The Bush NLRB in Perspective: Does the Playing Field Need Leveling?

Clifford R. Oviatt Jr.
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DOES THE PLAYING FIELD NEED LEVELING?

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It has been written and stated recently that now is the time to "level the playing field" between management and labor in the labor and employment law arena.1 The effort to recast the balance has been directed at the National Labor Relations Act2 ("NLRA" or the "Act") and the National Labor Relations Board (the "Board").

If it chooses to do so, the Clinton Administration has a unique opportunity to recast the Board by appointing, during its tenure, a completely new Board and General Counsel. As of press time, three positions on the Board, as well as the General Counsel’s position are currently vacant.3 Furthermore, Member Dennis Devaney’s term will expire in 1994 and Chairman James Stephens’ will the following year. The impact of these changes may be felt throughout the remaining three years of the Clinton Administration and the nation’s major labor law forum could well have a new philosophy and profile lasting well beyond 1996.

Would a dramatic philosophical change at the Board be a wise step for America and its economy? Is the playing field between management and labor now so uneven as to require balancing? Should we expect our primary labor law forum to be more proactive? Should the Board disregard or reinterpret prior law to fit its own philosophical views?

These are some of the issues that will be addressed in the discussion that follows. However, in an effort to pique the reader’s curiosity, I shall approach these issues from a different dimension. My intention is to analyze the major decisions of the 1990-1993 Board4 in an effort to determine whether the level playing field is in

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1. Frank Swoboda, Panel to Study Overhaul of Labor Law; Administration Move Signals Increased Support to Unions, WASH. POST, Feb. 17, 1993, at F3 (quoting Robert B. Reich, Secretary of Labor).
3. President Clinton has nominated William B. Gould IV to be the next chairman of the Board and Margaret Browning as another of the Board’s members.
4. For the majority of this time, the Board consisted of only four members — Chair-
fact uneven and what the possible impact may be if a major change
in the philosophy of the Board does occur.

Any study of this nature must commence with a study of the
Act itself. Section 1 of the National Labor Relations Act\(^5\) reveals that
the drafters were clearly cognizant of the delicate balance between
management and labor that is necessary to sustain a healthy economy.
It states:

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 association substantially burdens and affects the flow of
commerce, and tends to aggravate recurrent business depressions, by
depressing wage rates and the purchasing power of wage earners in
industry and by preventing the stabilization of competitive wage
rates and working conditions within and between industries.\(^6\)

It continues:

Experience has further demonstrated that certain practices by some
labor organizations, their officers, and members have the intent or
the necessary effect of burdening or obstructing commerce by pre-
venting the free flow of goods in such commerce through strikes
and other forms of industrial unrest or through concerted activities
which impair the interest of the public in the free flow of such
commerce. The elimination of such practices is a necessary condi-
tion to the assurance of the rights herein guaranteed.\(^7\)

The announced public policy, the cornerstone of the Act as
amended in 1947, is thus established to be:

- to eliminate obstructions to the free flow of commerce;

- to mitigate and eliminate those practices which have obstructed the
free flow of commerce by encouraging collective bargaining, and
also by protecting the right of all workers to freely associate, to

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6. Id.
7. Id.
organize and to select representatives for the purpose of negotiating their wages, hours and conditions of employment.

The Board is empowered to prevent any "person" from committing an unfair labor practice (as described in Section 8 of the Act) which affects commerce. Section 8 details various acts in which employers and unions, both of which are defined as "persons" in the Act, are prohibited from engaging.

Likewise, in order to guarantee that employees have "the fullest freedom" in exercising their rights which are guaranteed by the Act, the Board is obligated and directed by the statute to determine the proper unit of employees to be considered appropriate for collective bargaining purposes. Thus, it is clear that one of the primary purposes of the Act is to protect the rights of employees and not just those of unions and employers. It is in that context that this analysis is undertaken.

I. ADMINISTRATIVE EFFECTIVENESS OF THE BUSH BOARD

As the Bush Board commenced its term in 1990, there was, and had been for some time, much criticism about the length of time the Board took to resolve cases and render decisions. Conscious of this, the Board took steps to develop programs to reduce the backlog of cases which had been at the Board for over two years and, at the same time, to keep current with the existing intake of cases. This effort produced the results listed in Table 1.

Clearly, gains were made, as the two year and older backlog in unfair labor practice cases was reduced from sixty to eight in the two year period between 1989-1991 and continued to be reduced thereafter. A like reduction occurred in the area of representation cases. Similarly, the cases at the Board for over one year also reduced substantially during the overall three and one-half year period.

12. These figures have been supplied by the Office of the Executive Secretary of the National Labor Relations Board. To give a more complete picture of the number of unfair labor practice charges filed and complaints issued, both of which are functions administered by the General Counsel, these figures have also been included.
13. Id.
14. Id.
15. Id.
TABLE 1
NLRB CASELOAD 1989-1992

UNFAIR LABOR PRACTICE CASES

<table>
<thead>
<tr>
<th>Fiscal Year</th>
<th>Charges Filed</th>
<th>Complaints Issued</th>
<th>Decisions Rendered</th>
<th>Total Backlog</th>
<th>Over 1 Yr.</th>
<th>Over 2 Yrs.</th>
<th>Over 5 Yrs.</th>
</tr>
</thead>
<tbody>
<tr>
<td>1989</td>
<td>32,401</td>
<td>3,226</td>
<td>750</td>
<td>342</td>
<td>94</td>
<td>52</td>
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<td>577</td>
<td>329</td>
<td>102</td>
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<td>3</td>
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<tr>
<td>1991</td>
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<td>3,208</td>
<td>774</td>
<td>272</td>
<td>33</td>
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<td>751</td>
<td>284</td>
<td>40</td>
<td>9</td>
<td>0</td>
</tr>
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</table>

REPRESENTATION CASES

<table>
<thead>
<tr>
<th>Fiscal Year</th>
<th>Petitions Filed</th>
<th>Decisions Rendered</th>
<th>Total Backlog</th>
<th>Over 1 Yr.</th>
<th>Over 2 Yrs.</th>
<th>Over 5 Yrs.</th>
</tr>
</thead>
<tbody>
<tr>
<td>1989</td>
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<td>18</td>
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<td>0</td>
</tr>
<tr>
<td>1990</td>
<td>7,674</td>
<td>282</td>
<td>90</td>
<td>14</td>
<td>3</td>
<td>0</td>
</tr>
<tr>
<td>1991</td>
<td>6,652</td>
<td>282</td>
<td>76</td>
<td>10</td>
<td>0</td>
<td>0</td>
</tr>
<tr>
<td>1992</td>
<td>6,257</td>
<td>231</td>
<td>79</td>
<td>6</td>
<td>1</td>
<td>0</td>
</tr>
</tbody>
</table>
From 1989 to 1992 the Board decided almost four thousand cases. While certainly many will disagree with my choice of cases to represent the work of the Board, and I might well disagree with theirs, some representative selection must be made. Since the generally accepted view is that oral argument is granted only in significant cases where the Board wishes to settle an outstanding issue, or to pronounce a change in the law, there may be some representative significance in selecting oral argument cases for inclusion in this discussion. Additionally, "Special Distribution" cases are selected by the Executive Secretary of the Board to be cases of significance and are included on a "Special Distribution List" circulated by the Executive Secretary to the Board Members, the General Counsel and the Regional Directors to advise them of important new case law. As a result, I have chosen to discuss those cases in which a request for oral argument was granted and held, as well as those cases which are termed "Special Distribution" cases.

