat shops.” It got, “If you don’t come in on Sunday, don’t come in on Monday.”

In addition, Labor got the “anti-trust” injunction and treble damages which almost resulted in the seizure of the homes of 184 members of the Hatters Union in order to satisfy the award of $252,130 against the Hatters Union in its strike and secondary boycott against Danbury Hat Company in Connecticut (the AFL later proclaimed “Hatters Day” in which members of the AFL contributed an hour’s pay to pay off the award). The judiciary became a dominant force in labor relations by the use of the injunction in la-

7. Debs later ran for President of the United States and received one million votes.
8. When 20,000 workers, mostly women, went out on strike against the textile mills, they carried banners, proclaiming, “We want Bread . . . and Roses Too.” The violent confrontation occurred in reaction to a technique adopted by the strikers; in order to alleviate the hardship of the strike on the children of the strikers, sympathizers outside of Lawrence “adopted” the children and when the children were about to be placed aboard the railroad cars to leave Lawrence, there was a violent confrontation at the railroad station.
10. Loewe v. Lawlor, 208 U.S. 274 (1908), commonly referred to as the “Danbury Hatters” case. Despite the passage of the Clayton Act in 1914, which some thought would exempt unions from anti-trust, the Act was not so construed. See, Duplex Printing Press Co. v. Deering, 254 U.S. 443 (1921); Coronado Coal Co. v. United Mine Workers, 268 U.S. 295 (1925). The Sherman Anti-Trust Act, 15 U.S.C. §§ 1-7 (1982) outlawed “every . . . combination . . . or conspiracy in restraint of trade or commerce among the several states.” 15 U.S.C. § 1 (1982). The Clayton Act enacted in 1914 stated that “the labor of a human being is not a commodity or article of commerce” and “no injunction shall be granted . . . in any case between an employer and employees . . . growing out of a dispute concerning terms or conditions of employment.” 29 U.S.C. § 52 (1982). See also Dulles, supra note 9, at 197.
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bor disputes.

The Great Depression of the late 1920's and the stock crash of 1929 took their toll. By 1933, 12,830,000 persons were out of work, about one-fourth of the urban labor force of over 51 million. The American economy was in a chaos and American employees, employers and unions suffered.

It was during this period that the U.S. government started on the road of regulating the labor relations of the country, establishing a federal labor relations policy and fostering collective bargaining. In 1926, Congress passed the Railway Labor Act ("RLA")\(^{11}\) which established rules for collective bargaining in the railroad industry; the RLA was subsequently amended to cover the airline industry. In 1932, to address the abuses of the injunction in labor disputes, Congress passed the Norris-LaGuardia Act.\(^{12}\) The Norris-LaGuardia Act had a three-prong thrust on the labor picture. It severely limited the power of the federal courts to issue injunctions in labor disputes;\(^{13}\) it became the vehicle for the U.S. Supreme Court to severely limit the applicability of the anti-trust doctrine to union activities and, for a while, labor enjoyed its exemption;\(^{14}\) it outlawed the "yellow dog" contract, a commitment signed by employee that he/she would not join a union (called a "yellow dog" contract because, it is said,\(^{15}\) only a yellow dog would sign such a contract).

13. Injunctions are still available in labor disputes in limited situations at the request of the government under specific conditions, e.g., the National Labor Relations Act, (secondary boycotts, jurisdictional disputes, recognition picketing, "hot cargo") see also §§ 10(c), 10(f), 10(h), 10(j) and 10(l) of the NLRA; national emergency injunctions; and in certain situations at the behest of an employer, e.g., the "Boys Market" injunction - to enjoin a strike over an arbitrable matter where the collective bargaining agreement provides for arbitration to resolve the dispute. While the "Boys Market" injunction may be an anathema to labor, its use highlights one of the major characteristics of current collective bargaining, the use of arbitration as a method for the peaceful resolution of disputes. Collective bargaining agreements, for the most part, include no strike/no lockout provisions. The Supreme Court has endorsed arbitration by its decisions, which bolster and protect the arbitral process not only during the term of the contract but after the expiration of the collective bargaining agreement. See Boys Market, Inc. v. Retail Clerk's Union Local 770, 398 U.S. 235 (1970). Nolde Bros. Inc. v. Local 358 Bakery & Confectionery Workers Union, 430 U.S. 243 (1977). See also, infra pp. 46-49.
15. Mills, LABOR MANAGEMENT RELATIONS (2d ed. 1982) at 35.
One of the responses to the Depression and the greatest catalyst for the shaping of modern day labor relations and collective bargaining in the United States was the National Labor Relations Act ("NLRA" or "Act"). Enacted by Congress in 1935, it was a part of the New Deal program of President Roosevelt.

It is declared to be the policy of the United States . . . [to encourage] the practice and procedure of collective bargaining and [to protect] 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.

"Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection."

Those declarations were and continue to be the cornerstones of the federal labor policy for the private sector.

16. National Labor Relations Act, ("NLRA") 29 U.S.C. §§ 151-68 (1935). The initial roots of the NLRA first appeared in 1933 in the National Industrial Recovery Act ("NIRA"), which allowed industry to establish codes of "fair competition," fix prices and allocate production quotas without regard to the anti-trust laws. To offset those concessions to industry, the NIRA gave labor Section 7(a) which guaranteed employees the right to organize and bargain collectively. Dissension and attacks from all sides presaged the decline and doom of the NIRA, finalized when the U.S. Supreme Court declared it unconstitutional. Efforts by Senator Robert Wagner in 1934 and early 1935 during the decline culminated in the NLRA, coincided with the final demise of the NIRA; the NIRA was declared unconstitutional in May 1935, President Roosevelt signed the NLRA on July 5, 1935.

17. The New Deal legislation sought to reverse the economic picture not only through the collective bargaining process but by other legislation addressed directly to unemployment, welfare, child labor and other issues. Federal Emergency Relief Administration was established to provide relief for the needy; Public Works Administration and Civil Works Administration were designed to put people to work on long term public projects, e.g., bridges, roads, schools; Civilian Conservation Corp. was designed to put young people to work and preserve and restore the land; Social Security Act provided unemployment insurance, old-age pensions; Fair Labor Standards Act established a federal minimum wage (25 cents in 1939; 30 cents in 1940 and 45 cents in 1945) and a norm of hours per week with overtime for hours worked in excess of the norm; child labor laws.


20. The NLRA applies generally to employers in the private sector, but some employers are excluded, e.g., railroads, airlines and religious schools. (In 1926, Congress had passed the Railway Labor Act which laid down the guidelines for collective bargaining in the railroad industry; subsequently it embraced the airline industry.) The Board in the exercise of its discretion, may also refuse to exercise jurisdiction over employers who do not meet certain mone-
These mandates were implemented under the Act by (1) providing for elections among employees in an appropriate bargaining unit, to afford them the opportunity to select, by majority vote, in a secret election conducted by the National Labor Relations Board, which labor organization, if any, they wished to have as their exclusive collective bargaining representative; and (2) declaring certain activities by employers to be unfair labor practices and providing procedures to remedy such unfair labor practices.

Thus, what had, in the past, been variously rejected, tolerated, and fought over, namely the right of employees to join unions and bargain collectively, was accepted in 1935, and declared by Congress to be the law of the land.

The Wagner Act laid the groundwork for unprecedented organizational activities and the expansion of collective bargaining throughout the country, sometimes accompanied again by confrontations, strikes, violence, and "sit-downs," in plants. By 1939, the AFL membership exceeded 8 million; by the end of World War II, labor membership increased to more than 14 million, 35.8% of the nonagricultural employment, and there were collective bargaining agreements in most of the important industries and companies in the United States, e.g., steel, auto, mine, men's clothing, women's garment, longshore, maritime, stage and screen.

The end of World War II brought on a rash of strikes as unions sought to recoup the cut in take-home pay which resulted from wage freezes during the war and aggravated by the changeover from war to peace. With it also came a reaction against some union practices.

In 1947, the Wagner Act was drastically amended by the Labor-Management Relations Act, referred to as the Taft-Hartley Act. Opposed by labor as a "slave labor" act, it was nevertheless passed by Congress, over the veto of President Truman. The Taft-Hartley Act declared that certain activities and practices of labor organizations were "unfair labor practices," e.g., secondary boycotts, jurisdictional disputes. The closed shop authorization was replaced by a 30-day union shop provision. Prestrike notices were required when the parties were renegotiating or modifying a collective bargaining agreement. The labor injunction was reactivated to a limited degree; the N.L.R.B. could seek injunctions from the federal district courts in certain situations and the Attorney General could seek injunctions in a national emergency strike or lockout under specified procedures.

The reaction against unions continued into the 1950's, fueled by the revelations of grave improprieties and abuses in the internal affairs of some unions which were disclosed in the hearings conducted by the Select Committee on Improper Activities in the Labor or Management Field, headed by Senator McClellan; a young Robert F. Kennedy was its chief counsel. It led to the enactment of the Landrum-Griffin Act of 1959, designed to bring democracy to union affairs. It initiated federal supervision of internal affairs of unions, particularly union elections and trusteeships; set forth a "bill of rights" for members; and provided for financial disclosure requirements for union officials. Landrum-Griffin also amended the Wagner Act and Taft-Hartley Act, "plugging some holes" in the secondary boycott provisions; outlawing "hot cargo" agreements; and restricting recognitional and organizational picketing. The 1974 Health Care amendments expanded the Board's jurisdiction to include health care institutions and established pre-strike/lockout and pre-picketing notices and procedures where health care institutions are involved, in order to minimize the possible adverse impact upon patient care caused by strike or picketing.

Independent of the NLRA, Congress addressed the matter of job and other discrimination by other legislation. Women's entry into non-traditional occupations brought the demand of "Equal Pay for Equal Work." In 1963, Congress passed the Equal Pay Act prohibiting wage discrimination because of sex. Title VII of the 1964 Civil Rights Act prohibits employers, unions and employment agencies from discriminating because of an individual's race, color, religion, national origin or sex. And the Supreme Court has also reinterpreted the 1866 Civil Rights Act to preclude employment discrimination on
the basis of race. The Age Discrimination in Employment Act, first enacted in 1968, and subsequently amended in 1986, prohibits discrimination against those who reach the ripe old age of 40.

**Regulation Under the NLRA**

In the United States, it is, thus, clear that the federal government, to a great degree, regulates and fashions the labor relations between the employer, the union and the employees. The nature and extent of the federal intervention and regulation may vary; some aspects of the relationship may be subject to greater intervention and regulation than others, particularly depending upon the applicability of the NLRA or the RLA to the employer involved.

The NLRA closely regulates the establishment of the collective bargaining relationship between the employer and the union. The election procedure provides the mechanism to determine whether the collective bargaining relationship shall come into existence, by providing for elections and ensuring “laboratory conditions” for the exercise of the franchise by the employees; it establishes, often, the nature of the relationship, by determining the appropriate collective bargaining unit, the scope and composition of the unit, e.g., whether the unit shall be a single plant, multi-plant, multi-employer or craft unit; whether certain individuals (supervisors, managerial individuals, etc.) are “employees” under the Act. In the unfair labor practice proceedings, it may determine whether an employer has the obligation to recognize and bargain with a labor organization, without an election, because the employer has destroyed “laboratory conditions” and an election cannot be held; it determines whether a recognition and bargaining obligation exists where there has been a sale of a business, relocation, expansion, sale of assets, sale of stock, merger or acquisition.

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While the NLRA does not establish the specific terms of a collective bargaining agreement between the employer and the collective bargaining representative, which is left to the "free" collective bargaining between the parties, the Act has a decided impact upon the nature of the final product, by denoting which subjects are mandatory and which are permissive subjects of collective bargaining, which can be bargained to impasse and subject to economic pressure of strikes or lockouts; by evaluating the actions of the parties to ensure "good faith" bargaining; by ruling on the demands for information; by establishing the rules of the duty to bargain during the term of the collective bargaining agreement; by laying down the rules on the duty to bargain on managerial decisions to sell, relocate, automate or subcontract. By determining when the bargaining between the parties has come to "impasse," the Act has an impact upon the economic weapons to be brought to bear by employer or union to resolve their differences, e.g., unilateral change of wages, hours or working conditions. Similarly, under the NLRA, a party desiring to modify or terminate a collective bargaining agreement must give notice to the other party sixty days prior to the expiration date of the collective bargaining agreement and must give notice to the federal and state mediation services thirty days thereafter; failure to comply with such notice provisions renders the strike, lockout or modification unlawful. In terms of the resort to the arsenal of weapons, e.g., strike, lockout, picketing, the Act intervenes by its rules relating to striker replacements, multi-employer bargaining, secondary boycotts, picketing on private property, communications and "free speech."

Where disputes and differences arise between the parties, subject to the NLRA, the Board does not act as a mediator or arbitrator. Of course, many of the disputes become the subject of Board proceedings, and, in that capacity, the Agency contributes its services to the resolution of labor disputes, both formally and informally.

The nature and degree of regulation and federal intervention in labor relations under the NLRA may be highlighted by a passing
reference and comparison with the nature of intervention and regulation under the RLA and the nature of intervention under the British System of labor relations.26

REGULATION UNDER THE RLA

The RLA, as distinguished from the NLRA, establishes a rather detailed machinery for the resolution of disputes between the parties. All disputes involving grievances, or the interpretation or application of agreements, (referred to as “minor disputes” under the RLA) must pursue established procedures for resolution by voluntary boards or by an administrative agency, the National Railroad Adjustment Board; disputes over the formation or modification of agreements (“major” disputes under the RLA) are subject to mediation by the National Mediation Board and may also become the subject of arbitration proceedings, if the parties agree. The RLA also provides that major disputes not resolved by the process may be submitted to fact finding and recommendations by emergency boards established by the President. Compliance with these procedures may be subject to enforcement by the federal courts as an exception to the Norris-LaGuardia Act. Thus, under the RLA, the government, in effect, can delay the strike by the union and preclude change of the status quo by the carrier, by withholding the determination that an impasse has occurred and by invoking these “virtually endless”27 dispute resolution processes. By comparison, under the NLRA, although there are some pre-strike notice requirements, the timing of the strike is generally within the power of the union and, except for national emergency situations and health care institution disputes, delay and mediation is not within the control of the government.

REGULATION IN GREAT BRITAIN

In contrast to the American experience, labor relations in Great Britain,28 are fashioned, for the most part, by economic power,

26. For an analysis of the “interventionist” and abstentionist” character of the NLRA, the RLA, and the English System of labor relations, see Arouca and Perritt, Transportation Law and Policy For A Deregulated Industry, 1 Lab. Law 617 (1985). The authors classify the statutes and labor relations as “interventionist” or “abstentionist.” A low level of government intervention is labelled “abstentionist,” while a high degree of intervention is characterized as “interventionist.”


rather than by law. Historically, this resulted from the limited franchise during Britain's industrial revolution and from a mistrust of the courts.\footnote{29} Unable to achieve its ends through the ballot, labor resorted to its economic power. As a result, "multi-unionism" has been sanctioned. Union recognition is, basically, left to the parties to resolve. There is no obligation under law to make an employer bargain with a union or to compel a union to bargain with an employer. Employers have no legally enforceable obligation to refrain from actions intended to discourage unionization, except for the unfair dismissal.\footnote{30}

Once the collective bargaining relationship is established, the collective bargaining agreement arrived at by the parties is open-ended rather than fixed; apparently, the parties may make new or modify old decisions, on a continuing basis and problems tend to be resolved on an "ad hoc" basis as they arise; the parties' agreements are tentative, continually modifiable in whole or in part.\footnote{31} Collective agreements were not generally enforceable as legally binding contracts and the parties rely on economic power to secure observance of their agreements. Historically, British unions enjoyed "immunities" against suits by employers against actions which interfere with the employer's business.