II. REFUSAL TO BARGAIN — NIELSEN LITHOGRAPHING CO. v. NLRB

In June 1983, negotiation of a new contract between the Nielsen Lithographing Company and the Graphic Communications International Union commenced. This was not the first negotiation between the parties by any means — they had been negotiating labor contracts for some forty years. Early in the negotiations the company’s negotiator proposed a reduction in employee compensation and the benefit package. The company’s chief negotiator advised the union that the company was still making a profit but that it needed “concessions” to compete because increasing costs were resulting in a significant loss of business to competitors. He noted that trends indicated that in the future, the company was going to have greater difficulty with labor cost items which would force price increases, making the company even less competitive and resulting in lay-offs.

In these early negotiating meetings, the company actually furnished the union with various charts and graphs compiled from company records which it claimed supported the company’s need for concessions. The company’s chief negotiator also pointed out to the

16. Id.
17. 854 F.2d 1063 (7th Cir. 1988).
19. Id.
union that while the company originally possessed a technological advantage over its competitors by pioneering the use of a half-web press, the competition had, by the time of the negotiations, obtained a half-web press, resulting in the loss of this competitive advantage. The union acknowledged that this was "not any new information to [them]." The company also presented the union with data illustrating that it was losing business to competitors whose wages and benefits were below those of the company, and the company's negotiating team observed that its employees had already lost hours of work and jobs to layoffs.

After hearing the company's position and reviewing the charts and graphs presented by the company, the union's chief negotiator requested that the company open its books and allow a union expert to examine its financial records to verify the truth of the company's assertions concerning future competitive disadvantage. The company's negotiator responded that the company was not pleading poverty, that it was in fact making money, but that it was losing its competitive edge and, by the time of the next contract negotiations, would be in financial difficulty. Thereafter, the union made a detailed information request for documents which included: a) documents the employer had submitted to banks for the purposes of obtaining loans, including projected balance sheets and income statements; b) a list of all supervisory employees and their total compensation; c) a list of non-unit employees who had been laid off and for how long; d) a list of company officers' and owners' expense accounts; e) a list of cars owned by the company; and f) an analysis of the working capital of the company for the prior three years.

While the company agreed to supply the union with any relevant bargaining unit data, it refused to supply the union with the other requested items. When an impasse was reached the company implemented its proposal and the union engaged in a strike and filed a Section 8(a)(5) refusal to bargain charge, claiming the company refused to bargain by failing to provide the union with the requested information.

At a hearing before an administrative law judge, the union took
the position that it was entitled to financial information whenever the company sought concessions. The union negotiator also explained that it needed the list of supervisors because the negotiating committee felt that if the company was not competitive it might be because there were "too many chiefs and not enough Indians." He testified that the union needed a list of people who were not in the bargaining unit and who had been laid off to determine whether, in the event lay-offs were inevitable, there were other non-unit employees who should be laid off along with the union people. In its initial decision the Board found that the employer had violated Section 8(a)(5) by not providing the union with the requested financial data.

On review, the Seventh Circuit refused to enforce the Board's Order and remanded the case to the Board. In its remand decision, the Seventh Circuit directed the Board to reconsider its decision in light of that court's then "recent" opinion in NLRB v. Harvstone Manufacturing Corp. In Harvstone, the court found that the company's claim of competitive disadvantage amounted to a contention during bargaining that it would not pay, as opposed to a claim that it could not pay, what the union was demanding. The court in Harvstone construed the employer's claim of competitive disadvantage simply as an acknowledgement of an economic fact of life: if companies "don't make a reasonable profit so they can be a viable competitive business, they won't stay in business and no one will have jobs." This, said the court, was nothing more than a truism and did not rise to the level of a claim of present inability to pay.

Interestingly, in Harvstone, the Seventh Circuit also considered whether a claim of future competitive disadvantage, not limited to the term of the contract under negotiations, translated into a claim of inability to pay. The court observed in response to that issue that "if an employer operates at a competitive disadvantage for a long enough time, its profit margin as a matter of pure economics, will decline and eventually force it out of business." But the court emphasized

26. Id.
27. Id.
28. Id.
30. Nielsen Lithographing Co. v. NLRB, 854 F.2d 1063 (7th Cir. 1988).
31. 785 F.2d 570 (7th Cir. 1986).
32. Harvstone Mfg., 785 F.2d at 577.
33. Id. at 576.
34. Id. at 576-77.
35. Id. at 577.
that the relevant time period is "that of the term of the new collective bargaining agreement." The court concluded that an employer's claim that competitive disadvantage will ultimately lead to an inability to pay at some future time does not preclude a finding that "at least for the term of the new collective bargaining agreement — the employer operating at a competitive disadvantage is financially able, although perhaps unwilling, to pay increased wages." 37

On remand, the Bush Board reversed its prior decision and dismissed the complaint in a split decision. 38 The Board majority 39 found no Truitt violation. 40 I concurred and found that the statements made by management in the case were not susceptible to a "cannot" pay finding. 41 The majority emphasized that the company's negotiator repeatedly stated that the company was still making a profit, even though the company was losing business to competitors and in the negotiations specifically disavowed any claim or inability to pay during the period of the proposed new contract. 42 The Board majority acknowledged that the company had asserted that at some unspecified point in the future, it was going to have a problem with labor costs but it found in these statements nothing that could fairly suggest that the company would be so unprofitable during the term of the contract under negotiation that it could not pay what the union was demanding. 43 The company, it held, was claiming only that it might not make as much of a profit if it did not get the concessions that it requested. 44 The Board stressed that the employer's efforts to maximize profits or to reallocate expenses among various categories do not in and of themselves constitute a claim of financial inability to pay, as contemplated by Truitt. 45

I agreed with my colleagues' analysis but said that requiring the employer in this case to supply the requested information would not

36. Id.
37. Id.
40. NLRB v. Truitt Mfg., 351 U.S. 149 (1956) (holding that an employer may not refuse to provide a union with information about its financial status when asserting an inability to pay an increase in wages).
42. Id. at 701-03.
43. Id. at 700-01.
44. Id. at 701.
45. Id.
46. Id.
encourage the practice and procedure of collective bargaining.\textsuperscript{47} It was my view that the company's position concerning its competitive stance was not sufficiently capable of accurate verification by the union to aid the bargaining process. Instead, requiring the company to supply the information requested by the union could well bog down bargaining and develop into a debate over management's inability to track the future direction of the company.