In recent years, the extent of intervention in labor relations by the British government varied from time to time as the political power shifted between the Conservative Party and the Labour Party. The Conservatives leaned toward regulation and the Labour government leaned toward permitting the interplay of economic pressures by the parties. Thus, the Conservative government enacted the Industrial Relations Act of 1971, which was fashioned after the then current Taft-Hartley Act in the United States. That statute included provisions for the protection of the individual against abuse by union power; regulation of union rules and members' rights; restrictions on freedom to strike (unfair industrial practices); restrictions on closed shops; right to be "non unionist"; presumption that collective agreements are legally enforceable as contracts; right to union recogni-

\footnote{29} See also, Martin Vranken, Deregulating the Employment Relationship: Current Trends in Europe, Comparative Labor Law, Vol. 7, No. 2 (1986), at 158-164.

\footnote{30} Arouca and Perritt, supra, note 26 at 620.

\footnote{31} Arouca and Perritt, supra, note 26, at 621.
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3. The Industrial Relations Act of 1971 "was a spectacular failure" because it was based upon the mistaken assumption that employers would use the law and that trade unions would cooperate with it.34

In 1974, the Labour party enacted the Trade Union and Labour Relations Act ("TULRA"), and an amendment in 1976 which repealed and substantially modified many of the provisions of the 1971 Act and restored much of the old labour relations of Britain. It updated "immunity" for certain torts committed by persons in contemplation or furtherance of a trade dispute; restored and modified trade union immunity from tort actions (later repealed in 1982); restored immunity for peaceful picketing "i.c.f.t.d." (in contemplation/furtherance of a trade dispute) (narrowed in 1980); restored the presumption that collective agreements are not legally binding.

In 1980 and 1982, the Conservative government passed the Employment Act which attempted to curtail union power and modify common law rights and "immunities." Those laws amended the 1974 TULRA and limited the labor immunity to picketing at the place of work (the primary employer) and removed immunity from civil action for unlawful secondary activity; recognition procedures were repealed. In 1983, the Equal Pay (Amendment) Regulations amended Equal Pay Act 1970 to introduce equal pay for work of equal value for men and women. The 1984 Trade Union Act laid down rules for secret ballot for certain leadership positions in trade unions, secret ballot confirming industrial action, and periodic ballots for maintenance of political fund and check-off regulations for political contributions. In 1986, Wage and Sex Discrimination were the subject of legislative consideration.35

Apparently, the British government, thus, plays only a small role in regulating collective bargaining. No administrative agencies supervise the selection of bargaining representatives or regulate unfair labor practices as under the NLRA. Disputes are resolved through the use of economic power and common law suits in court, but such suits are limited by certain "immunities" granted to labor unions.

Deregulation

In the United States, in recent years, the federal government

32. See supra, note 28.
33. Arouca & Perritt, supra note 26, at 622.
34. Industrial Encyclopedia, supra note 28.
35. Id.
Hofstra Labor Law Journal has pursued a policy of less federal intervention, a policy of deregulation/privatization. There have been varying degrees and kinds of economic deregulation in certain industries, e.g., the transportation industries, railroad, airline, and maritime, the banking industry, the communications industry and the oil and natural gas industry. In the transportation industry, the government withdrew or modified a long standing regulation dealing with rates and routes of carriers; in the banking industry, restrictions on the scope and nature of banking operations were removed; in the communications industry, there was a break-up of the control of the industry by AT&T, "Ma Bell."

Deregulation and privatization have not been limited to the United States. Deregulation has reached into Russia and Poland; private restaurants under private management, with the attendant long lines as in the United States, have become a part of the scene in Russia and Poland. Canada decontrolled natural gas transactions in 1986. In 1987, London Regional Transport announced plans to sell LRT Bus Engineering ("REL"), its bus maintenance subsidiary, to the private sector. The bus industry was deregulated in October 1986. In New Zealand, "a principal objective of the Labour Government's economic reform has been to roll back the frontiers of state involvement in industry and commerce." Japan moved to break up its "Ma Bell." Italy, in 1987, looked with favor upon deregulation. Thus, deregulation does not appear to have national or

36. See, e.g., N.Y. Times, February 10, 1985, § 3, at 1 ("All last week, in his budget message, annual economic report and State of the Union address, President Reagan laid out the game plan for his second term. He means to consolidate the conservative revolution in public policy - he calls it a Second American Revolution - that he began four years ago. In fact, the Reagan revolution, which he suggests is a reprise of George Washington's, is meant to be the counterstroke of the Roosevelt revolution of the 1930's. Where Franklin Roosevelt sought to overcome the problems of the Depression by increasing the economic and social role of the Federal Government, Ronald Reagan has attacked "stagflation" - that combination of stagnation and inflation that dogged the economy in the 1970's - by cutting the role of government and by relying increasingly on what he calls "the magic of the market!" to generate strong economic growth.") Facts on File World News Digest, February 7, 1986, at 75 (President Reagan's annual economic report for 1986 "called for further government deregulation, particularly in the nation's banking and agricultural sectors. The President also said in his report that he had established a 'working group to investigate which government functions could be effectively returned to the private sector.' The sale of government operations to private investors was known as "privatization."

41. The N.Y. Times, January 8, 1984, § 3, at 8.
geographic boundaries.48

**IMPACT OF Deregulation OF Industry IN U.S.**

Any assessment of the nature and impact of economic deregulation upon the labor relations that existed in industries prior to the deregulation and an assessment of the nature of direct decisional deregulation of labor relations in the United States must be undertaken with a major caveat. "The future is seldom determined by a single event. Therefore, it would be unrealistic to predict the future of collective bargaining solely by an analysis of deregulation. The aggregate effect of other presently unknown or unquantifiable factors undoubtedly could control the ultimate resolution of this inquiry."44

Professor Dunlop, who served as Secretary of Labor under President Gerald Ford, and who is currently a Professor at Harvard University, when asked to "assess the consequences of deregulation in the transportation industries on their industrial relations" or to "help to interpret developments that are expected to be engendered by deregulation in railroads, airlines, trucking or maritime and the changing interactions of managements, labor organizations and specialized governmental agencies as a consequence," responded as follows: "All reflection on the consequences of deregulation from models of economics and industrial relations or from the intuition of practitioners needs to be discounted by the maxim that the unintended consequences of government regulation (or deregulation) are likely to prove eventually the most significant."45

45. Dunlop, *Deregulation and Industrial Relations*, Transportation Labor Issues, supra note 44 at 12. Professor Dunlop further observed:

Deregulation not only alters competitive conditions in a product market for transportation services but has consequences in upstream and downstream product markets and in a variety of related factor markets. In transportation there are likely to be major consequences in markets for equipment-trucks, airplanes, rolling stock — in the markets for specialized services and the extent of self service, as well as in associated labor markets. The impacts are complex and ripple widely from the center of the impact.

The industrial relations consequences of deregulation constitute a problem in the analysis of the dynamics of an industrial relations system. Change an element of
Notwithstanding these caveats, a great deal has been written about deregulation of the transportation industry, before it took place, when it came to pass, and an assessment of the experience after a few years of such deregulation. Suffice it to say, there has been no true consensus of what was supposed to happen and what in fact happened in labor relations in this industry.

The same caveat and lack of predictability may be made where the regulation and deregulation are directly involved with labor relations.

In the airline industry, deregulation was set in motion in October 1978 with the enactment of the Airline Deregulation Act. The airline industry was “cleared for takeoff” into a new environment—competition. “The blanket of a pervasive Federal government [which had] served to warm all parties in the industry” would be removed; forty years of “maternal economic regulation” by the Civil Aeronautics Board would be replaced by open competition.

The past ten years of deregulation in the airline industry has brought a dramatic change in the industry and, in turn, affected labor relations in the industry. Deregulation prompted a surge of non-union “upstart” airlines, many of which have not survived; a wave of mergers and acquisitions; takeovers; creation of holding companies; bankruptcies; “double-breasting” operations. With respect to the airline labor relations, although “predictions of airlines labor (and some carrier managements) of unmitigated disaster in the wake

an established system by a significant extent—technology, or competitor conditions arising from international trade or government regulation—and then trace through the dynamics of adjustments in a congruent system. Id.


47. Fowler, supra at 41.


49. Id. at 3.

50. Mergers and acquisitions included Carl Icahn-TWA, People Express-Frontier, United-Pan Am Pacific, Texas Air-Eastern, TWA-Ozark, Texas Air-People Express, Northwest-Republic, Piedmont-Empire, People Express-Britt and PBA, Delta-Western, Alaska-Jet America, American-Air California, Alaska-Horizon and USAir-PSA; three of these mergers were approved by the Department of Transportation over the objections by the Department of Justice because of the anti-trust problems. Kahn, supra note 46, at 4. See also, Cleared For Take Off, supra note 46, part 3, Union Representation Following Mergers and Acquisitions, at 97-139.
of deregulation have not come to pass,"^{51} the impact has been substantial and its full force is still uncertain. Thus, in 1980, Texas Air Corporation, the holding company of Texas Airlines, created New York Air as a separate, nonunion, low cost carrier and engaged in "double-breasting," the operation of union and non-union carriers; on September 24, 1983, Continental Airlines declared bankruptcy under Chapter 11, abrogated its collective bargaining agreement, cut its pay scales in half and resumed business on a non-union basis; Braniff also declared bankruptcy and persuaded its unions to accept lower wage rates in view of the actions at Continental. Another by-product of the changes and instability in the airline industry resulting from deregulation was the disappearance of what used to be the accepted "pattern settlements." "Time was when one could predict mechanics' wage rates with reasonable certainty, on the basis of the machinists' agreement with one of the major carriers whose contracts came up at roughly the same time. The same applied, to a lesser extent, to agreements with pilots. Such guideposts are gone for the time being."^{52} In sharp contrast with the national patterns established prior to deregulation, "negotiations became heavily enterprise-oriented and employee compensation became increasingly disparate among carriers", carriers in financial difficulty pressed hard and secured concessions through pay freezes and cuts and through changes in work rules that reduced costs; and financially healthy carriers, also, pushed for lower pay wages for new hires (the two-tier pay scale system) to meet the competition of other carriers and the non-union "upstarts."^{53} Airline unions, on the other hand, in return, demanded stock ownership, profit-sharing and other programs to offset the "give backs". Further, contract settlements included "recognition of the need for increased productivity in an era of reduced stipends from the Federal treasury."^{54} Further, airline unions have learned how to cope and counter the "traumatic changes" in the airline industry, in this world of takeovers and hostile acquisitions. Thus, the unions intervened and prevented the effort of Texas Air to take over TWA by helping Carl Icahn's acquisition; pilots of United, unhappy with Allegis Corporation, the holding company, offered to purchase United for $4.5 billion and contributed to the change in

51. Fowler, supra, see also, Kahn, at 2.
52. Fowler, supra, at 41-42.
53. Kahn, supra note 46, at 4; See also Johnson, Trends in Pilots' Pay and Employment Opportunities, Cleared For Take Off at 67-85.
55. Fowler, supra, at 41-42.
management; the controversy between the unions and Texas Air is a continuing one.\textsuperscript{56}

Deregulation of the airline industry has also impacted upon the structure of labor organizations. Some 30,000 airline workers have lost their jobs since the 1978 Air Deregulation Act was passed. As a result, labor unions have undertaken mergers "to improve the workers' positions in response to corporate reorganization or takeover of their business by a large conglomerate."\textsuperscript{57}

Airline deregulation has changed the picture of labor relations — strikes by airline employees, strike replacements by airlines, "crossovers" by airline employees (employees who do not initially participate in the strike or who return to work during the strike) and the internal rivalry for jobs between the "crossovers" and returning strikers; "secondary" activities, "sympathetic" strikes and threats of such activities.\textsuperscript{58}

The future course of labor relations in the deregulated airline industry is somewhat uncertain. Management and unions agree that deregulation has caused a great upheaval in the airline industry. Labor representatives [stress] the hardships deregulation has caused airline employees and [call] for a limited amount of regulation, for example: statutory imposition of labor protective provisions; management representatives [emphasize] the opportunities created by deregulation for industry growth, higher employment, and greater benefits to both shareholders and consumers. Every-

\textsuperscript{56} Kahn, supra note 46, at 4-6. The most recent manifestation of the ongoing dispute between the unions and Texas Air is the strike by the machinists union (IAM) against Eastern Airlines a division of Texas Air in February 1989 and the concurrent "sympathy" action by the pilots' union (ALPA), resulting in Eastern Airlines filing for bankruptcy. See also The Long Island Railroad Company v. IAM etc. (S.D.N.Y. 1989); Eastern Airlines v. Air Lines Pilots Association (11th Cir. March 24, 1989) and (S.D. Fla., April 11, 1989).

\textsuperscript{57} Kilroy, supra note 44.

\textsuperscript{58} See Trans World Airlines, Inc. v. Independent Federation of Flight Attendants ("IFFA") — U.S. — L.R.R.M. (BNA) — 57 U.S.L.W. 4283 (Feb. 28, 1989), (employer is not required by RLA to lay off junior crossover employees in order to reinstate more senior full-term strikers at the conclusion of a strike upon their application for reinstatement). See also, Trans World Airlines, Inc. v. Independent Federation of Flight Attendants, 809 F.2d 483 (8th Cir. 1987), affirmed by an equally divided of U.S. Sup. Ct.; petition for rehearing denied (union security and dues check off provisions in collective bargaining agreement remain in effect during strike after impasse). IFFA v. T.W.A., Inc. (W.D. Mo. March 9, 1988) ("bad faith" bargaining). See also supra, note 56 and infra note 79. Note that in August 1981, the air traffic controllers, employed by the federal government, engaged in a strike; the federal government discharged the strikers for violating the federal "no strike" law and the Professional Air Traffic Controllers Association (PATCO) which was the collective bargaining representative of the air traffic controllers and which called the strike was subsequently disbanded. See also, Cleared For Take Off, op at supra note 46, Part 5, Handling of Major Disputes, pp. 185-251.
body calls for more cooperation and less confrontation in labor management relations; but . . . the new era of good feeling is not yet a realistic possibility except in a few individual cases.\textsuperscript{59}

Some believe that the results of deregulation in the airline industry “will soon lead to a large dose of re-regulation.”\textsuperscript{60}

The impact on labor relations as a result of deregulation in the airline industry has been mirrored to some degree in other industries subjected to deregulation such as trucking and communications, as shown by the emergence of non-union companies, double-breasted operations, mergers, acquisitions, concession and “give-back” bargaining negotiations.

Deregulation of the transportation industry has resulted in greater competition within the various parts of the industry and between and among the different modes of transportation. New companies have entered the field, some of which are non-union, and thus competition has increased within the trucking industry.

It has been predicted\textsuperscript{61} that there will be increased merger activity; increased competition and expansion into high-profit markets; abandonment of marginal or unprofitable operations; increase in new entrants, many of which will fill the voids left by the abandonment of unprofitable or marginal operations; and increase in bankruptcies. In turn, collective bargaining will reflect these influences and result in wage restraint; increased emphasis on productivity; pressure for concessionary relief for individual carriers in financial difficulty; erosion of Industry-wide Bargaining and Pattern Settlements; and increased emphasis on job security.

One of the questions raised by the deregulation of the trucking industry is the possible impact upon the past pattern of bargaining on a national basis. Labor relations in the trucking industry developed, as the trucking industry developed — local, to regional, to national carriers with collective bargaining agreements corresponding to the geographical developments. National agreements continued regularly throughout the 1960’s and 1970’s.

Although the entry of more trucking companies in competition with the established companies in the trucking industry resulted from deregulation and somewhat weakened the power of the Teamsters Union in its dealing with the industry, it has been predicted

\textsuperscript{59} Cleared For Take-off, supra note 46, at x-xi.
\textsuperscript{60} Kahn, supra note 46, at 7.
\textsuperscript{61} Zeh, The Future of Craft Structure, supra note 44, at 147, 180-181, (for an exposition of predictions of impact on the transportation industry).
that "although the economic forces intensified by deregulation are having a dramatic impact on the industry and a discernible impact on short-term bargaining goals, they are not likely to undermine the structure of multi-employer bargaining in the railroad or trucking sectors in the near future."62

Deregulation in the trucking industry, combined with other economic difficulties, produced a Master Freight agreement in 1982 of "historic dimensions." The agreement was "negotiated and ratified a month before the old agreement expired, and provided for no wage adjustments other than annual cost-of-living increases ... ."63

The 1988 National Master Freight Agreement64 similarly reflected the new approach to labor negotiations. The Teamsters announced its ratification, despite disapproval by about 64% of the rank-and-file membership, on the ground that it was compelled to accept the agreement under a constitutional rule which required two-thirds vote to reject, and a strike, the Teamsters International declared, would be improper. The minimum wage increase over the three-year life of the contract is approximately 10%.

In the communications industry, the "deregulation" has come about, not by statutory or administrative rulings as in the transportation industry, but rather as a result of antitrust litigation and divestiture and breakup of the American Telephone and Telegraph Company ("AT&T") in 1984. Divestiture will materially affect the nature of collective bargaining. In the past, bargaining was conducted on a nationwide basis, with an opportunity for the various regions to negotiate on "local" matters after the national pattern was established. This also resulted in the power residing with the International CWA, which conducted the national negotiations and not with the local unions. Although the CWA will try, to approximate national bargaining as close as possible, the best it can hope for is bargaining for eight contracts — one with AT&T and additional contracts with each of the seven new regional Bell System companies. Without uniform bargaining structure, many contract provisions will grow dissimilar.65 This, in turn, will also reduce the power of the International; power will now reside at the local and regional union levels. The CWA will restructure itself and tailor itself to the structure of the new AT&T and the seven regional operating compa-

The number of jobs in the telecommunications industry has plummeted since AT&T deregulated. It is asserted that more than 53,000 jobs in the regional holding companies have been eliminated since divestiture, and 87,000 jobs have been lost in AT&T. The loss of jobs and reduction of membership will, of course, affect the collective bargaining between the parties.

Apart from the impact which deregulation of industry will have on the established collective bargaining relationships in the various industries, it is clear that deregulation will result in the entry of new companies in the industry and resultant competition. In turn this will undoubtedly increase the number of labor disputes in connection with organizing campaigns and labor disputes when employers, faced with such competition, will seek to gain labor cost advantages in dealing with their collective bargaining representatives, with the possibility of strikes and the attendant repercussions and problems. Resulting in instances of secondary activity and "double breasting" by established unionized employers trying to meet the competition. All of which will undoubtedly result in activity under the NLRA and the RLA. Representation election proceedings and unfair labor practice proceedings under the NLRA, would present issues *inter alia* of obligation to bargain with and status of existing collective bargaining agreements of incumbent unions; successorship; scope of unit; discrimination; status of double-breasting operations; duty to bargain over "management" decisions e.g., to close, relocate, subcontract, lay off, unfair labor practice proceedings

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68. Section 9 of the NLRA, 29 U.S.C. § 159.
before the National Labor Relations Board and the federal courts involving the organizational and recognitional picketing provisions of Section 8(b)(7),\(^74\) under the secondary boycott provisions of Section 8(b)(4),\(^75\) and under the hot cargo provisions of Section 8(e).\(^76\) Plant


74. Section 8(b)(7) [29 U.S.C.A. § 158] states, in part, that it shall be an unfair labor practice for a labor organization

to picket or cause to be picketed, or threaten to picket or cause to be picketed, any employer where an object thereof is forcing or requiring an employer to recognize or bargain with a labor organization as the representative of his employees, or forcing or requiring the employees of an employer to accept or select such labor organization as their collective bargaining representative, unless such labor organization is currently certified as the representative of such employees:

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\text{... (C) where such picketing has been conducted without a petition under section 9(c) [section 159(c) of this title] being filed within a reasonable period of time not to exceed thirty days from the commencement of such picketing: Provided. That when such a petition has been filed the Board shall forthwith, without regard to the provisions of section 159 (c)(1) or the absence of a showing of a substantial interest on the part of the labor organization, direct an election in such unit as the Board finds to be appropriate and shall certify the results thereof: Provided further. That nothing in this subparagraph (C) shall be construed to prohibit any picketing or other publicity for the purpose of truthfully advising the public (including consumers) that an employer does not employ members of, or have a contract with, a labor organization, unless an effect of such picketing is to induce any individual employed by any other person in the course of his employment, not to pick up, deliver or transport any goods or not to perform any services.}
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75. Section 8(b)(4) states, in part, that it shall be an unfair labor practice for a labor organization

(i) to engage in, or to induce or encourage any individual employed by any person engaged in commerce or in an industry affecting commerce to engage in, a strike or a refusal in the course of his employment to use, manufacture, process, transport, or otherwise handle or work on any goods, articles, materials, or commodities or to perform any services; or (ii) to threaten, coerce, or restrain any person engaged in commerce or in an industry affecting commerce, where in either case an object thereof is —

\[
\text{... (B) forcing or requiring any person to cease using, selling, handling, transporting, or otherwise dealing in the products of any other producer, processor, or manufacturer, or to cease doing business with any other person, or forcing or requiring any other employer to recognize or bargain with a labor organization as the representative of his employees unless such labor organization has been certified as the representative of such employees under the provisions of section 9. ...}
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76. Section 8(e) states, in part:

It shall be an unfair labor practice for any labor organization and any employer to enter into any contract or agreement, express or implied, whereby such employer ceases or refrains or agrees to cease or refrain from handling, using, selling, transporting or otherwise dealing in any of the products of any other employer, or to cease doing business with any other person, and any contract or agreement entered into heretofore or hereafter containing such an agreement shall be to such extent unenforceable and void ...
closings and mass lay offs, should they occur, will present issues under the recently enacted Worker Adjustment Retraining Notification Act ("WARN").

Competition will also generate changes in the nature of bargaining (i.e., "give backs," "hard bargaining") and, in turn, generate charges under the NLRA and the RLA.

Deregulation of the railroads and airlines has revived the perennial question — should the railroads and airlines continue to be governed by the RLA or should the RLA be merged into the NLRA.

Deregulation of the NLRA

Over the years, from the day of its passage to this very day, there has been criticism of the Board in its operations and in its decisions. Criticism has come from both of the major contestants — employers and unions — joined often by Congress and neutrals. But, none have been so vitriolic as those of recent years.

Labor spokespersons assert that the current Board is reversing decisions of previous Boards in favor of management. AFL-CIO Secretary Tom Donahue declared the Act, as currently administered, "an abject and utter failure." Lawrence J. Cohen compared the Board to a vessel which

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78. For example, the strike by the flight attendants against TWA has generated multiple litigation under the RLA before the U.S. District Court, the U.S. Court of Appeals and the U.S. Supreme Court. The litigation has raised important issues, e.g., the relative rights of strike replacements, "crossovers," and strikers who offer to return to work; which contract provisions survive the expiration of the collective bargaining agreement; the status of the union security provision after the expiration of the collective bargaining agreement; allegations of bad faith bargaining. See, supra notes 56, 58.
79. In view of the possibility of secondary boycott activity as a result of the deregulation of railroads and airlines, it is important to note that there are important differences between the RLA and the NLRA with respect to the treatment of secondary boycotts and injunctions. See Burlington No. Rwy. Co. v. Brotherhood of Maintenance of Way Employees, 481 U.S. 429 (1987).
has been taken over by pirates who are methodically scuttling the Act which they are charged to protect. This Board has managed, in little over one year, to turn the state of labor relations in the country back 50 years, for its actions encourage a return to economic warfare, rather than the peaceful resolution of disputes through bargaining and through the Board.82

Defenders of the Board counter with the declaration that the current Board is not really reversing decisions, but rather reinstating prior decisions of long standing which prior Boards had imprudently reversed. Former N.L.R.B. General Counsel Peter Nash hailed recent Board reversals as a “return to sanity.”83 Former Board Chairman Edward Miller asserted that only a few precedents have been altered by the Board and that these reversals make little difference in the world of labor relations —

the new conservatives are acting about as we would have expected them to do and are changing some precedents out on the fringes of the law, but what they’re doing out there has little or no impact on the realities of industrial relations. They make interesting commentary for law reviews.84

Congress and “neutrals” joined the fray. Several years ago, a majority of the House Labor Committee issued a report “Failure of Labor Law - A Betrayal of American Workers;” the minority on the subcommittee issued a counterstatement, characterized the majority report as “overstatement, overdramatization, and . . . hyperbolic rhetoric.” Judge Mikva observed that “union members believe the NLRA provides inadequate protection when they confront management.”85 Professor Clyde Summers declared, “the legal rules developed by the Board and the courts do not express or implement the premises and purposes of the Act.”86

There has been clamor for change — deregulation of labor relations. Some suggest outright repeal of the NLRA;87 some suggest

procedural changes of the Act to expedite the processing of cases and to reduce the backlog; some suggest certain types of cases be withdrawn from the jurisdiction of the Board and the Act; some suggest the transfer of unfair labor practice cases to the federal district courts, or creation of new Labor Courts.

A call has been issued for a “tripartite, private sector conference, attended by representatives of labor, management and government be held . . . [to] discuss a wide variety of possible changes.”

Most of the suggestions would require legislative action. There have been no statutory changes of the NLRA since 1959 (except for the limited health care amendments in 1974). The one recent effort to change the NLRA by the Labor Reform Bill in 1978 was a disaster. However, the lack of statutory change does not mean that there has been “no change.” Changes have been reflected by the decisions of the NLRA. Decision making deregulation, to some degree, has taken the place of statutory deregulation of the NLRA.

Recent decisions of the Board reflect the philosophy of deregulation — a policy of less involvement of the federal government in the labor relations of the employer and the labor organizations, an approach to labor relations to let management and labor resolve

88. See Miller supra note 87, at 160-6. (“One of the areas in which the Board’s regulation through decision making seems to me singularly ineffective and not very necessary is that of regulating the conduct of parties who already have a mature relationship.” Id. at 160. “Is there really any public interest to be served by the Board’s carefully reviewing the discharge and discipline of union officers and stewards who take part in a wild cat strike?” Id. at 161. “[Is it] really useful to have the Board monitor the bargaining process and decide whether companies or unions have ‘bargained in good faith.’” Id. “Couldn’t equal employment regulation be centralized in one place and . . . remove that jurisdiction from the National Labor Relations Board.” Id. at 165. “[I] wonder whether we need an administrative agency to regulate [secondary boycotts] or whether we could simply leave the enforcement of that area to private actions under Section 303 . . . and expand Section 303 to permit the courts to issue injunctions as well as awards of damages in appropriate cases.” Id. “The Board could also simplify its regulatory role and reduce the need for elaborate hearings and case-by-case decision making in representation cases if it would engage in rule-making.” Id. at 162. “I have earlier suggested that when the General Counsel issues a complaint it ought to be brought directly before a federal district court judge, rather than before one of the Board’s Administrative Law Judges. Amend the law to provide for prompt enforcement or review of Administrative Law Judges’ decisions in the local federal district courts, rather than passing them all by the N.L.R.B. in Washington and then on to a United States Court of Appeals.” Id. at 164).


91. See supra note 80.
their differences through their own actions and procedures, and, if need be, their economic powers.

A review of some recent decisions demonstrates that, in fact, there has been some "deregulation" of the NLRA by Board decisions in some very important areas of labor relations. For example, what can an employer say in the pre-election campaign; must an employer bargain about his decision to shut down part of his operation; can an employer relocate his plant or part of its operations during the term of the collective bargaining agreement; must an employer bargain about such decision to relocate; does a no-strike provision include a sympathy strike; can an employer who engages in an economic offensive lockout hire temporary replacements; when can an arbitration of a dispute between the employer and the union/employee foreclose an unfair labor practice proceeding; can there be a settlement of an unfair labor practice over the objection of the general counsel or the charging party, can an employer keep the union off its property.

**PRE-ELECTION CAMPAIGN**

In carrying out its duties and responsibilities to afford employees the opportunity to select or reject a labor organization as their collective bargaining representative through the election process, the Board has zealously undertaken to ensure laboratory conditions and an informed electorate, so that the results of the ballot reflect a free and fair choice on the part of the employees. In seeking to establish such a climate, the Board has been called upon to assess the speeches and other pre-election propaganda of the parties to determine whether they constituted threats, coercion or promises of benefits and exceeded the bounds of free speech.

In addition, the Board, in the past, undertook to regulate the pre-election campaign by setting aside an election "where there has been a misrepresentation or other similar campaign trickery, which involves a substantial departure from the truth, at a time which prevents the other party or parties from making an effective reply, so that the misrepresentation, whether deliberate or not, may reasonably be expected to have a significant impact on the election." Over the years, the Board has rejected and reinstated this *Hollywood Ceramics* doctrine. Finally, for the second time in 1982, the Board

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overruled *Hollywood Ceramics*. Regarding employees as mature individuals who are capable of recognizing campaign propaganda for what it is and discounting it, the Board "will no longer probe into the truth or falsity of the parties' campaign statements." 94

Management Decisions-Total/Partial Plant Shutdown; Relocation; Subcontracting; and Layoffs

The NLRA prohibits, in clear and unequivocal language, "discrimination in regard to hire or tenure of employment or any term or condition of employment to encourage or discourage membership in any labor organization," 95 (e.g. discharging an employee for joining or assisting a labor organization). Nevertheless, the U.S. Supreme Court has unequivocally declared that an employer may close down his entire business even if such closing and liquidation "is motivated by vindictiveness toward the Union," even if such action is "prompted by a desire to avoid unionization." 96 "A proposition that a single businessman cannot choose to go out of business if he wants to would represent such a startling innovation that it should not be entertained without the clearest manifestation of legislative intent or unequivocal judicial precedent so construing the Labor Relations Act. We find neither." 97 However, if the employer has several plants, his closing of one plant (a "partial closing") for anti-union reasons is an unfair labor practice if motivated by a purpose to chill unionism in any of the remaining plants of the employer and it may reasonably be foreseen that the closing would have that effect. 98 Similarly, as distinguished from the finality of a plant shutdown and liquidation which completely terminates the employment relationship, the "runaway shop," relocation of a plant, opening of a new-plant, transfer of work to another plant or to other employees in the same plant or to an alter-ego corporation, or subcontracting the work to another company to avoid or retaliate against union activity is distinguisha-

95. NLRA, § 8(a)(3).
96. Textile Workers Union v. Darlington Mfg. Co. 380 U.S. 263 (1965). Note, however, the Supreme Court’s caveat: “nothing we have said in this opinion would justify an employer interfering with employee organizational activities by threatening to close his plant, as distinguished from announcing a decision to close already reached” by him. Id. at fn. 20 at 274.
97. Id. at 270.
ble from Darlington and constitutes an unfair labor practice.  