Chairman Stephens dissented and emphasized the fact that the employer had linked his concession to the loss of jobs currently held by the employees; and thus, put in issue the status of present economic condition to the point where the union was entitled to obtain financial information to verify that condition, under the principles of \textit{Truitt}.\textsuperscript{48} The Chairman thought his disagreement with the majority was one that turned on the relevance of information related to claims of economic hardships that fall short of a claim of inability to pay.\textsuperscript{49} Contrary to the majority, he found that some claims of economic hardship trigger the duty to supply information on the financial condition of the company, not just the inability to pay as encompassed by \textit{Truitt}.\textsuperscript{50} The Seventh Circuit Court of Appeals affirmed the Board's decision.\textsuperscript{51}

In \textit{Continental Winding Co.},\textsuperscript{52} one of four companion cases\textsuperscript{53} decided by the Board the same day as \textit{Nielsen}, the employer expressed during bargaining its desire to remain competitive when the question of wages and other benefits were brought up in negotiations.\textsuperscript{54} The company's chief negotiator expressly denied throughout negotiations that the company was claiming any inability to pay.\textsuperscript{55} The Board, however, was persuaded that the company had in fact claimed it was unable to pay when company officials had stated among other things that: a) the company could not afford to keep its doors open; b) there was no money in the business; c) the company

\begin{footnotes}
\item[47] Id.
\item[48] Id. at 703.
\item[49] Id. at 707.
\item[50] Id.
\item[51] Graphic Communications Int'l Union, Local 508 v. NLRB, 977 F.2d 1168 (7th Cir. 1992).
\item[54] \textit{Continental Winding}, 305 N.L.R.B. at 134.
\item[55] Id. at 133-34.
\end{footnotes}
had lost 50% of its business; d) the president of the company had not drawn money from the company for over three years — he and the company had been losing money for the past three years and the company was “in the red” for the current year; e) the company’s president had obtained a personal loan so that the company could meet its payroll and other financial obligations; f) the company expected a $60,000 loss by year’s end; g) other members of the association of which the company was a member had become insolvent, after being unionized; and h) there was no money in the company and the union could not “squeeze blood from a turnip.”

The test the Board will apply in these request for information cases seems to be clear. The Board will not be governed solely by what the employer says but will rather examine its position and other statements it makes during negotiations. Thus, if its “will not pay” statements do not support or are not consistent with other employer statements or actions during the negotiations, the Board will find a claim of inability to pay and the employer will have violated the Act by not providing the union with requested relevant information. Likewise, the Board also held that an employer seeking concessions from the union does not ipso facto require the employer to provide the union with financial information upon request.57

Clearly then, if an employer is trying to seek refuge by claiming it is not stating an inability to pay, but its actions speak otherwise, this Board would be more inclined to require the employer to provide the requested information under the doctrine of Truitt.58 On the other hand, where an employer is consistent in its approach and is not trying to merely evade the bargaining and information request obligation, it would appear that the Bush Board would not extend the Truitt doctrine to require the employer to provide the relevant financial information upon request in concessionary bargaining.

The decisions also instructed the parties that an employer seeking concessions due to a competitive disadvantage, but not pleading inability to pay, is not governed by the Truitt principles and thus is not required to comply with a union request for financial information.59

56. Id. at 141.
57. Id.
58. See supra note 40.
59. Ameron Pipe Prods., 305 N.L.R.B. at 109; Concrete Pipe, 305 N.L.R.B. at 163; Georgia-Pacific, 305 N.L.R.B. at 117; Continental Winding, 305 N.L.R.B. at 141.
III. RELOCATION OF OPERATIONS — DUBUQUE PACKING

In the much heralded Dubuque Packing case, the Board issued an important decision that governs an employer’s obligation concerning decisions to relocate all or part of its operations in a somewhat complicated but fact specific situation. The question in Dubuque involved what test the Board should apply in determining when an employer must bargain with a union concerning a decision to relocate unit work.

In Dubuque, the employer, a meat packer, decided to relocate its hog, kill and cut operations from its home plant in Dubuque, Iowa to a new plant in Rochelle, Illinois. It did not bargain with the union representing the involved employees regarding the decision to move this operation.

The essential facts were as follows. In 1978, the company and the union negotiated an agreement requiring the workers to produce at a higher rate in return for a one-time cash payment. In August 1980, the company extracted concessions from the union including elimination of incentive pay. These concessions were worth approximately five million dollars per year. In return, the company pledged that it would not ask for further concessions before September 21, 1982, the expiration date of the union contract then in effect. However, in March 1981 the employer again requested concessions in the form of additional productivity in its hog, kill and cut department. When this request was rejected by the union, the employer gave six months notice, as required by the labor contract, of its intention to close the hog, kill and cut operation in Dubuque. There were discussions between the union and the company, including a company request for a wage freeze, which were aimed at keeping the Dubuque hog, kill and cut operation open for the balance of the

61. Id. at 387.
62. Id. at 396-97.
64. Id. at 505.
65. Id.
66. Id. at 504.
67. Id. at 506.
68. Id. at 507.
The union rejected these proposals and the day following the rejection, the company announced for the first time that it was planning to relocate, rather than close, its hog, kill and cut department. The union responded by requesting detailed financial information from the company substantiating its financial condition which the company refused to provide. Dubuque then advised its employees in writing that they could save their jobs by approving its wage freeze proposal. In June 1981, the wage freeze proposal was re-submitted to the workers for a vote. The resubmission was accompanied by the union leadership’s recommendation that it be rejected until Dubuque provided the financial information earlier requested by the union. The workers voted overwhelmingly to reject the proposal. Three days later, Dubuque informed the union that its decision to close the hog, kill and cut department was “irrevocable,” and in July, Dubuque purchased the Rochelle, Illinois plant.