99  Turning to management decisions and actions which are not motivated by anti-union considerations, but by economic or other considerations, what limitations or obligations are there on the part of the employer under the NLRA. When management and labor enter into the collective bargaining relationship, the NLRA lays down some rules governing the relationship, obligations, and freedom of action of the parties. Thus, it is clear that an employer is obligated to bargain with the collective bargaining representative with respect to the mandatory subjects of collective bargaining, such as, "wages, hours and other terms and conditions of employment." In addition, the employer generally may not unilaterally change those conditions before reaching a good faith impasse in bargaining.  

100  Further, when there is a collective bargaining agreement in effect, an employer who seeks to modify a term or condition "contained" in the collective bargaining agreement must not only bargain with respect to that change, but must obtain the union's consent before implementing the change.  

101  Issues arise, however, in determining what obligations attach to certain particular actions of an employer which are referred to as "managerial" decisions (e.g. subcontracting, closing of a business in whole or in part, plant relocation, subcontracting, layoffs, etc; whether the existing bargaining contract precludes such action; whether such action may be taken after impasse and when is there an impasse).  

102  The U.S. Supreme Court, when recently confronted with the issue of whether an employer was obligated to bargain with the recognized collective bargaining representative concerning a management decision to shut down part of its business, made some interesting and telling observations. "[I]n establishing what issues must be submitted to the process of bargaining, Congress had no expectation that the elected union representative would become an equal partner in


100. NLRA, § 8(d).

101. See infra p. 42.

the running of the business enterprise in which the union’s members are employed." Further, the Court noted that

[management must be free from the constraints of the bargaining process to the extent essential for the running of a profitable business. An employer’s need for unencumbered decision making, bargaining over management decisions that have a substantial impact on the continued availability of employment should be required only if the benefit for labor management relations and the collective bargaining process outweighs the burden placed on the conduct of the business.]


104. With respect to Subcontracting, the Supreme Court had previously held in agreement with the N.L.R.B., that in the particular circumstances of that case, there was an obligation on the part of the employer to bargain about that decision. Fibreboard Paper Products Corp. v. N.L.R.B., 379 U.S. 203 (1964). Chief Justice Warren’s opinion delineated the nature of the Court’s decision stating:

The facts of the present case illustrate the propriety of submitting the dispute to collective negotiation. The Company’s decision to contract out the maintenance work did not alter the Company’s basic operation. The maintenance work still had to be performed at the plant. No capital investment was contemplated; the Company merely replaced existing employees with those of an independent contractor to do the same work under similar conditions of employment. Therefore, to require the employer to bargain about the matter would not significantly abridge his freedom to manage the business.

We are thus not expanding the scope of mandatory bargaining to hold, as we now do, that the type of ‘contracting out’ involved in this case — the replacement of employees in the existing bargaining unit with those of an independent contractor to do the same work under similar conditions — is a statutory subject of collective bargaining under Section 8(d). Our decision need not and does not encompass other forms of ‘contracting out’ or ‘subcontracting’ which arise daily in our complex economy.

Justice Stewart delivered a concurring opinion which emphasized the limited scope of the Court’s decision and presaged the direction of the Supreme Court thereafter. (See First National Maintenance, supra note 103.) Justice Stewart stated;

subcontracting decisions are as a general matter subject to that duty. The Court holds no more than that this employer’s decision to subcontract this work, involving ‘the replacement of employees in the existing bargaining unit with those of an independent contractor to do the same work under similar conditions of employment’ is subject to the duty to bargain collectively.

Nothing the Court holds today should be understood as imposing a duty to bargain collectively regarding . . . management decisions, which lie at the core of entrepreneurial control [such as, ‘the investment in labor saving machinery or the liquidation of assets and the complete termination of business’]. Decisions concerning the commitment of investment capital and the basic scope of the enterprise are not in themselves primarily about conditions of employment, though the effect of the decision may be necessarily to terminate employment.

This kind of subcontracting falls short of such larger entrepreneurial questions as
These declarations effectively, removed many management decisions and actions from regulation under the National Labor Relations Act.

The Court concluded that "the harm likely to be done to an employer's need to operate freely in deciding whether to shut down part of its business purely for economic reasons outweighs the incremental benefit that might be gained through the union's participation in making the decision." The Court specifically limited its decision to partial closing and did not "intimate [a] view as to other types of management decisions, such as plant relocations, sales, other kinds of subcontracting, automation, etc. which are to be considered on their particular facts." The N.L.R.B. and courts of appeals have subsequently attempted to fill the void.

The Board's test on whether certain management decisions are mandatory subjects of collective bargaining was enunciated in *Otis Elevator Corp.* (United Technologies) ("Otis II") and involved the 3 different interpretations and analyses of the Supreme Court's decision in *First National Maintenance*. Although *Otis II* involved "relocation" or "consolidation", Board members stated that the test was applicable to various other management decisions (again with differing views by Board members). In *Otis II*, the Company had closed down its research and development facility in New Jersey and transferred its operations and employees to its plant in Connecticut because its New Jersey facility was outdated and its plant in Connecticut was modern and contained a high degree of technology and facilities; labor costs were not the motivating force. The Board (4 members) was unanimous in concluding that there was no obligation to bargain about the decision to relocate the plant, but, in three opinions, set forth differing rationales.

Chairman Dotson and Member Hunter reasoned:

Despite the evident effect on employees, the critical factor to a determination whether the decision is subject to mandatory bargaining is the essence of the decision itself, *i.e.*, whether it turns upon a change in the nature or direction of the business, or turns upon labor costs; *not* its effect on employees nor a union's ability to offer alternatives.

On the particular facts of the case, they concluded that the com-
pany's decision "turned not upon labor costs, but instead upon a change in the nature and direction of a significant facet of its business. Thus, it constituted a managerial decision of the sort which is at the core of entrepreneurial control outside the limited scope of Section 8(d), [the duty to bargain]." Going beyond the limitations imposed by the Supreme Court in its decision in First National Maintenance, they also would apply the same test to decisions by an employer to sell a business or part thereof, to dispose of its assets, to restructure or reconsolidate operations, to subcontract, to invest in labor-saving machinery, to change the methods of finance or of sales, advertising, product design "and all other decisions akin to the foregoing."

Member Dennis laid down a two-step test. First, one must determine whether the employer's decision is "amenable to resolution through the bargaining process," — whether "a factor over which the union has control (e.g., labor costs [is] a significant consideration in the employer's decision," i.e., is the union "in a position to lend assistance or offer concessions that reasonably could affect . . . the employer's decision." If the answer is negative, the employer has no duty to bargain over the decision. If the answer is affirmative, the second question is to weigh the "burdens" that bargaining would place upon the employer, such as, extent of capital investment, extent of changes, need for speed, flexibility and confidentiality, as compared to "amenability to bargaining." If the Board found the "burden" outweighed the "amenability," there would be no obligation to bargain. Member Dennis would apply her test to plant relocations, consolidations, automation and subcontracting; but no obligation to bargain with respect to partial closings and sales. On the particular facts of the case, Member Dennis concluded that since no labor-related consideration underlay the company's decision and the union could not have offered anything to change the decision, there was no obligation to bargain over the decision to relocate the operations.

Member Zimmerman agreed with that conclusion, since the company's reasons for relocating were "not amenable to bargaining. No concession proposed by the Union could reasonably be expected to" change the company's action. But, Member Zimmerman argued that there could be situations where bargaining should be required even though the reasons for the employer's actions did not turn on labor costs where "union concessions may substantially mitigate the concerns underlying the employer's decision, thereby convincing the employer to rescind its decision;" in that event, there would be an
obligation to bargain "absent any showing of the employer's urgent need for . . . speed, flexibility or secrecy." Basically, Member Zimmerman reiterated the test of the Supreme Court in First National Maintenance, "whether the benefit for labor management relations and the collective bargaining process outweighs the burden placed on the conduct of the business."105

Although the Board has undergone some change in board member since Otis II was enunciated, the current Board members have followed Otis II broadly, without specifying which of the three analyses they embrace;106 but, of course, Board members, at times, have differed in their interpretation of the facts and the conclusions to be drawn therefrom.107 The courts of appeals have, for the most part,

105. Member Zimmerman did not indicate which management decisions would come under his test, but he applied it to relocation in Milwaukee Spring Division of Illinois Coil Spring Co., 268 N.L.R.B. 601 (1984) (in which he dissented), to consolidation in Otis II and to subcontracting in Bob's Big Boy, 264 N.L.R.B. 1369 (1982).

106. The Board often stated "[t]he conclusion is consistent with the Supreme Court's opinion in First National Maintenance and with any of the views expressed in the Board's decision in [Otis II]." See, e.g., Oak Rubber Company, 277 N.L.R.B. 1322 (1985). But see Parma Industries, Inc., 292 N.L.R.B. No. 9 (1989) where Member Cracraft disagreed with the other Board members with respect to the obligation to bargain on a decision to close part of its business or sell its assets. The Board decision states:

Absent discriminatory motivation, Member Cracraft would not find that an employer's decision to close part of its business or sell assets is a mandatory subject of bargaining. First National Maintenance Corp. v. N.L.R.B., 452 U.S. 666 (1981) (partial closing); General Motors Corp., 191 N.L.R.B. 951 (1971), petition for review denied sub nom. Auto Workers Local 864 v. N.L.R.B., 470 F.2d 422 (D.C. Cir. 1972) (sale). Member Cracraft specifically disagrees with her colleagues' claim that 'under any of the views expressed in Otis Elevator Co., 269 N.L.R.B. 891 (1984),' an employer must bargain over partial closing and sale decisions 'predicated predominantly on labor cost considerations.' Member Cracraft points out that in fn. 8 of Member Dennis' Otis concurrence, Member Dennis clearly and unequivocally stated that 'if the matter presented is an economically motivated partial closing or a sale, no decision bargaining is required.' Member Cracraft further observes that, apart from the misplaced reliance on Otis, her colleagues have cited no cases to support their novel position.

Id. at 3, n.5.

107. See Gar Wood-Detroit Truck Equipment, Inc., 274 N.L.R.B. No. 23 (1985) (no obligation to bargain over decision to subcontract out work previously performed by employees, now to be performed by an independent contractor, at the same employer location; the decision did not turn on labor costs, although they entered into the overhead costs which the employer wanted to reduce); Hawthorne Mellody, Inc., 275 N.L.R.B. No. 55 (1985) (no obligation to bargain about move of delivery operations, inasmuch as decision "turned upon a change in the nature and direction of the business," even though labor costs were "a motivating factor"). See also Columbia City Freight Lines Inc., 271 N.L.R.B. 12 (1984); Fraser Shipyards, Inc., 272 N.L.R.B. 496 (1984); Bostrup Division, UOP, Inc., 272 N.L.R.B. 999 (1984); Oak Rubber Company, 277 N.L.R.B. 1322 (1985); Inland Steel Container, 275 N.L.R.B. 929 (1985), aff'd, 822 F.2d 559 (5th Cir. 1987); Arrow Automotive Industries, 284 N.L.R.B. No. 57 (1987), enf. denied, 853 F.2d 223 (4th Cir. 1988); ABS Industries, Inc., 281 N.L.R.B. No. 145 (1986); Morco Industries, Inc., 279 N.L.R.B. No. 100 (1986); Pennsylvania
accepted and approved the Board's approach in Otis II,\textsuperscript{108} although, on some occasion a court has attacked a particular conclusion of the Board in rather harsh terms.\textsuperscript{108} The Board extended the obligation to bargain under Otis II to an employer's decision to layoff employees for economic reasons (not layoffs pursuant to a collective bargaining agreement or layoffs resulting from non-mandatory decisions).\textsuperscript{110}

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\textsuperscript{108} See, e.g. N.L.R.B. v. Westinghouse Broadcasting and Cable Inc., 849 F.2d 15 (1st Cir. 1988); Local 2179, United Steelworkers v. N.L.R.B. (Island Steel Container Company) 822 F.2d 559 (5th Cir. 1987); Weather Tamer Inc. v. N.L.R.B. 676 F.2d 483 (11th Cir. 1982); N.L.R.B. v. Island Typographers Inc., 705 F.2d 44 (2d Cir. 1983); Mason v. Continental Group Inc. 763 F.2d 483 (11th Cir. 1982), cert. denied, 474 U.S. 1087 (1986); W.W. Grainger, Inc. v. N.L.R.B. 860 F.2d 244 (7th Cir. 1988).

\textsuperscript{109} Arrow Automotive Industries, Inc. v. N.L.R.B. 853 F.2d 223 (4th Cir. 1988).

\textsuperscript{110} Lapeer Foundry and Machine Inc., 289 N.L.R.B. No. 126 (1988). An employer's decision to lay off employee for economic reasons (not layoffs pursuant to a collective bargaining agreement or layoffs resulting from non-mandatory decisions) is a mandatory subject of bargaining. "In determining [employer's] bargaining obligation . . . [the Board] will apply the principles set forth in [Otis II]."
As previously indicated, where a collective bargaining agreement is in effect, an employer who seeks to modify a term or condition "contained in" the agreement must, not only bargain with respect to the change, but must obtain the union's consent before implementing the change. With respect to a plant relocation or relocation of unit work, during the term of a collective bargaining agreement, the Board has held that an employer may remove a plant or an operation to another location when such a decision is motivated by economic considerations, including labor costs, (after bargaining too impasse, where required under Otis II), absent a specific provision to the contrary in the collective bargaining agreement, i.e., un-

When a business is confronted with an economic problem such as declining sales, excessive inventory, or an unprofitable department, it may have several options to address this problem. Management may decide, for example, to lay off employees, to shut down the unprofitable department, or to consolidate operations and transfer work to a more efficient plant. Although job losses may result whether the decision is to lay off, shut down, or consolidate, the focus of the decision to lay off differs from the focus of the other two decisions in a critical manner. In deciding to lay off employees, management directly alters employees' terms of employment. This decision, like the decision to reduce workers' wages, necessarily turns on labor costs because the decision itself is to modify terms of employment in order to save money during economic downturns. By contrast, the decisions in FNM to shut down and in Otis to consolidate part of the business involved a direct modification of the business structure. Those decisions had only a secondary effect of altering employees' terms of employment. Accordingly, pursuant to the Otis plurality two-factor test, the decision to shut down part of the business or consolidate operations affects the scope, direction, or nature of the business and need not be bargained. On the other hand, the decision to lay off turns on labor costs and must be bargained. The Otis two-step test of Member Dennis mandates the same conclusion. A decision to lay off is predicated on the assumption that savings will accrue from reduced labor costs during a period when a full complement of workers is unnecessary. Labor-related considerations therefore form the basis for the decision. As a union has control over this labor-related factor, it can offer alternatives to the layoff, such as wage reductions, modified work rules, or part-time schedules for a larger group, in order to save the company money during the economic downturn. Accordingly, the layoff decision is amenable to resolution through the collective-bargaining process. With regard to the burden placed on the business, we note that a decision solely to lay off employees does not involve an investment of capital, an alteration of the company's basic operations, nor a need for confidentiality. Although management has a legitimate concern with the need for speed and flexibility in effectuating a layoff to remedy its economic plight, we believe that the legal requirements that exist to ensure meaningful bargaining in a timely fashion address this concern adequately. We therefore find that the burden borne by management in having to bargain over an economic layoff decision is outweighed by the benefit for the collective-bargaining process.

In light of the above analysis, we conclude that the decision to lay off employees for economic reasons is a mandatory subject of bargaining. Consequently, an employer must provide notice to and bargain with the union concerning the decision to lay off bargaining unit employees and the effects of that decision. Id.

See also Litton Financial Printing Division, 286 N.L.R.B. No. 79 (1987).
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less (1) the right to relocate is expressly waived in the agreement, or
(2) the agreement contains a work preservation clause, a clause
which expressly preserves the work for the bargaining unit employ-
ees for the term of the contract. The Board has applied the same
rule to subcontracting during the term of the collective bargaining
agreement.

Regardless of whether or not an employer, in a particular situa-
tion has an obligation to bargain about a management decision to
shut down, relocate, consolidate, subcontract, etc., which affects em-
ployee “wages, hours and other terms of employment,” the employer
has the obligation to bargain over the “effects” of the employer’s
decision, absent a clear and express waiver by the union.

Perhaps in an effort to soften the impact of its non-mandatory
confirmation, the Supreme Court emphasized that “the Union must be
given a significant opportunity to bargain about these matters of job
security as part of the ‘effects’ bargaining mandated by Section
8(a)(5)”; that “bargaining over the effects of a decision must be con-
ducted in a meaningful manner and at a meaningful time, and the
Board may impose sanctions to insure its adequacy”; that a “Union,
by pursuing such bargaining rights may achieve valuable concessions
from an employer engaged in a partial closing”; that by bargaining
over effects of the decision to partially close the Union “indirectly
may assure that the decision itself is deliberately considered”; that a
Union is protected “against a partial closing decision that is moti-
vated by an intent to harm the Union.” Finally, the Supreme Court
suggests that under certain circumstances, such as, where labor costs
are an important factor in the decision to close, “management will
have an incentive to confer voluntarily with the Union to seek con-
cessions that may make continuing the business profitable” (empha-
sis supplied).

Plant closings and/or layoffs of employees, and the controversy
and the differences between President Reagan and the Congress in
1988, on the issues of requiring notice prior to such actions by em-

See also Suburban Transit Corp. 276 N.L.R.B. No. 5 (1985); Brown Company, 278 N.L.R.B.
783 (1986); De Soto, Inc. 278 N.L.R.B. 788 (1986) National Metalcrafters, Inc., 276
N.L.R.B. No. 14 (1985); Consumers Distributing Company, Ltd. 274 N.L.R.B. No. 50

112. See e.g. Gar Wood-Detroit Truck Equipment, Inc. 274 N.L.R.B. 113 (1985); Mid-

113. See also, Otis Elevator Company, 283 N.L.R.B. No. 40 (1987) (“Otis III”); Gar-
wood-Detroit Truck Equipment, supra note 112.
ployers, highlighted the federal policy of regulation/deregulation. When Congress passed the long awaited Omnibus Trade and Competitiveness Act ("Trade Bill") in April 1988, it included a provision which required a company with more than 100 employees to give sixty days' advance notice of a plant closing or a mass layoff lasting more than six months. President Reagan vetoed the trade bill on May 24, 1988 largely because of the plant closing provision. He and others felt that it was a matter best left for the parties. An effort to override the veto proved unsuccessful; on May 24, 1988 the House overrode the veto but on June 8, the Senate sustained the veto by a slight margin. Eight days later, a bill was introduced in the Senate, identical to the vetoed plant closing provision, as a separate piece of legislation. On June 13, 1988, Congress passed the Workers Adjustment and Retraining Notification Act ("WARN") and "[a]fter much soul searching and head counting, President Reagan let [WARN] become law on August 4, 1988, despite his serious reservations concerning the fundamental concept of mandatory notice" by an employer prior to a plant closing or mass layoff. WARN became effective February 4, 1989.

Under WARN, covered employers who close a plant, or an operating unit within a plant, or institute a mass layoff, must notify local government officials and affected employees (through their union representatives, if any), in writing, at least sixty (60) days in advance of the closing or layoff unless the closing or layoff falls within an exception or exemption under the Act, (such as a layoff at a "temporary" facility, a lawful lockout, replacement of strikers, result of a natural disaster or by "business circumstances that were not reasonably foreseeable") in which case the employer must give as much notice as is reasonably possible. Failure to comply with the advance notice provisions of WARN subjects the employer to a potential lawsuit by affected employees for back pay and all employee benefits that would have accrued under any ERISA plan for each day of violation to a maximum of 60 days, civil penalties of $500 per day for a maximum of 60 days ($30,000) for each closing or layoff where notice has not been properly given, payable to the unit of local government that should have received notice, attorney's fees at the

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116. But see, infra p. 38.
118. Id.; 29 U.S.C. 2103.
court's discretion; these penalties may be mitigated under certain circumstances.\textsuperscript{119}

An employer is subject to WARN, if the employer employs at least 100 full time employees or 100 employees (regardless of full time status) who work an aggregate of 4000 hours per week (exclusive of overtime).\textsuperscript{120} The plant closing and layoff provisions comes into play only if there is an "employment loss" (i.e., employees receive the benefits of WARN only if there is an "employment loss" as a result of a plant closing or layoff). "Employment loss" means "(A) an employment termination, other than a discharge for cause, a voluntary departure, or a retirement or (B) a layoff exceeding six months or (C) a reduction in hours or work of more than fifty (50) per cent during each month of a six month period."\textsuperscript{121}

A permanent or temporary shutdown of a site of employment or a facility or operating unit within a single site of employment is a plant closing if the shut down results in an employment loss for 50 or more full-time employees during a 30-day period.\textsuperscript{122} A reduction in force (that is not a plant closing) is a mass layoff if it results in an employment loss at a single site of employment during any 30 day period for (1) 33 percent of the full time employees and at least 50 full time employees, or (2) at least 500 full time employees without regard to percentage.\textsuperscript{123} Note that, in view of the 6 months definition of "employment loss" layoff, a layoff originally contemplated and announced for less than six months (and therefore not an "employment loss") which extends beyond the six months becomes a "mass layoff," "employment loss" unless the extension beyond the six months was not reasonably foreseeable at the time notice should have been given and the employer provides notice as soon as it is

\begin{footnotes}
\item 119. 29 U.SC. 2104. The Court has discretion to reduce the penalties if the employer demonstrates that the violation was in "good faith" and that the employer had "reasonable ground" for believing that its actions were not a violation of WARN. Individual damages would also be reduced by (1) payment of wages made during the violation period; (2) voluntary payments made to the employee that is not required by any legal obligation; and (3) payment or service credit under an employee benefit plan on behalf of employee. In no event may the court award damages for more than one-half the number of days of employment to a maximum of 60 days. The civil penalty of $500 per day is waived if the employer pays to each aggrieved employee the total amount due within three weeks from the date the employer orders the shut down or lay off. \textit{Id.}
\item 120. 29 U.SC. 2101. A "part-time employee" is an employee who is employed for an average of fewer than 20 hours per week or who has been employed for fewer than 6 of the 12 months preceding the date on which notice is required.
\item 121. 29 U.SC. 2101.
\item 122. \textit{Id.}
\item 123. \textit{Id.}
\end{footnotes}
reasonably foreseeable that the layoff would extend beyond six months. Similarly, where two or more groups of employees, each consisting of less than the minimum required to constitute an "employment loss," "plant closing," "mass layoff," within a 90-day period when combined meet the numerical requirements such combined layoffs constitute an "employment loss" under WARN unless the employer can demonstrate that the two or more employment losses are the result of separate and distinct actions and not an attempt to evade WARN.

Finally, an employee will not have suffered an "employment loss" as a result of relocation of an employer's operations, in whole or in part, if (1) the employer offers the employee a transfer to a different site of employment within a "reasonable commuting distance" with no more than a 6-month break in employment, or (2) if the employee accepts an offer of employment at a different site (regardless of distance) within 30 days of the offer, closing or layoff (whichever is later) with no more than 6-month break in employment.

WARN does not supersede or preempt other statutes dealing with plant closings or layoffs. It specifically declares "[t]he rights and remedies provided to employees by this Act are in addition to, and not in lieu of, any other contractual or statutory rights and remedies, except that the period of notification required by this Act shall run concurrently with any period of notification required by contract or any other statute." Further, "nothing in this Act shall be deemed to validate or invalidate any judicial or administrative ruling relating to the hiring of permanent replacements for economic strikers under the National Labor Relations Act," and "[t]he remedies provided for in this [Act] shall be the exclusive remedies for any violation of this Act. Under this Act, a Federal Court shall not have authority to enjoin a plant closing or mass layoff."

Although the concept and purpose of WARN is basically a very simple one, that "with certain exceptions, employers of 100 or more workers must give at least 60 days' advance notice of a plant closing or mass layoff to affected workers or their representatives, to the State dislocated worker unit, and to the appropriate local govern-

125. Id.
129. 29 U.S.C. 2104.
ment," it has become apparent from the comments received by the Department of Labor and statements and speeches by management and labor, many questions will be raised and, undoubtedly, be the subject of litigation in the federal courts. And, although the Act provides for the Secretary of Labor to issue "interpretative regulations," the Department of Labor does not have the authority or responsibility to enforce the provisions of WARN; that is left to the federal courts and probably before juries. Indeed, the "Interim Interpretative Rule" Implementing WARN and "Supplemental Information" published by the Department of Labor on Dec. 2, 1988, highlighted the legal issues presented by WARN when the very first issue it raised and left unresolved was the question whether the Act required notices as early as December 6, 1988 for plant closings and mass layoffs which occur after February 4, 1989, the effective date of the Act, or require notices only after February 4, 1989 for plant closings and mass layoffs which occur on February 4, 1989 and thereafter. "DOL views the effective date provision to mean that covered employment action which occur on or after February 4, 1989 are subject to the notice of requirements," so that notice may be required as early as December 6, 1988; employers are, therefore, "best advised to proceed conservatively and to provide notice" for full 60 days prior to any plant closing or mass layoff that will occur after February 4, 1989, the effective date of the Act.

"The issues and problems of WARN boggle [the] mind."

STRIKES/SYMPATHY STRIKES

The right to strike, in the private sector, is unquestionably guaranteed under the NLRA. However, it is a right which a collective bargaining representative may waive and, indeed, many collective bargaining agreements contain no-strike/no lockout provisions. Inasmuch as it is a waiver of a guaranteed right, the waiver must be clear and explicit. Over the years, a no-strike waiver was strictly construed. Accordingly, a general no-strike clause, absent clear evi-
dence to the contrary, was construed by the Board not to prohibit a sympathy strike — a refusal by employees to cross another union's picket line.\(^{133}\)

Overruling that line of cases, recently the Board concluded that a "broad no-strike clause bars employees from honoring stranger picket lines."\(^{134}\) On remand, the Board stated:

we can discern no logical or practical basis for the proposition that the prohibition of all 'strikes' does not include sympathy strikes merely because the word 'sympathy' is not used. . . . If a collective bargaining agreement prohibits strikes, [the Board] shall read the prohibition plainly and literally as prohibiting all strikes, including sympathy strikes. If, however, the contract or extrinsic evidence demonstrates that the parties intended to exempt sympathy strikes, [the Board] shall give the parties' intent controlling weight.\(^{135}\)

The Court of Appeals for the District of Columbia approved the Board's approach, but, because the Board "failed to do what its opinion acknowledges it must do in interpreting a no-strike clause: 'give the parties' intent controlling weight . . . whether that intent is established by the language of the clause itself, by inferences drawn from the contract as a whole, or by extrinsic evidence'; the court remanded the case to the Board for examination of the extrinsic evidence, specifically, evidence of bargaining history. On remand, the Board (Stephens & Cracraft; Johansen, concurring) reversed its prior conclusions and found that, although the language of the no-

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133. See Davis-McKee, 238 N.L.R.B. 652 (1978).
135. Id.; See also Metropolitan Edison Co., 279 N.L.R.B. No. 47 (1988), review den. sub nom., IBEW v. N.L.R.B., 826 F.2d 1283 (3d Cir. 1987); Cf. Ariz. Public Service Co., 273 N.L.R.B. 1757 (1985), enf. den. and remanded, 788 F.2d 1412 (9th Cir. 1986); Oil, Chemical & Atomic Workers, Local 1-547 v. N.L.R.B., 842 F.2d 1141 (9th Cir. 1988). It should be noted that absent a no-strike clause or a clause which precludes a sympathy strike, a refusal by an employee to cross a picket line is protected concerted activity and such employee may not be disciplined or discharged; that employee is akin to an economic striker and has similar rights; she may be replaced, if business requires. Butterworth-Manning-Ashmore Mortuary, 270 N.L.R.B. No. 148 (1984), 120 L.R.R.M. 2632 (9th Cir. 1985); Business Services by Manpower, 272 N.L.R.B. No. 119 (1984), enf. den., 784 F.2d 442 (2d Cir. 1986) 121 L.R.R.M. 2827; Astabula Forge, Division of ABS Company, 269 N.L.R.B. No. 138 (1984); Redwing Carriers, 137 N.L.R.B. 1545 (1962), enf'd, 325 F.2d 1011 (D.C. Cir. 1963). Some members of the Board and some courts have made a distinction between a refusal to cross a picket line at the premises of the employee's employer and a stranger picket line at another employer's premises. See N.L.R.B. v. William S. Carroll, Inc., 578 F.2d 1 (1st Cir. 1978); Montana Dakota Util. Co. v. N.L.R.B., 455 F.2d 1088 (8th Cir. 1972); Business Services by Manpower, supra. The majority of the Board regards both activities protected concerted activities.
strike clause in the contract standing alone is sufficient to cover sympa-
thy strikes, a review of the record testimony, particularly the find-
ing of the administrative law judge crediting the testimony of the
union’s negotiator, “the bargaining history evidences an agreement
to disagree over the scope of the no-strike clause [and] there was no
waiver [by the union] of the right to honor stranger picket lines.”
Member Johansen, concurring in the result, reiterated his previous
dissent on the Board’s initial conclusion and, relying upon the Su-
preme Court’s decision in Metropolitan Edison Co. v. N.L.R.B.,
(that there must be a “clear and unmistakable” waiver of a statutory
right) would find that “a general no-strike provision . . . standing
alone, is insufficient to find a clear and unmistakable waiver of the
right to engage in sympathy strikes under that exacting standard.”

LOCKOUTS/TEMPORARY REPLACEMENTS

In the arsenal of weapons, unions may resort to a strike. As
indicted above, generally, a strike is protected concerted activity and,
absent overriding considerations (e.g., no-strike clause, misconduct,
non-compliance with pre-strike notice requirements), strikers may
not be discharged or discriminated against.