Dubuque and the union continued to negotiate during the next few months over Dubuque’s proposed relocation of other operations. During this time the union continued to request negotiations over the relocation of the hog, kill and cut operation but the company advised that such operations were closing and refused to bargain over the decision. On October 1st, Dubuque’s newly acquired Rochelle plant began full operation and two days later the company eliminated approximately 530 hog, kill and cut jobs at the Dubuque plant. On October 19, 1981, an agreement was signed between the company and the union, granting wage concessions for the remaining workers at the Dubuque plant in return for the company’s agreement to keep 900 jobs in Dubuque and to extend the current labor agreement. By early 1982 however, the company’s hope for obtaining new financing had collapsed, taking with it Dubuque’s prospects for remaining in business in Dubuque and Rochelle. Subsequently, both plants were

69. Id. at 510.
70. Id. at 510-11.
71. Id. at 510, 513.
72. Id.
73. Id. at 514.
74. Id.
75. Id. at 515-16.
76. Id. at 517.
77. Id. at 525.
78. Id. at 527-28.
79. Id. at 534.
closed and sold on October 15, 1982.\textsuperscript{80}

The union filed unfair labor practice charges with the Board and complaints were issued. Those complaints claimed that Dubuque had refused to bargain in good faith with respect to the decision to relocate the hog, kill and cut operation, claiming especially the company’s alleged duplicity and its refusal to disclose financial data.\textsuperscript{81} An administrative law judge rendered a decision in the case on June 17, 1985. The judge, suggesting that Dubuque’s conduct did fall below the standard of good faith bargaining, nevertheless held that Dubuque did not commit an unfair labor practice because the company was not under any duty to negotiate over its decision to relocate.\textsuperscript{82} The Board affirmed the judge’s decision, adopting the findings and opinion.\textsuperscript{83} The District of Columbia Court of Appeals remanded the case, declaring that the Board’s opinion had been inadequately explained.\textsuperscript{84} At that time, the only extant law failed to provide a single test for determining whether companies were bound to bargain over a decision concerning partial relocation.\textsuperscript{85} The Circuit Court of Appeals held that given the confusion in the law, it could not trace the Board’s reasoning in \textit{Dubuque} to ensure that the Board’s action was not arbitrary.\textsuperscript{86} Thus, the court remanded \textit{Dubuque} to the Board for further consideration, strongly advising the Board to develop and apply a single standard.\textsuperscript{87}

On remand the Board unanimously approved a new test that differed from all three tests which had been set forth in \textit{Otis II}. The Board applied this new test to the relocation of Dubuque’s hog, kill and cut operation and found that a duty to bargain had existed and had been breached.\textsuperscript{88} Dubuque was ordered to pay back-wages to all employees terminated as a result of the relocation from the date of their termination until October 15, 1982, the date operations ceased in Dubuque, Iowa and Rochelle, Illinois.\textsuperscript{89} In developing this single test, the Board developed an analysis and weaved itself a narrow road between.

\begin{itemize}
\item \textsuperscript{80} Id. at 529.
\item \textsuperscript{81} Id. at 501.
\item \textsuperscript{82} Id. at 538-41.
\item \textsuperscript{83} Id. at 499.
\item \textsuperscript{84} United Food Workers, Local 150-A v. NLRB, 880 F.2d 1422 (D.C. Cir. 1989).
\item \textsuperscript{85} Otis Elevator Co., 269 N.L.R.B. 891 (1984) [hereinafter Otis II].
\item \textsuperscript{86} United Food Workers, 880 F.2d at 1439.
\item \textsuperscript{87} Id. at 1436-37.
\item \textsuperscript{88} Dubuque Packing Co., 303 N.L.R.B. 386 (1991).
\item \textsuperscript{89} Id. at 399.
\end{itemize}
The developed test was as follows:

1. The burden will initially be on the Board’s General Counsel to establish that the employer’s decision involved a relocation of unit work unaccompanied by a basic change in the nature of the employer’s operations.

2. When the General Counsel meets this initial burden then a prima facie case is established.

3. At this point the employer may produce evidence rebutting the prima facie case by establishing that the work performed at the new location varies significantly from the work performed at the former plant, by establishing that the work performed at the former plant is to be discontinued entirely and not moved to the new location, or by establishing that the employer’s decision involved a change in the scope in direction of the enterprise.

4. Alternatively, the employer may show that (a) labor costs (direct and/or indirect) were not a factor in the decision; or (b) even if labor costs were a factor in the decision, the union could not have offered labor cost concessions that could have changed the employer’s decision to relocate.

In applying the test the Board found that the company had made labor costs a determinative factor in its decision to relocate and that the relocation decision was therefore a mandatory subject of bargaining. The Board did not respond to the failure to supply financial information question, but did indicate that if the union deliberately delays, for example by making frivolous information requests, the Board will be guided by that fact as it applies to impasse. The Board emphasized that there may be circumstances where a relocation decision must be made or implemented expeditiously or where there are special or emergency circumstances that would make bargaining about that situation difficult.

On August 10, 1993, the United States Circuit Court of Appeals for the District of Columbia affirmed the Board’s Order and its ratio-

90. Id. at 391.
91. Id. at 393
92. Id. at 392.
93. Id.
nale stating that:

we find that the Board’s test does not impermissibly fail to protect management’s prerogatives over capital investment . . . . [And] [F]inally, we find no fatal uncertainty in the Board’s test as it applies to these facts. As we explain below the Board’s ruling easily survives Dubuque’s contention that the test requirements were not met in regard to this particular relocation. Employers should have no trouble understanding that actions such as Dubuque’s run afoul of the Board’s newly articulated standard.

This decision in many ways put to rest, for the time being at least, the struggle that has existed between rulings in Fibreboard and First National Maintenance, where in footnote 22 the Supreme Court specifically excluded plant relocations from the application of First National Maintenance on the theory that the employer’s core of entrepreneurial control must not be disturbed. The test provides the parties with a workable model and is intended for application in factual situations that present a question of whether, in the interest of practical labor relations, negotiations should be undertaken to drive the parties to the bargaining table to discuss the relocation. Such is consistent with the purposes of the Act which support the settlement of disputes through collective bargaining. This decision appears to provide the parties with a test which is clearly applicable in the factual framework of day-to-day negotiations.

IV. TIMELY BARGAINING EFFECTS OF A SALE

The issue of when an employer must bargain with a recognized collective bargaining representative about the effects of the employer’s sale of its business was again considered in Riedel International

94. United Food Workers Local 150-A v. NLRB, 1 F.3d 24, 32-33 (D.C. Cir. 1993).
95. Fibreboard Paper Prods. Corp. v. NLRB, 379 U.S. 203 (1964) (holding that an employer must bargain with union prior to subcontracting out work for the purpose of reducing labor costs).
96. First Nat’l Maintenance Corp. v. NLRB, 452 U.S. 666 (1981) (holding an employer’s economically motivated decision to shut down part of its business is not a mandatory subject of collective bargaining).
97. Id. at 686 n.22.
99. Following these decisions the employer and the union both recognized that the employer had an obligation to discuss the impact of the sale of a company upon the employees and their jobs with their union at a meaningful time and not after the sale had become a fait accompli.
Previously, in 1973, the Board had decided in Walter Pape, Inc. that an employer (seller) was obligated to advise the union and discuss with it the impact of a decision to sell when the sale was "under active consideration" by a potential buyer. This appeared to mean that when an employer and a potential buyer are seriously talking about reaching an agreement of sale, the employer is obligated to notify the union and bargain upon request with respect to the effects of the sale upon the seller's employees. This standard was reconsidered by the Bush Board in its 1990 Willamette decision.