Employers may, on the other hand, utilize their arsenal of
weapons. Thus, in response to a strike, an employer may hire
replacements. If the strike is a lawful economic strike, the employer
may hire permanent replacements and, when a striker applies for
reinstatement, the employer has no obligation to discharge the per-
manent replacement to make way for the striker; his only obligation
is to put the returning striker on a preferential hiring list. If the
strike is an unfair labor practice strike (protesting unfair labor prac-
tices of an employer), the employer may hire replacements, but if a
striker offers to return to work, the employer must reinstate such
striker even if it requires the termination of the replacement.137

In the arsenal of weapons, the employer also has available to
him another weapon to bring to bear in an economic dispute with the
union, namely, the lockout. The U.S. Supreme Court has recognized
the right of an employer, generally, to engage in a defensive lock-

137. But see Belkmar, Inc. v. Hale, 463 U.S. 491 (1983) (permanent strike replacements
may bring misrepresentation and breach of contract action in state court against an employer
who later replaced them by reinstated strikers). See also N.L.R.B. v. Mackay Radio & Tele-
graph Co., 304 U.S. 333 (1938); Laidlaw Corp., 171 N.L.R.B. 1366 (1968), enf’d, 414 F.2d
99 (7th Cir. 1969).
out, rather than await the strike by the union. Further, in a defensive lockout, the employer may hire temporary replacements. The question left unanswered, by the U.S. Supreme Court, was "whether an employer who lawfully locks out his employees to support a bargaining position [an offensive lockout] may go further and hire temporary replacements to continue normal operations."

The Board and the Courts had answered the question both ways in the past. Recently, a majority of the Board concluded that "absent specific proof of anti-union motivation, [an employer may use] temporary employees in order to engage in business during an otherwise lawful lockout, including a lockout initiated solely for the purpose of bringing pressure to bear in support of a legitimate bargaining position." Further, "the absence of [bargaining] impasse . . . [and] the absence of a reasonable fear of strike . . . are not dispositive with respect to the post-lockout use of temporary employees. They may, however, be relevant in a case where the employer's professed business motivation is challenged as pretextual."

Upholding the Board's conclusion that the use of temporary replacements is neither inherently destructive of employee rights nor inherently prejudicial to the Union's interest and has only "a comparatively slight adverse effect on protected employee rights," the Court stated, "[t]he use of replacements during the lockout was a tactic chosen by the employer obviously to put pressure upon the union. Such pressure, however, affects the realities of the union's bargaining positions rather than any right as such to bargain collectively, strike or engage in other concerted activity."

144. In assessing the legality of the employer's action in hiring temporary replacements, reference is made to the test set forth by the U.S. Supreme Court in N.L.R.B. v. Great Dane Trailers, Inc., 388 U.S. 26, 34 (1967) as follows:

First, if it can reasonably be concluded that the employer's discriminatory conduct was "inherently destructive" of important employee rights, no proof of anti-union motivation is needed and the Board can find an unfair labor practice even if the employer introduces evidence that the conduct was motivated by business considerations. Second, if the adverse effect of the discriminatory conduct on employee rights...
Although neither the N.L.R.B. nor the courts have passed upon the legality of hiring permanent replacements during a lawful lockout, the General Counsel of the N.L.R.B. has taken the position that hiring of permanent replacements during a lockout is unlawful because it is "inherently destructive" of the fundamental Section 7 right of collective bargaining and even if the impact on employee rights were "comparatively slight" it would still lack a legitimate and substantial business justification.

**NLRA and Arbitration Under a Collective Bargaining Agreement**

Where an employer and a labor organization are in a collective bargaining relationship and the collective bargaining agreement contains grievance/arbitration provisions for the resolution of disputes between the parties, it often occurs that an action by an employer may constitute a matter which is arbitrable under the collective bargaining agreement and, also, be a matter which may constitute an unfair labor practice under the NLRA. Thus, for example, a unilateral change of wages, hours or working conditions by an employer during the term of the collective bargaining agreement may present a dispute over the terms and meaning of the contract and thus present an arbitrable issue under the contract; such unilateral action may also constitute an unfair labor practice in violation of Section 8(a)(5) of the NLRA, i.e., a failure to bargain by bypassing the collective bargaining representative.

Another example is employer discipline of an employee for pursuing a grievance. Such action by the employer may present an arbitrable dispute under the collective bargaining agreement, for example, discharge was not for just cause, and, also, constitute an unfair labor practice in violation of Section 8(a)(3) and (1) of the NLRA, for example, discrimination for engaging in union or protected con-

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145. See N.L.R.B. v. Brown Food Store at 292-294. See also supra note 140.
Several questions are presented: Suppose the aggrieved union invoked the processes of the Board and files an unfair labor practice charge alleging an 8(a)(5) violation, should the Board process that charge or should the Board, at least initially, compel the charging party to first pursue the grievance/arbitration machinery under the collective bargaining agreement. A similar question is presented in the second example, if the aggrieved union or the aggrieved employee files an unfair labor practice charge alleging a violation of Section 8(a)(3) and (1) of the N.L.R.B., should the charging party be required by the Board to first pursue the matter in the grievance/arbitration forum?

Suppose the aggrieved union or employee has, in fact, pursued the grievance/arbitration procedures under the collective bargaining agreement, and the arbitrator has issued a decision which is adverse, in whole or in part, to the union/employee. For example, when the arbitrator ruled against the union/employee on the merits or failed to give a full and adequate remedy. Suppose the union/employee, thereupon, files an unfair labor practice charge with the Board, based upon the same activity, what should the Board do with the unfair labor practice charge?

The Board's answer to those questions was to make an "accommodation between, on the one hand, the fullest use of the collective bargaining and the arbitral process and, on the other, the statutory policy reflected by Congress' grant to the Board of exclusive jurisdiction to prevent unfair labor practices." The accommodation was a deferral by the Board to the arbitration process under the collective bargaining agreement, with certain safeguards established by the Board. The Board's deferral policy is a declaration by the Board that the parties utilize the dispute settlement mechanisms agreed upon mutually by the parties and contained in their collective bargaining agreement, and to minimize the involvement and intervention by the government. As we will see, there is some intervention by the government when the arbitration process does not meet the standards and safeguards established by the Board.

This deferral doctrine was first enunciated by the Board when the union/employee, unhappy with the decision of the arbitrator following the grievance/arbitration proceedings under the collective bargaining agreement, invoked the processes of the Board by filing

an unfair labor practice charge. In *Spielberg Mfg. Co.*, the Board adopted a policy of deferral to the arbitrator's award and refused to pass upon the unfair labor practice charge where the arbitration "proceedings appear to have been fair and regular, all parties had agreed to be bound; and the decision of the arbitration panel is not clearly repugnant to the purposes and policies of the Act" and the arbitrator had considered the unfair labor practice issue. Recently, the Board has expanded and liberalized this deferral policy. In *Olin Corp.*, the Board has stated that it will presume that the arbitrator has considered the unfair labor practice issue if (1) the contractual issue is "factually parallel" to the unfair labor practice issue, and (2) the arbitrator "was presented generally with the facts relevant to resolving the unfair labor practice." In assessing whether the arbitration result was "clearly repugnant" to the Act, the Board modified its *Spielberg* requirement that "an arbitrator's award . . . be totally consistent with Board precedent;" the Board will now defer "unless the award is palpably wrong", i.e., unless the arbitrator's decision is not susceptible to an interpretation consistent with the Act." Further, the party advocating nondeferral by the Board has the burden of affirmatively demonstrating the defects in the arbitral process or the award.

In *Collyer Insulated Wire*, the Board applied its deferral policy to require a party to first utilize the grievance/arbitration procedures under the collective bargaining agreement, rather than process the unfair labor practice charge; where a charge has been filed, the Agency will "freeze" the charge, direct the parties to utilize the arbitration process under the contract, and, after the arbitrator's award, the Board, if necessary, apply the *Spielberg/Olin* test, to determine whether deferral is warranted. The *Collyer* case involved a possible violation of the duty to bargain under Section 8(a)(5) of the Act. In *National Radio Co.*, the Board extended the *Collyer* deferral policy to cases involving discrimination against an employee, in violation of Section 8(a)(3) of the Act. In *General American Transportation Corp.*, the Board overruled *National Radio* and held that it would not apply *Collyer* in 8a(1) and (3) cases because

149. Id. at 1082.
152. See supra note 147.
they involved the statutory rights of employees and limited Collyer to cases involving the interpretation of a collective bargaining agreement. Recently, United Technologies Corp. the Board overruled General American and returned to National Radio. The Board, will now apply its pre-arbitral deferral policy to employee discrimination cases and refusal to bargain cases and thus permit the parties to resolve their labor disputes through their own agreed upon method, with a minimum of federal intervention.

A thorny issue which has yet to be fully resolved is the status of the agreed upon arbitration process, agreed upon by the employer and the union and embodied in the collective bargaining agreement, when that agreement has expired and the parties are negotiating another agreement. For example, the survival of the grievance/arbitration process post-contract-expiration, or the obligation of the parties to honor the grievance/arbitration process during the hiatus between contracts, under the National Labor Relations Act.

Preliminarily, it must be noted that under the NLRA, upon the expiration of a collective bargaining agreement while the parties are negotiating a new contract, the parties are required to maintain the status quo with respect to wages, hours and working conditions until, inter alia, the negotiations come to impasse; an employer may not unilaterally change the wages, hours and working conditions during the negotiations, unless the parties are at impasse, in which event, the employer may unilaterally institute changes compatible with the employer's pre-impasse proposals. While the status quo if often referred to in terms of a continuation of the terms and conditions of mandatory subjects of bargaining contained in the contract, it is not totally accurate and oversimplistic; thus, the union security and the check-off provisions of the contract do not survive the expiration of the contract.

156. N.L.R.B. v. Katz, 369 U.S. 736 (1962); N.L.R.B. v. Crompton-Highland Mills, Inc., 337 U.S. 217 (1949). There are other conditions or events which may permit changes, without impasse, e.g. the employer and the union agree to such changes pending negotiations; the union waived the right to bargain; the employment terms for replacements of strikers (See, Service Electric Co., 281 N.L.R.B. No. 107 (1986); Lincoln, A Subsidiary of Pentair, 125 LRRM 1374 (Advice Mem. 1987)); where the expired contract is an 8(f) contract in the construction industry. See John Deklewa & Sons, 282 N.L.R.B. No. 184 (1987).
Thus, there is presented the issue of the survival of the grievance/arbitration provisions after the expiration of the collective bargaining agreement and the issue is heightened by the Supreme Court's characterization of the arbitration process. In *Steelworkers v. Warrior & Gulf Navigation Co.*, the Supreme Court, on the one hand, "gave effect to the congressional policy in favor of voluntary settlement of disputes through arbitration by creating a presumption of arbitrability" in suits to compel arbitration under Section 301, but, on the other hand, emphasized that "arbitration is a matter of contract and a party cannot be required to submit to arbitration any dispute which he has not agreed to submit." In *Nolde Bros. Inc. v. Local 358 Bakery & Confectionery Workers Union, AFL-CIO*, the Supreme Court held that an employer was obligated to arbitrate, under the arbitration procedures in the expired collective bargaining agreement, a claim for severance pay which was called for by that expired agreement but to which the employees became entitled, if at all, only when the plant shut down several days after the expiration of the contract. Relying upon the federal policy favoring arbitration,

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158. 363 U.S. 574, 582 (1960).
159. 29 U.S.C. § 185 states: (a) [Venue, amount, and citizenship] Suits for violation of contracts between an employer and a labor organization representing employees in an industry affecting commerce as defined in this Act [chapter], or between any such labor organization, may be brought in any district court of the United States having jurisdiction or the parties, without respect to the amount in controversy or without regard to the citizenship of the parties.
(b) [Responsibility for acts of agent; entity for purposes of suit; enforcement of money judgments] Any labor organization which represents employees in an industry affecting commerce as defined in this Act [chapter] and any employer whose activities affect commerce as defined in this Act [chapter] shall be bound by the acts of its agents. Any such labor organization may sue or be sued as an entity and in behalf of the employees whom it represents in the courts of the United States. Any money judgment against a labor organization in a district court of the United States. Any money judgment against its assets, and shall not be enforceable against any individual member or his assets.
(c) [Jurisdiction] For the purposes of actions and proceedings by or against labor organizations in the district courts of the United States, district courts shall be deemed to have jurisdiction of a labor organization (1) in the district in which such organization maintains its principal offices, or (2) in any district in which its duly authorized officers or agents are engaged in representing or acting for employee members.
(d) [Service of process] The service of summons, subpoena, or other legal process of any court of the United States upon an officer or agent of a labor organization, in his capacity as such, shall constitute service upon the labor organization.
(e) [Determination of question of agency] For the purposes of this section, in determining whether any person is acting as an "agent" of another person so as to make such other person responsible for his acts, the question of whether the specific acts performed were actually authorized or subsequently ratified shall not be controlling.
the Supreme Court concluded that, "where the dispute is over a provision of the expired agreement, the presumptions favoring arbitrambility must be negated expressly or by clear implication." With respect to the particular severance pay grievance, the court concluded "[t]he dispute, . . . although arising after the expiration of the collective bargaining contract, clearly arises under that contract." *Nolde* arose in the context of a suit under Section 301.

The survival of the arbitration obligation after the expiration of the collective bargaining agreement under the NLRA has traversed a varied course before the Board. In *Hilton Davis Chemical Company, Division of Sterling Drug, Inc.*, the Board held that although an employer is obligated during a contractual hiatus to honor the grievance procedure under the expired contract, it was not obligated to honor the arbitration procedure. In *American Sink Top & Cabinet Co.*, relying upon *Nolde*, the Board held that the employer was obligated to process to arbitration a grievance that was arguably based on the expired contract and there was no reason to believe that the parties intended arbitration to end with the expiration of the contract.

The current position of the Board was enunciated in *Indiana and Michigan Electric Company*. The Board noted that *Nolde* involved "a suit to compel arbitration and thus focused on the interpretation of a contract rather than the interpretation of the National Labor Relations Act." Accordingly, the Board concluded, that *Nolde* did not override *Hilton Davis*, but rather reaffirmed the principle that arbitration arises from mutual consent and not from a statutory obligation to arbitrate.

In *Indiana and Michigan*, during the hiatus between the expiration of the 1976-1978 collective bargaining agreement and the execution of the 1979-1981 agreement, the employer processed grievances through the various steps of the grievance procedures, but refused to proceed to arbitration on nine alleged violations of the contract which occurred during the contractual hiatus. The Board, in three opinions (Babson & Stephens; Dotson dissenting in part; Johansen concurring in part and dissenting in part) reaffirmed its deci-

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sion in *Hilton Davis*, with some modification — an employer has an obligation to follow the grievance procedures of the expired contract during the hiatus period post expiration, but the “Act does not impose a duty to adhere to the arbitration procedure independent of any contractual commitment to do so;” but, “*Nolde* teaches us that in certain circumstances the arbitration commitment survives the expiration of the collective bargaining agreement embodying it” and, therefore, an employer remains “subject to a potentially viable contractual commitment to arbitrate even after the contracts expired.”

Accordingly, the Board concluded that, with respect to the arbitration issues, Indiana Michigan had violated the Act by announcing to the Union upon the expiration of the 1976-1978 contract that it would not arbitrate any grievance filed during the contractual hiatus by routinely refusing to arbitrate hiatus grievances as they arose, because such “unqualified” repudiation of arbitration post expiration of the contract “encompassed not only grievances for which there may have been no post expiration obligation to arbitrate under *Nolde*, but also grievances arbitrable under *Nolde*."

With respect to the processing of grievances, the Board reiterated that an employer is obligated to continue to follow the grievance procedures (as distinguished from arbitration) post expiration of a contract.\(^1\)

While the Board may have, at least for the time being, resolved

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165. With respect to the specific nine hiatus grievances which the company refused to arbitrate, the Board (Dotson, Babson, Stephens; Johansen dissent) concluded that the company had no obligation to arbitrate any of them because the rights invoked in each grievance did not “arise under” the expired contract within the meaning of *Nolde*— “a dispute based on post expiration events arises under the contract within the meaning of *Nolde* only if it concerns contract rights capable of occurring or vesting to some degree during the life of the contract and ripening or remaining enforceable after the contract expires,” e.g. pension benefits clause, sale of business successor obligation clause. The nine hiatus grievances “were triggered by events or conduct that occurred after the expiration of the contracts. None of the rights invoked were worked for or accumulated over time.” Member Johansen disagreed and argued that the company should be required to arbitrate the nine hiatus grievances because “specific contract rights were invoked by each . . . therefore, the grievance disputes were over provisions of the expired contracts and thus arose under the contracts within the meaning of *Nolde*. Further evaluation of the extent of the contract rights invoked encroaches on the merits of the dispute, an area reserved for the arbitrator.” 430 U.S. 243-5.

166. Chairman Dotson dissented in part. Although Dotson adhered to the rule that an employer has an obligation at all times under Section 8(d) to meet and confer with a bargaining representative about employee grievances, there should not be an obligation to follow the specific contracted grievance procedures which were in the expired contract. He concluded that although the company’s “blanket repudiation of ‘initial arbitration’ [which was the last step of the grievance procedure short of arbitration] was unlawfully overbroad,” the company had no obligation to follow the “initial arbitration” process. To that extent, Dotson would have overruled Board precedent and would hold that the post expiration duty to follow the contractual grievance procedure generally exists only to the extent of a parallel post expiration duty to arbitrate grievances “arising under” the contract, as in *Hilton Davis* modified by *Nolde*. 
the issue of the extent of the survival of the arbitration obligation post contract expiration under the NLRA and made its accommodation of the NLRA obligation with the Supreme Court’s Section 301 obligation under Nolde, the subsidiary issues are still open for resolution and differences of opinion, on a case by case basis. The subsidiary issues are: (1) whether the language of the arbitration clause in the expired contract was sufficient to overcome, expressly or by clear implication, the presumption that the obligation to arbitrate imposed by the contract extended to disputes arising under the contract and occurring after the contract had expired; (2) whether the subject of the grievance was one "arising under" the expired contract within the meaning of Nolde; (3) whether refusal of the employer to arbitrate grievances was a general across-the-board refusal to arbitrate based upon the expiration of the contract or the arbitrability of specific grievances.\(^\text{167}\)

### Settlement of Unfair Labor Practices Cases

Although the NLRA provides a machinery for initiating unfair labor practice proceeding against employers and labor organizations and litigating such cases before an administrative law judge and appeals to the Board, the federal courts of appeals, and, at time, the U.S. Supreme Court, the General Counsel and the Board are committed, wherever possible, to resolve these matters through settlement rather than through litigation. At every stage of the processing of a “meritorious” (probably or actually meritorious) case, the Agency will make every effort to seek and encourage settlement. Accordingly, many cases are settled by the parties, prior to any formal action or proceeding by the Agency. For example, bilateral agreement between the charging party and the charged party prior to the

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167. See Dallas Morning News, 285 N.L.R.B. No. 106 (1987), (the evidence was “ambiguous insofar as the issue of an undifferentiated blanket refusal is concerned;” the Board could not “say that a preponderance of the record evidence weighs in favor of finding ... wholesale repudiation if the arbitration procedure;” Litton Financial Printing Division, A Division of Litton Business System, Inc., 286 N.L.R.B. No. 79 (1987) (“generalized refusal to arbitrate . . . based upon the expiration of the contract rather than the arbitrability of specific grievances;” dissent by Dotson); UPPCO, Inc. 288 N.L.R.B. No. 98 (1988) (where the expired contract provided for recall on basis of plant wide seniority, the employer’s action following an economic strike upon the expiration of the contract, in recalling employees based upon departmental seniority was subject to the contractual grievance and arbitration procedure provided for in the expired collective bargaining agreement, since it involved “a right worked for and accumulated during the term of the contract and intended by the parties to survive contract expirations;” the company refusal to arbitrate was an “across-the-board” refusal rather than a case-by-case assessment of each grievance; dissent by Cracraft who concluded that the evidence did not indicate across-the-board rejection of arbitration).
issuance of any formal complaint. Such settlements may be "out of Board" settlements and the Agency is not a party thereto, but con-
dones the settlement by the approval of the withdrawal of the charge; or the settlement may be one to which the Agency is a party, i.e., an "informal" settlement agreement or a "formal" settlement stipulation. At times, the settlement occurs after the institution of formal proceedings against the charged party, e.g., after issuance of a formal complaint, during or after the hearing before the adminis-
trative law judge. The policy in favor of settlement is to minimize federal intervention.

While these settlements, for the most part, are mutually agreed upon by all the interested parties, including the General Counsel, there are many occasions when a charging party, or an interested party or the General Counsel is not in agreement with a proposed settlement. In such cases, the question presented is whether the Agency should enter into such a settlement with the charged party/respondent, without the agreement of the charging party, or in another posture, whether the Board should approve a settlement entered into between the respondent and the charging party over the opposition of the General Counsel.

Inasmuch as the NLRA is a public-interest statute and the un-
fair labor practice proceedings are pursued in the vindication of pub-
lic rights and not private rights, one dominant rule in considering the approval of settlement agreements is that the settlement effectuate the policies of the Act.

Until recently, the Board would approve a settlement agreement only if the agreement "substantially remedied" the unfair labor practices alleged in the complaint, which the Board assumed was "meritorious and the General Counsel is prepared to carry his [or her] burden of proof."\(^{168}\)

Recently, the Board modified its policy, and will approve settle-
ments between the charging party and the employer/union charged with unfair labor practices over the opposition of the general counsel without requiring that the settlement provide a full remedy as might be issued by the Board after full litigation and success by the Gen-

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manded, National Book Consolidators Inc. v. N.L.R.B., 672 F.2d 323 (1982). 274 N.L.R.B. No. 181 (1985); Carpenters 46 Northern California Counties Conference Board (Arntz Con-
eral Counsel. Thus in Independent Stave Co.,\textsuperscript{169} the General Counsel issued a complaint alleging that the employer had discriminatorily refused to hire several individuals because of their union activities with the predecessor company. In settlement, the employer and the charging party agreed to employ the individuals and pay them 10\% of backpay and the charging party agreed to withdraw the charge. The General Counsel opposed the settlement on the ground that the backpay was inadequate and the settlement did not provide for a posting of notices to employees.

Overruling Clear Haven, under which the Board would have rejected the settlement, the Board accepted the settlement. Instead of adhering to the previous settlement policy with its "rigid requirement that the settlement must mirror a full remedy," the Board enunciated a new approach, giving a greater weight to the wishes of the parties, whereby the Board will examine all the surrounding circumstances including, but not limited to, (1) whether the charging party(ies), the respondent(s), and any of the individual discriminatee(s) have agreed to be bound, and the position taken by the General Counsel regarding the settlement; (2) whether the settlement is reasonable in light of the nature of the violations alleged, and the stage of the litigation; (3) whether there has been any fraud, coercion, or duress by any of the parties in reaching the settlement; and (4) whether the respondent has engaged in a history of violations of the Act or has breached previous settlement agreements resolving unfair labor practice disputes.\textsuperscript{170}

With respect to the particular settlement in the case, the Board concluded that, considering the "customary risks inherent in any litigation," and "in light of the early stage of the proceeding," the remedy of reinstatement and 10\% backpay was reasonable.\textsuperscript{171}

Another settlement area where the N.L.R.B. encountered difficulty and was the source of controversy between the Board and some courts of appeals\textsuperscript{172} involved the question of the entitlement of the charging party to a hearing on its objections to a proposed unilateral

\textsuperscript{169}. 287 N.L.R.B. No. 76 (1987).
\textsuperscript{171}. See also TNS, Inc., 288 N.L.R.B. No. 5 (1988), on remand from, Oil Chemical & Atomic Workers Union v. N.L.R.B., 806 F.2d 269 (D.C. Cir. 1986).
settlement of a complaint issued by the General Counsel of the N.L.R.B. and review of that settlement by the Board and/or the courts. That issue was finally resolved by the U.S. Supreme Court in *N.L.R.B. v. United Food and Commercial Workers Union, Local 23*,173 where the Court held that such post-complaint/pre-hearing settlements are not reviewable by the Board or the courts. "We hold that it is a reasonable construction of the NLRA to find that until the hearing begins, settlement or dismissal determinations are prosecutorial" actions by the General Counsel, not adjudicatory dispositions, and as such are not subject to review.

**Union Activities on Private Property Union Access to Private Property**

The clash between the rights of employees guaranteed under Section 7 of the NLRA to "self organization, to form, join or assist labor organizations . . . and to engage in concerted activities . . . and the right to refrain" therefrom and the "unalienable" right to private property, was inescapable.

The issue was early presented when employers promulgated rules which attempted to limit the right of employees to engage in union or concerted activities on the employer's property and attempts by employers to oust non-employees from their private property. The response of the U.S. Supreme Court was clear: the employer's right to private property is recognized, but, that right must, under some circumstances, give way to the rights guaranteed under the NLRA.

With respect to employer efforts to limit the rights of employees to engage in such activities, the Court declared:

Working time is for work. It is therefore within the province of an employer to promulgate and enforce a rule prohibiting union solicitation during working hours. It is no less true that time outside working hours, whether before or after work, or during luncheon or rest periods, is an employee's time to use as he wishes without unreasonable restraint, although the employee is on company property. It is therefore not within the province of an employer to promulgate and enforce a rule prohibiting union solicitation by an employee outside of working hours, although on company property.174

In view of the fact that the term “working hours” normally embraces the entire period that the employee is on company property from the beginning of work or prior thereto to the end of work, including lunch and break periods, as distinguished from “working time” which normally covers only the time actually spent by the employee in the performance of her duties, the Board has been confronted with the legality of no-solicitation, no-distribution rules which utilize the terms “working hours” or “working time,” and make no effort to further define those terms. The Board, as in other matters recently, has reversed its position several times. The most recent declaration is set forth in Our Way, Inc.\textsuperscript{175}

A rule prohibiting solicitation during “work time” or “working time” is presumptively valid because, absent evidence to the contrary, the term refers to periods when the employees are actually working as distinguished from the non-work time; “on the other hand . . . a rule prohibiting solicitation during ‘working hours’ is prima facie susceptible of the interpretation that solicitation is prohibited during all business hours and, thus, invalid,” unless it could be clearly established that the term permitted solicitation during breaktime.\textsuperscript{176}

With respect to the right of non-employee union personnel to have access to company property, the U.S. Supreme Court reiterated that an “[a]ccommodation between the [Section 7 rights of employees and private property rights of employers] must be obtained with as little destruction of one as is consistent with the maintenance of the other.”\textsuperscript{177}

Subsequently, the Supreme Court declared that the “locus of that accommodation . . . may fall at differing points along the spec-


\textsuperscript{176} Essex International, Inc., 211 N.L.R.B. 749 (1974); Our Way, \textit{supra} note 175. TRW Bearings Division, 257 N.L.R.B. 442 (1981), which was reversed by Our Way, had held that rules which prohibited solicitation during “working hours” or “working time” are presumptively invalid, absent clarifying language, because those terms would normally be construed by employees to prohibit solicitation at any time during their stay on company property, including non-work time or break periods.


Other issues presented are the rights of employees who are on company property after their tour of duty has been completed. See GTE Lenkurt, 204 N.L.R.B. 921 (1973); East Bay Newspapers Inc., 225 N.L.R.B. 1148 (1976).

trum depending on the nature and strength of the respective Section 7 rights and private property rights asserted in any given context.\textsuperscript{178} The Board was entrusted with the primary responsibility for making the accommodation.

The U.S. Supreme Court enunciated what has been described as the "alternative means" test, where an employer may lawfully prohibit non-employee distribution of union literature if reasonable efforts by the union through other available channels of communication will enable it to reach the employees with its message and if the employer’s order or notice does not discriminate against the union by allowing other distribution.\textsuperscript{179}

After years of applying primarily the "alternative means" test laid down by the Supreme Court in \textit{Babcock & Wilcox}, although at times, acknowledging the particular nature of the union’s activities,\textsuperscript{180} the Board recently reconsidered the test to be applied in accommodating the Section 7 rights and employer property rights, first recasting the test to shift emphasis away from the "alternative means" test and, then two years later reversing itself and reverting back to the "alternative means" test. Thus, in \textit{Fairmont Hotel Co.},\textsuperscript{181} the union had a dispute with a bakery, allegedly because it had substandard conditions for its employees; the union was not attempting to organize the bakery; the union distributed handbills at the hotel in front of its main entrance, on private property of the hotel, to advise the hotel customers of its dispute with the bakery and to request the public not to patronize the hotel; the hotel directed the union to move to the public street; the union refused. In weighing the right of a union to be on private property, the Board (Dotson, Johansen, Babson; Stephens concurring) laid down a revised test of accommodation:

\begin{itemize}
  \item \textsuperscript{179} N.L.R.B. v. Babcock & Wilcox Co., supra. See also Sears Roebuck & Co. v. San Diego County Council of Carpenters, 436 U.S. 180 (1978) ("no other reasonable means of communicating its organizational message to the employee exists").
  \item \textsuperscript{180} See Giant Foods, supra note 178 where the Board stated: Although the [area] standards picketing . . . is dissimilar in purpose to either the organizational activity involved in Babcock, or the primary economic picketing by the employer’s employees in Hudgens, the Board’s role is the same — to accommodate the Section 7 rights of the pickets with the private property rights of the Employer. However, as the Court pointed out in Hudgens, the locus of accommodation of these rights may fall at differing points along the spectrum depending on the nature and strength of the respective Section 7 rights asserted in any given context. See also Montgomery Ward, supra note 178.
  \item \textsuperscript{181} 282 N.L.R.B. No. 27 (1986).
\end{itemize}
If the property owner’s claim is a strong one, while the Section 7 right at issue is clearly a less compelling one, the property right will prevail. If the property claim is a tenuous one, and the Section 7 right is clearly more compelling, then the Section 7 right will prevail. Only in those cases where the respective claims are equal in strength will effective means of communication become determinative.\textsuperscript{182}

Factors which might affect the relative strength or weakness of a claimed property right included, “the use to which the property in question is put; the restrictions, if any, that are imposed on public access to the property or facility located on the property, and the size and location of the facility.” With respect to the Section 7 rights, factors which might affect the relative strength or weakness of such rights included, “the nature of the right asserted, the purpose for which it is being asserted, the employer that is the target of the activity, the situs of the activity, the relationship of the situs to the target, the intended audience of the activity, and, possibly the manner in which the right is being asserted.” As an example, the Board noted that “organizational rights and the rights to engage in primary economic activity at the situs of a dispute may be viewed as more compelling than handbilling and other informational activity at locations other than the primary situs.”\textsuperscript{183}

Subsequent Board decisions made it clear that the formulation of the \textit{Fairmont} weighing test may have been easier than its application in particular cases.\textsuperscript{184} One of the more “unusual or difficult”

\textsuperscript{182} \textit{Id.}

\textsuperscript{183} Applying the reformulated test to the \textit{Fairmont} Hotel situation, the Board concluded that the property rights asserted by \textit{Fairmont} were “more compelling than the Section 7 rights asserted by the Union [because] \textit{Fairmont} maintains an atmosphere of formality and decorum [at the main hotel entrance] and this area is generally open to the patrons of the hotel. [A]ll employees . . . are required to use other designated entrances; “there is no evidence that \textit{Fairmont} previously has permitted anyone to handbill or picket on its private property,” “\textit{Fairmont} has a valid interest in minimizing congestion, litter, and the possibility of theft of luggage in the private area in front of the hotel’s main entrance; “inasmuch as innkeepers are frequently held to a higher standard of care for their guests than many other employers offering public facilities, \textit{Fairmont} has a valid interest in limiting its tort liability.” On the other hand, the Section 7 rights asserted by the Union were of “more limited significance”; the area standards handbilling had no “vital link” to the \textit{Fairmont} employees; “the Union’s activity . . . was carried out at the property of an employer with which the Union had no primary dispute, not even an area-standards one, and the employees of which stood to reap no benefit, not even an incidental one, if the Union achieved its ultimate objective of improved wages for the employees of [the bakery with whom the union had the area-standards dispute].” The Board concluded that “because the rights asserted by \textit{Fairmont} and the Union are not relatively equal, we deem it unnecessary to consider whether reasonable, alternative means by which the Union could have communicated its message were available.”