Riedel had been negotiating a possible sale of its Willamette assets to the Knappton Corporation since December 1987. The negotiations continued until April when it became evident that this asset sale would not be consummated until the principals of each company met and negotiated the final issues. On April 14th, such negotiations took place and a memorandum of agreement was signed late that evening which was to be effective on April 15th. On the morning of April 15th, by prearrangement, the employees of the purchaser (Knappton) were manning Willamette's dispatch office and responding to calls for "ship assist" placed to Willamette's existing telephone number. Also, by prearrangement in the purchase agreement and effective that morning, Willamette had assigned to Knappton control of the Willamette owned tugs and barges even though financing for the sale had not yet been committed by the banks. Following conferences with the bank and financing commitments by them, at 11:45 on the morning of April 15th, the seller's representative came to the union's office and presented the union's agent with a letter advising that Knappton had purchased Willamette's assets and that Willamette was closing operations as of the close of business that day. This was the first and only notice the union had received that there had been ongoing negotiations for the sale of Willamette. Respondent's agents further explained that Willamette's employees represented by the union would be terminated.

102. Willamette, 300 N.L.R.B. at 283.
103. Id. at 284.
104. Id.
105. Id.
106. Id.
107. Id.
108. Id.
when the business closed that day and that the current labor agreement and the bargaining relationship between Willamette and the union would likewise be terminated at the end of the day. 109 Approximately fifteen minutes later, Willamette's deck hands received their own letters from the company stating that with "regret" Willamette had "closed operations" and therefore the employees' employment with the company was being terminated that same day. 110

Thereafter, on April 19th, the union wrote the respondent to protest the sale and the seller's failure to negotiate, the effect of the sale having constituted a contract violation and demanded a meeting to bargain over the effects of the sale upon the employees. 111 The union also stated that it would file unfair labor practice charges. 112 Willamette then replied that it had not committed a contract violation and promised to meet on April 28th to bargain over the effects. 113 On April 28th, the union presented respondent with a written list of demands, including severance pay linked to length of service, continuation of certain health benefits contributions for a fixed period and a good faith commitment on the part of Willamette to employ laid-off employees at other operations of the company. 114 No agreement was reached and the record does not disclose whether there were any other negotiations. 115 The union consequently filed unfair labor practice charges claiming a refusal to bargain by the seller, Willamette. 116

It should be noted at the outset, that there was no claim by the union that Willamette owed the union a duty to bargain over its decision to sell the company. 117 The General Counsel conceded that respondent Willamette could make that decision unilaterally under the doctrine established by the Supreme Court in First National Maintenance. 118 The claim was clearly and solely that the employer failed to bargain over the effects of the sale in accordance with its obliga-
The Board held that the General Counsel was on firm ground in claiming that the duty to bargain over the "effects" of a decision to sell normally contemplates that the employer must give "advanced" or some pre-sale notice to the union. The Board held that the General Counsel was on firm ground in claiming that the duty to bargain over the "effects" of a decision to sell normally contemplates that the employer must give "advanced" or some pre-sale notice to the union.

In defense of its position, Willamette made two claims. Initially, the employer argued that a possible sale to a particular buyer cannot be regarded as an actual decision to sell. Likewise, since the decision to sell was not reached until April 14th, there was no earlier opportunity to advise the union that it had made such a decision to sell the corporation's assets. Therefore, it claimed that it had no obligation to bargain until an agreement to sell had been reached.

The administrative law judge, following Walter Pape, found that the employer presented the union with a fait accompli in that the sale had been concluded on April 14th and the employees were notified the following day when the financing arrangements were finalized. He found that by February the negotiations, while complex and uncertain that a sale would be effectuated, had reached "the serious stage" and that the seller had disclosed to both his labor consultant and his primary financing institution that it was negotiating with Knappton for the sale of the operation. Thus, he concluded that by mid-February the respondent believed that there was a substantial likelihood that the negotiations would lead to an agreement.

Likewise, he found that the company was not engaged in parallel negotiations with any other prospective purchaser. It had no backup negotiation or backup buyer even though it had previously indicated that the reason for the sale was the precarious financial situation of the corporation. Accordingly, he found that when the board of directors of Willamette made the decision in December to sell the company, it was at that time that the duty developed to inform and

120. *Id.* at 282-83.
121. *Id.* at 284-85.
122. *Id.*
123. *Id.*
124. *See supra* text accompanying note 100.
126. *Id.*
127. *Id.*
128. *Id.*
129. *Id.*
meet upon demand with the union to discuss the effect of the sale. 130 He concluded that any other analysis “would often leave a union without practical strength to bargain over the effects of the sale of an enterprise.” 131 He cited as his support Metropolitan Teletronics Corp. 132

As a second defense, the respondent claimed that the negotiations had to be kept secret from the public in order to enhance the asset to the buyer and thus enable the respondent to secure enough cash to meet its debt requirement concerns. 133 The respondent’s attorney testified that the tug and barge business on the Willamette River was extremely competitive and both Willamette and Knappton were fearful that premature publicity about the sale would result in widespread knowledge among the local business community that Willamette was entertaining a sale and could lead to many of its customers taking their business to other tug and barge companies. 134 The judge found this was not a legitimate concern and insufficient to nullify the union’s presumptive right to advance notice. 135 Thus, the judge held, citing the rule of Walter Pape which stated that “at the very least, respondent should have advised the union that the termination of [business] routes was under active consideration and was imminent,” 136 that Willamette had not fulfilled its obligation to bargain. 137

The Board affirmed the judge, but overruled portions of the Walter Pape doctrine. 138 It held that the union was entitled to “as much notice of the closing and termination of employees as was needed for meaningful bargaining at a meaningful time.” 139 While it refused to find exactly how many days notice would be required, the Board did hold that same day notice was clearly insufficient. 140 In overruling Walter Pape to the extent that it was inconsistent with the decision, the Board stated that

130. Id.
131. Id.
132. 279 N.L.R.B. 957 (1986), enforced, 819 F.2d 1130 (2d Cir. 1987) (holding that timely notice to the union is an element of meaningful bargaining).
133. Willamette, 300 N.L.R.B. at 286.
134. Id.
135. Id.
136. Walter Pape, 205 N.L.R.B. at 720.
137. Willamette, 300 N.L.R.B. at 286.
138. Id. at 282.
139. Id. at 283.
140. Id.
the sale of a business, unlike certain other nonbargainable decisions involving the scope and direction of a business, is not unilateral in character. The sale may fall through at any time before a purchase agreement is reached. Accordingly, we find no merit in the General Counsel's contention that, for effects-bargaining purposes, an employer is obligated to provide notice to the union as soon as the sale is "under active consideration." \(^1\)

It went on to find that although the decision to sell did not occur until the execution of a binding agreement to sell, that a violation still existed because the employer's failure to provide the union with any meaningful notice, prior to the actual sale and transfer of the assets, that the seller was ceasing business and terminating its employees. \(^2\) The Board reasoned:

> if a seller and a purchaser can be expected to negotiate about, and draft their agreement to provide for satisfaction of, various contingencies such as governmental clearances, so, too, should they be able to account for the human factor — the employees' interest in having their designated representative notified and given an opportunity to bargain about the effects of the sale. That circumstances may compel confidentiality in arriving at a sales agreement does not obviate the employer's duty to give pre-implementation notice to the union to allow time for effects bargaining, provision for which may be negotiated in the sales agreement. We do not presume here to advise corporate negotiators how to accommodate the right of a union to negotiate effect of this sale on the employees it represents. \(^3\)

Thus, while affirming the judge, the Board established a new test. In sale situations, enough time must be given so that meaningful negotiations may occur, or accommodation for such must be made in the purchase and sale agreement in order for the employer to meet its statutory obligation to bargain over the effects of a sale with the union. \(^4\) This rule protects the rights of employees and gives their representative union an opportunity to negotiate that which it was entitled to negotiate (the effect of the sale) within the confines of business necessity.

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141. Id. at 282.
142. Id.
143. Id. at 282-83.
144. Id. at 283.
In a companion case, *Los Angeles Soap Co.*, the Board adopted the judge’s opinion, citing *Willamette*. There, the purchaser (Valley) demanded that there be no information provided with respect to the sale to anyone and, if any information did leak out, it could mean that the sale would not be consummated. The seller (employer) and his wife worked in secret so as to not compromise the need for confidentiality and alone prepared the necessary documents for the sale to the purchaser. The subject of confidentiality was repeatedly discussed during a series of telephone conversations from November 23rd to December 4th. While the negotiations commenced on November 14th and on November 17th a “round figure” was established as the purchase price, the sale was not consummated until December 4th when the seller’s board of directors met and approved the sale. Later that same afternoon, the employer met with day-shift employees and informed them that the company was closing permanently and would cease operations. The judge rejected the seller’s argument of special or emergency circumstances and held that this case did not create an exception to the rule announced in *Willamette*. Again the Board refused to address the question of when the employer’s duty to notify the union first arose and instead affirmed the judge, citing *Willamette* as its authority. In both cases, a *Transmarine* remedy was applied.

These two cases are important because they adhere to the established principle that the union is entitled to sufficient notice to constructively bargain over the effects of a sale and also because they adopt a more realistic solution than the one announced in *Walter Pape*. Clearly, since it is impossible in many economic transactions to be sure that a sale will be consummated, it is likewise impractical to commence negotiations with the union with respect to the effects of the pending “sale” on the employees when the sale is only a possibility. However, in *Willamette*, irrespective of the economic and security

146. Id. at 292.
147. Id.
148. Id.
149. Id. at 291-92.
150. Id. at 292.
151. Id. at 289 & n.1.
152. Transmarine Navigation Corp., 170 N.L.R.B. 389 (1968). A *Transmarine* remedy seeks to restore the union, as nearly as possible, to the status it would have occupied had the employer given timely notice. To accomplish this, the employer is ordered to bargain with the union over the effects of its decision and to provide backpay. Id.
reasons the company gave not to provide notice, the Board affirmed the basic principle that notice must be given prior to an actual sale when the negotiations would be more than *pro forma* because the sale was a *fait accompli.*\(^{153}\) It held that a provision could be made in the purchase and sale agreement to conclude the negotiations with the union before the closing of the sale, or other contract arrangements could be made to accommodate this contingent close-down liability.\(^{154}\) *Los Angeles Soap* also provided that some prior notice was necessary; but, it should be noted that it backed away from indicating that the three or four days notice mentioned in the judge’s decision in his reference to *Emsing’s Supermarket*\(^{155}\) was insufficient.\(^{156}\) Therefore, it may well be that three or four days advanced notice would have been satisfactory under *Willamette.* In any event, it can be argued that this is a more realistic solution to a difficult practical, economic and negotiating problem. Parties must have the freedom to negotiate the purchases and sales of businesses, but their obligations to bargain with employee representatives must be met in a time frame that leaves the representative and the employer with an opportunity to effectively conclude and solve the resulting impact of the sale on the employees.

V. COMPANY-EMPLOYEE COMMITTEES — ELECTROMATION AND DUPONT

Clearly, two of the most publicized Board decisions of the last five years are *Electromation, Inc.*\(^{157}\) and *E. I. du Pont de Nemours & Co.*\(^{158}\) Both cases considered the question of whether an employer-employee committee was a labor organization under Section 2(5) of the Act\(^ {159}\) and, if so, whether the company had dominated, assisted or otherwise violated the Act by involving itself too deeply in the formation and operation of one or more of these committees. *Electromation,* decided in December 1992, involved a non-union facility. On the other hand, *DuPont,* decided in May 1993, involved

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154. *Id.*
155. NLRB v. Emsing’s Supermarket, 872 F.2d 1279 (7th Cir. 1989).
156. *Los Angeles Soap,* 300 N.L.R.B. at 289 n.1. Judge Stevenson agreed with the General Counsel that three to four days notice was insufficient. *Id.* at 295.
158. 311 N.L.R.B. No. 88 (May 28, 1993).
the operation of these committees in a union facility. Both have been characterized as impact decisions which, depending upon your point of view, may require an amendment to the law. These cases are made prominent by an apparent growing emphasis by the government, as well as experts in the field of employee motivation, encouraging more employer and employee joint involvement and participation in decision-making. Some even say that this is necessary if we are to compete globally in the next decade. With that type of rhetoric as background, it may be helpful to look at the facts of each case and the decisions rendered.