\textsuperscript{184} See, e.g., United Supermarkets, Inc., 283 N.L.R.B. No. 130 (1987); Browning’s
cases presented to the Board under Fairmont was the question whether a union may picket within the corridors of a privately-owned office building located in midtown Manhattan in New York City. In 40-41 Realty Associates, Inc.,\textsuperscript{185} and the Union which represented a unit of 20 dental assistants, x-ray assistants, dental hygienists and clericals, after lack of success in reaching a collective bargaining agreement with the Group Health Dental Facility went on strike and, initially, picketed on the sidewalk outside the twenty-story building in which the Dental Facility is located on the second floor. After three weeks of such outside picketing, the union, relying upon a court decision which had found picketing in the corridor of a private commercial building lawful activity,\textsuperscript{186} decided to picket in front of the entrance to the Dental Facility offices in the corridor of the second floor. At the request of the Dental Facility, the building owner threatened to have the pickets arrested if they did not leave the building. The issue thus presented was whether the union’s second floor corridor picketing in support of an economic strike was lawful, protected activity, which in turn, would render the threat of arrest an unfair labor practice. The Board (Stephens & Babson), applying the Fairmont balancing test, concluded that the Section 7 right and the property right asserted were equally compelling. However, the union had reasonable alternative methods to convey its message to the intended audience other than picketing in the second-floor corridor, e.g., picketing and handbilling at the building entrance, advising other unions providing insurance coverage to their union members, which comprise a substantial number of the customers of the Dental Facility, that there was a strike and requesting a boycott of the Dental Facility. The Board distinguished the Seattle-First National case, on the ground that in Seattle-First National many of the customers of the restaurant, including occupants of the building, were “on impulse” patrons who did not decide to patronize the restaurant until many hours after they entered the building and saw the picketers and handbillers outside the building; whereas, in the instant case, the “most likely inference here is that the dental facility patients and non-striking employees came to the building intending to visit the dental facility” and were not “impulse” purchasers.

\textsuperscript{185} 288 N.L.R.B. No. 23 (1988).

\textsuperscript{186} See Seattle First Nat’l Bank v. N.L.R.B. 651 F.2d 1272 (9th Cir. 1980). The picketing occurred on the 46th floor of a 50-story office building in front of a restaurant with whom the picketing union had a contract-negotiation dispute.
ers of dental services and, accordingly, the union’s message could be adequately conveyed to them as they entered the building. The dissent by Member Johansen highlighted the difficulty of application of the *Fairmont* rule - “Today’s decision distorts and erodes an important Section 7 right - the right to strike - where alternatives to access to an employer’s premises for exercise of that right have proven unreasonable.” Member Johansen dissented on the ground that this result did “not reflect the thorough consideration of both statutory and property interest that the Supreme Court found necessary in their proper accommodation [of Section 7 rights with private property rights] and because it retreats from the Board’s determination in *Fairmont Hotel* to examine each interest fully, I dissent. . . .”187

Furthermore, as the Board later acknowledged, in *Jean Country* notwithstanding the plurality view of *Fairmont* that “alternative means” could not be considered unless the property right and Section 7 rights were equal in strength, the great number of cases decided under *Fairmont* involved a finding by at least a majority of the Board panel that one right asserted did not clearly outweigh the other, and, therefore, it was necessary to examine the availability of reasonable alternative means in those cases.188

Accordingly, upon further consideration, the Board (newly constituted, Stephens, Johansen, Cracraft and Higgins) “conclude[d] that the availability of reasonable alternative means is a factor that must be considered in every access case.”189

[W]e cannot conclude that we should ever refrain from making any inquiry at all into whether a denial of access will entirely preclude the exercise of a Section 7 right or whether access is totally unnecessary to the exercise of the right. . . . [T]he General Counsel bears the initial burden on the alternative means factor, i.e., . . . the General Counsel must show that without access to the property, those seeking to exercise the right in question have no reasonable means of communicating with the audience that exercise of that right entails.190

The Board noted that “generally it will be the exceptional case where the use of newspapers, radio and television will be feasible alternatives to direct contact;” factors that may be relevant to the assessment of alternative means include “the desirability of avoiding

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188. 291 N.L.R.B. No. 4 (1988), slip op. at 3, note 2 and cases cited therein.
189. *Id.*
190. *Id.* at 6-7.
the enmeshment of neutrals in labor disputes, the safety of attempting communications at alternative public sites, the burden and expense of nontrespassory communication alternatives, and the extent to which exclusive use of the alternatives would dilute the effectiveness of the message.\(^\text{191}\)

An interesting side issue involving union activity and private rights is the propriety of picketing by a union at the private home of an employer or its agents or other comparable "private" location in connection with an otherwise lawful dispute between the union and the employer.

Section 8(b)(1)(B) prohibits a labor organization from restraining or coercing "an employer in the selection of his representatives for the purpose of collective bargaining or the adjustment of grievances." Such conduct is prohibited if it has the effect of restraining the employer's choice of a representative, even if the result was not intended,\(^\text{192}\) and prescribes any union pressure which "may adversely affect" an employer representative's performance of his or her protected duties.\(^\text{193}\)

In *United Brotherhood of Carpenters and Joiners of America, Local 1098*\(^\text{194}\) the union picketed the home of the employer's general manager, who was in charge of labor relations, and the home of the employer's majority stockholder. The Board concluded that peaceful picketing of such homes in support of a lawful economic objective was not unlawful under the NLRA. In reaching that conclusion, the Board noted that the picket signs named only the employer and its dispute with the union; the wording of the picket signs supported a lawful economic objective; the picketing involved no misconduct; there was no threats or violence; and the picketing occurred during normal working hours.

However, in early 1988, the General Counsel of the N.L.R.B. concluded that, under certain circumstances, a union's picketing of the home of one of the employer's negotiators and the business office of the negotiator's spouse was unlawful and warranted the issuance of a complaint. The circumstances of that case were: Upon the expiration of the collective bargaining agreement, the employees engaged

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191. *Id.* at 7-9.
194. 280 N.L.R.B. No. 102 (1986).
in a strike for four months. After the strike, the parties continued to bargain and the union picketed the home of the employer’s Manager of Industrial Relations who was involved in the contract negotiations and grievance processing. Picketing was conducted by from one to fourteen pickets, during mornings, afternoons and late evenings; on one occasion the pickets were outside the home from 12:30 a.m. to 2:30 a.m. Some picket signs specifically named the Manager as well as the Employer; the picket signs labelled the manager as unfair, as holding the union hostage and asked whether the Employer’s bargaining proposal which sought benefit reductions was the Manager’s own plan. On one occasion during the picketing the Manager’s home was struck by two paint bombs from an unknown source. The Manager’s wife worked as a real estate agent in an office located in a shopping mall; on at least two occasions, the union picketed the shopping mall driveway entrance with signs similar to those used at the Manager’s home.

The General Counsel concluded that, unlike the picketing in Womack, the union’s picketing, in the case under consideration, tended to have the effect of coercing the manager in the performance of his duties as the Employer’s bargaining representative and the picketing had the foreseeable effect of causing the manager to alter his position during negotiations or causing him to remove himself as the employer’s negotiator. The General Counsel distinguished the case from Womack in that the picketing at home occurred beyond normal working hours, the language on the picket signs attacked the manager by name, portrayed him as a stumbling block to reaching an agreement, held him up to “obluguy and scorn,” the union’s picketing was attended by vandalism even though not attributed to the union or pickets, and the union also picketed the business office of the wife although there was no relationship between that business and the employer.

In a similar vein, the U.S. Supreme Court recently considered the issues of picketing at a private home in the context of the constitutionality of a local statute which banned picketing in front of private homes. By a 6-3 decision, the Supreme Court upheld the picketing law and concluded it did not violate the First Amendment because it was a limited one, banning picketing “before or about the residence of any individual,” but allowing other protests like marches and door-to-door leafletting. The ordinance leaves open ample alternative channels of communication and is content-neutral.195

CONCLUSION

The history of labor relations in the United States, both before and after the enactment of the NLRA, demonstrates, on the one hand, its adversarial nature, and, on the other hand, the ability of employers and unions to put aside their adversarial roles and work out their problems amicably to their mutual satisfaction and for the common good. Regulation of labor relations by the NLRA, despite the attacks from both sides of the bargaining table, has proven a viable method for the resolution of disputes between employers, unions and employees. Regulation under the NLRA has been valuable in limiting the swing of the labor-management relations pendulum and, when necessary, to attempt to minimize the arc of the pendulum. As indicated previously, the decisional process of the Board may be regarded as manifestations of \textit{de facto}, if not \textit{de jure}, deregulation. We have noted that there have been calls, over the years, for deregulation of labor relations by outright repeal of the NLRA or by substantial modification or withdrawal of some of the powers and authority of the NLRA.


The polarization of years gone by has lessened in recent years with a growing awareness by both sides that mutual respect and understanding may serve their needs better and a joint effort may be essential to counter the common assault upon their mutual interest. The current trend in labor relations is in the direction of efforts to mitigate the confrontational and adversarial nature of the employer-union relationship by attempting to make the employee a participant
in the entrepreneurial process of the employer, by having the employee share in the decision making process as well as the actual production process and by making the total relationship a sharing experience. The methods or programs to achieve these results vary and, as can be anticipated, are not totally acceptable to all. Some favor Employee Stock Ownership Plan ("ESOP");\textsuperscript{197} others favor labor-management co-operative programs, variously referred to as quality of work-life, employment involvement, joint production teams, worker participation, labor-management participation teams or committees. The employee ownership of Avis is an example of one approach. The UAW and GM-Toyota joint venture at New United Motors Manufacturing, Inc., in Fremont, California, the Employment Involvement Program ("EI") agreed upon by Ford Motor Company and the UAW, the Saturn agreement between GM and UAW are examples of the cooperative approach to labor relations.\textsuperscript{198}

Who would have thought that a high union official, by mutual agreement, would sit on the Board of Directors of a corporation with which the union has a collective bargaining contract? Douglas Fraser of the UAW sat on the Board of Directors of General Motors.

By whatever name, these efforts constitute a new approach to new problems.

\textit{[A]fter years of adversarial relations, many employers and unions have come to the realization that they can no longer ignore the real and persistent challenges from overseas and domestic competition and from technological change. In order to meet the demands of this more difficult environment, they have decided to abandon traditional confrontational attitudes to try to work together to increase productivity and quality for the company and improve the quality of work life for the employees.}\textsuperscript{199}

The federal government has actively supported these labor management cooperative programs. The U.S. Department of Labor has established a Bureau of Labor Management Relations and Cooperative Programs. A study, known as "The Laws Project" of "The Labor Laws Project," has been undertaken by the Department to assess the feasability and ramifications of such programs under the current

\textsuperscript{197}. ESOP is a device to facilitate employees' (generally collectively bargained but in some cases not collectively bargained) participation in the ownership of the company sponsoring the plan. The concept is that a plan borrows money from a bank or another type of lender and uses that money to purchase the shares of the employer. Depending on the percentage of shares purchased, ESOPs can exercise tremendous influence in the operations of the employer.

\textsuperscript{198}. See supra note 194.

\textsuperscript{199}. Schlossberg & Fetter, at 17.
state of labor laws and current collective bargaining.\textsuperscript{200}

Some of these cooperative programs do not fit within the accepted concepts of labor-management relations and, indeed, at times seem to conflict with existing legal dogma and current labor laws. Serious questions have been posed as to the legality of those efforts. Do these plans constitute a form of "company unionism" and assistance condemned by the NLRA? Can union officials' participation in managerial decisions as part of the joint team result in a breach of the duty of fair representation? Can payments by the employer to the union official in his capacity as a member of the joint team be a criminal violation of the Taft-Hartley Act? "These difficult issues and the manner in which they are handled will be crucial in setting the tone of U.S. labor relations."\textsuperscript{201}

It is clear that labor relations in the United States is subject to detailed regulation and will continue, notwithstanding economic deregulation or changes under the NLRA. And to those who would deregulate labor relations by repealing the NLRA or alter it radically to put the parties back to where they were prior to regulation under the National Labor Relations Act (and the Norris-La Guardia Act and the Railway Labor Act), I would suggest a review of the history of labor relations in the United States. It has been stated that "[t]he United States has had the bloodiest and most violent labor history of any industrial nation in the world."\textsuperscript{202} Regulation and federal intervention has brought positive actions and contributions by both labor and management, accommodations, cooperation and agreements by the parties which has established a basically sound system of labor relations and collective bargaining. So, added to that statement, I suggest, should be the phrase "and yet it is the best system of collective bargaining in the world," with due respect to our British colleagues.

One final observation on the subject of labor relations in the United States under the NLRA and deregulation — "Those who cannot remember the past are condemned to repeat it."\textsuperscript{203}

\begin{itemize}
\item[\textsuperscript{200}] See supra note 194.
\item[\textsuperscript{201}] Schlossberg & Fetter, at 38.
\item[\textsuperscript{202}] Taft and Ross, \textit{American Labor Violence: Its Causes, Character and Outcome}, included in \textit{Violence in America, Report to the National Commission on the Cause and Prevention of Violence in America}, June 1969, a Presidential Commission established pursuant to Executive Orders Nos. 11412 and 11469.
\item[\textsuperscript{203}] George Santayana, \textit{Reason in Society} (emphasis added).
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