Electromation is a company involved in the manufacture of electrical products in Indiana and employs approximately 200 people. In late 1988, as a result of financial difficulty, it decided to eliminate expenses by altering the existing employee attendance bonus policy and by making other working condition changes. In lieu of a wage increase scheduled for 1989, it decided to distribute year-end lump sum payments based upon an employee’s length of service. Shortly after that announcement, the employees left for their Christmas vacation and returned shortly after the first of the year with a sense of deep concern, troubled by the elimination of these bonuses and other changes. They let their feelings be known around the plant and the employer became aware of such feelings. In early January 1989, the company received a petition signed by sixty-eight employees expressing displeasure with a new attendance policy. The company’s president met with the supervisors to discuss the petition and the employees’ complaints and then decided to meet directly with the employees to discuss their problems. On January 11th the employer selected a group of eight employees and discussed with them a number of issues including wages, hours, incentive pay, attendance programs and leave policy — all, of course, are wage and

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161. See, e.g., Steven I. Locke, *Comment, Keeping Sections 2(5) and 8(2)(2) of the NLRA Intact: A Fresh Look at Worker Participation Committees through Electromation, Inc.*, 10 HOFSTRA LAB. LJ. 375 (1992).
163. Id.
164. Id.
165. Id.
166. Id.
167. Id.
168. Id.
working condition concerns.¹⁶⁹

Seven days later on January 18th the company’s president met again with the same group of eight employees.¹⁷⁰ At this meeting he explained to those present that he had distilled the employee’s complaints into five separate categories and that he was going to create action committees that “would meet and try to come up with ways to resolve these problems; and that if they came up with solutions that . . . [the company] believed were within budget concerns and . . . generally felt would be acceptable to the employees, that [the company] would implement these suggestions or proposals.”¹⁷¹ The employees indicated that they were not in agreement with respect to these action committees.¹⁷² They did not wish any more study — they wanted some answers, as they explained it. As the meeting continued, the company’s president was under the belief that the employees began to understand that it was better to try to solve the problems than to leave things as they were, and that the company was not going to unilaterally reverse the decisions already made.¹⁷³ Thus, the company’s president indicated that they accepted the idea of these action committees and agreed that employees would not be selected at random for the committees; instead, the company would post sign-up sheets.¹⁷⁴

On January 19th, the respondent posted a memorandum directed to all employees announcing the formation of five action committees.¹⁷⁵ Each committee would be involved with a specific topic, such as absenteeism policy, pay promotion and others.¹⁷⁶ Each action committee would consist of six employees, one or two members of management, and the company’s employee benefits manager who would coordinate all the activities of the action committees.¹⁷⁷ The sign-up sheets explained the responsibilities and goals of each committee.¹⁷⁸ The employees were not involved in the drafting of the memoranda or notices which contained the policy goals and the company, alone, determined the number of employees permitted to sign

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¹⁶⁹. Id. at 990-91.
¹⁷⁰. Id. at 991.
¹⁷¹. Id.
¹⁷². Id.
¹⁷³. Id.
¹⁷⁴. Id.
¹⁷⁵. Id.
¹⁷⁶. Id.
¹⁷⁷. Id.
¹⁷⁸. Id.
up for each committee. The company informed two employees who had signed up for more than one committee that each would be limited to only one committee.

The five committees that were announced were as follows: Absenteeism/Infractions; No-Smoking Policy; Communication Network; Pay Progression for Premium Positions; and Attendance Bonus Program. In late January, the first meetings of the action committees were held. The Action Committee Coordinator, Loretta Dickey (the Employee Benefits Manager), testified that management expected that employee members on the Committees would "kind of talk back and forth" with other employees in the plant, get their ideas, and that, indeed, the purpose of the Respondent's postings was to ensure that "anyone [who] wanted to know what was going on, they could go to these people."

Other management representatives also participated in the committees. The company paid employees for their time spent participating in the committee work and supplied necessary materials for the committee's work, as well as the conference room available for the meetings themselves.

Approximately three weeks after the meetings had commenced, the union demanded recognition from the company. It was clear that the company had no prior knowledge of organizing efforts by the union until the date upon which the demand was made. On February 21st, the company's president informed Committee Coordinator Dickey of the recognition demand and, at the next scheduled meeting of each action committee, Dickey informed the members of the committees that the respondent could no longer participate, but, that the employees could continue to meet if they so desired. Two of the committees continued to meet. The Pay Progression Committee decided to disband and the Attendance Bonus Committee decided to

179. Id.
180. Id.
181. Id.
182. Id.
183. Id.
184. Id.
185. Id.
186. Id.
187. Id.
188. Id.
189. Id.
write a proposal which they had discussed previously and then to not meet again.\textsuperscript{190}

The Attendance Bonus Committee’s proposal was one of two proposals that the employees had developed concerning attendance bonuses.\textsuperscript{191} The first one was developed during the second or third meeting of that action committee, but was rejected as too costly by the company’s controller, also a member of that committee.\textsuperscript{192} Thereafter, the committee devised a second proposal which the controller deemed fiscally sound.\textsuperscript{193} The proposal was never offered because the union’s campaign intervened between the time of the approval and the time the proposal would be presented by the action committee to the company president.\textsuperscript{194}

The administrative law judge found that the action committees which were created to discuss wages, hours and working conditions were labor organizations within the definition of Section 2(5).\textsuperscript{195} He thereupon found that the respondent’s company dominated and assisted the committees on the basis of evidence that the respondent organized the committees, created their nature and structure and determined their various functions.\textsuperscript{196} As for assistance, he noted that since the meetings had taken place on company property, the materials used by the committees had been supplied by the company and the members were paid for time spent on committee work, these committees were assisted by the employer in violation of Section 8(a)(2) of the Act.\textsuperscript{197}

The operative sections of the Act involved here, and in DuPont, were Sections 8(a)(2) and 2(5). Section 8(a)(2) provides that it shall be an unfair labor practice for an employer to dominate or interfere with the formation or administration of any labor organization or contribute financial or other support to it: \textit{Provided}, That subject to rules and regulations made and published by the Board pursuant to section 6, an employer shall not be prohibited from permitting employees to confer with them during work-

\begin{enumerate}
\item Id.
\item Id.
\item Id.
\item Id. at 991-92.
\item Id. at 992.
\item Id.
\item Id.
\item Id.
\item Id.
\item Id.
\item Id.
\item Id.
\end{enumerate}
A labor organization is defined by Section 2(5) of the Act as follows:

The term "labor organization" means any organization of any kind, or any agency or employee representation committee or plan, in which employees participate and which exists for the purpose, in whole or in part, of dealing with employers concerning grievances, labor disputes, wages, rates of pay, hours of employment, or the conditions of work.

To find a violation, therefore, there must be a finding that a labor organization exists and this, as one would expect, was the first inquiry made by the Board. The entire Board agreed that these committees were labor organizations. They were clearly established for the purpose of, and in fact did engage in, the discussion of wages, hours and working conditions. There seemed to be little dispute with the conclusion that the committees were labor organizations, except from Member Devaney who indicated that in order to qualify as a labor organization the committee is required to represent some employees. Member Devaney found from the evidence in the record that since the committees consisted of employees who participated in the committees and the committees represented other employees, they met the statutory definition of a labor organization. Since the discussion of wages, hours and working conditions was the purpose of the committees, he concluded that a labor organization existed and that a Section 8(a)(2) violation had resulted because the committees were created in response to the employees' disaffection concerning conditions of employment. Moreover, he concluded, because of the company's involvement with the formation of the committees and its continuing support of the committees, a Section 8(a)(2) violation had occurred.

I, on the other hand, found that since these committees were

200. Electromation, 309 N.L.R.B. at 997, 998-99 (Member Devaney, concurring), 1004 (Member Oviatt, concurring), 1014 (Member Raudabaugh, concurring).
201. Id.
202. Id. at 1003.
203. Id. at 1003.
204. Id.
205. Id.
established "for the purpose" of discussing wages, hours and conditions of employment with the employer, they were labor organizations under Section 2(5); therefore, I also concluded that, based upon the employer's involvement and support, the five committees were dominated and assisted by management in violation of Section 8(a)(2).

Member Raudabaugh also concurred and had little difficulty in finding a violation of Section 8(a)(2) which, of course, encompassed the finding that the committees were labor organizations under the Act. However, he called for a new interpretation of NLRB v. Newport News Shipbuilding Co. and argued that the Newport News decision places a premium on the continuation of the adversarial model of conflict between labor and management, but did not speak to current day, post Taft-Hartley statutory legislative history and practices. For instance, he indicated that "Newport News is not a straightjacket, and the NLRB, as the agency charged with interpreting the Act to reflect industrial reality, can and should interpret the Act to reflect the changes described herein."

Those changes, in his view, were Congress' adoption of the National Productivity and Equality of Working Life Act of 1975 and the Labor-Management Cooperation Act of 1978, both of which emphasized cooperative efforts between labor and management to improve the productivity of the nation's economy. He concluded by indicating that the NLRB is obligated to apply the reality of the workplace to its decisions and to bring that reality to its interpretation of law and that with the amendments to the Act, by the adoption of the Taft-Hartley Amendments of 1947, the focus of the law changed to protect employees rather than to guard against the industrial strength of the employer as was the case under the Act prior to those amendments.

Therefore, Member Raudabaugh suggested that a new test be applied which does not foreclose a fresh interpretation of Section 8(a)(2) and urged that the question of Section 8(a)(2) violations be determined by an analysis which would include the following factors:

206. Id. at 1009 (stating that "if [Employee Participation Programs] are to be lawful, Section 2(5) will have to be changed legislatively unless Section 8(a)(2) can be reinterpreted so as to accommodate such programs.").
207. 308 U.S. 241 (1939).
208. Electromation, 309 N.L.R.B. at 1012.
209. Id.
211. 29 U.S.C. §§ 173(c), 175(a), 175(b) (1988).
(1) the extent of the employer’s involvement in the structure and
operation of the committees; (2) whether the employees, from an
objective standpoint, reasonably perceive the [Employee Participation
Program] as a substitute for full collective bargaining through a
traditional union; (3) whether employees have been assured of their
Section 7 right to choose to be represented by a traditional union
under a system of full collective bargaining, and (4) the employer’s
motives in establishing the [Employee Participation Program].

In applying his test he found a violation as well and joined the
majority of Stephens, Devaney and myself. Thus, the majority con-
cluded that under the Act, as well as case law, the action committees
developed by Electromation in the manner in which they were devel-
oped and administered, and the purposes for which these committees
were created, constituted a clear violation of Section 8(a)(2).

While the issues in DuPont were similar to those presented in
Electromation, the facts were clearly different because of the union
setting in which DuPont was operating. Thus, an additional unfair
labor practice charge was included in the complaint to the effect that
the company had bypassed the union in establishing, creating and
operating the committees and dealing with the safety committees
which were the centerpiece of this dispute in violation of Section
8(a)(5) as well as Section 8(a)(2) of the Act.

DuPont had a history of developing and implementing various
programs which heightened employee concern for safety matters at its
Deepwater, New Jersey plant. Prior to 1984 the company implement-
ed its safety program through safety committees comprised solely of
managerial personnel. These committees had bestowed prizes and
various awards to employees who had been particularly conscious of
safety matters. Since August 1984 the company had also been uti-
ilizing a Personal Effectiveness Process (“PEP”) which encouraged
decision making through consensus. In 1987, the PEP program
was extended to the Safety Committees.

213. Id. at 1013.
214. Id. at 998.
216. Id. at 1.
217. E. I. du Pont de Nemours & Co., Case No. 4-CA-18737-1, N.L.R.B., ALJ slip op.
at 4-5 (May 13, 1992).
218. Id. at 4.
219. Id. at 5.
220. Id.
In 1987, the company created six safety and one fitness committee consistent with the PEP design. The General Counsel alleged in his complaint that all seven of these committees were unlawfully dominated labor organizations. The judge agreed and a Board panel of Devaney, Raudabaugh and myself agreed with the judge. Member Devaney wrote a separate concurring opinion.

The judge found that the company initiated the committees, selected the employees, offered committee membership, and determined the number of employees on each committee. Each committee’s members also included management personnel. Likewise, the judge found that while the committees continued in existence only at the will of the company, committee members served indefinite periods of time without any employee rotation on or off the committees. Employees were paid for their time spent on committee matters, as well as for performing committee functions and the company paid for all committee expenses. The judge also found that management controlled the agenda to be discussed at the meetings and approved all committee decisions. The formula for committee decision was by “consensus” which was defined as being “reached when all members of the group, including the leader, are willing to accept a decision.” A member of management acted as either leader (chairman) or resource (monitor), obliged to “keep the meeting on track.” Furthermore, the judge also found that the employees in a particular unit or group considered the committee member from that group as their representative, and that their committee participation was as a representative of the employees in their particular group or unit. The judge found that the effect of the committee structure was that the company dealt directly with the employees, rather than with the union which represented them, when their member employees took safety complaints and suggestions to the committees. Thus, he found that the committees had become “a forum for

221. _Id._
222. _Id._ at 29.
223. _Id._ at 15.
224. _Id._ at 13.
225. _Id._
226. _Id._
227. _Id._ at 15.
228. _Id._
229. _Id._
230. _Id._ at 18.
231. _Id._ at 30-31.
discussion and resolution" of problems and recommended the amount and frequency of safety awards.

The judge did not find that the Safety Conference, held "to formulate new ideas that would result in a high level of motivation and commitment for improved safety performance," was a labor organization. Employee participants were truly voluntary, advised not to act as representatives and were permitted to make any suggestions they wished. The conference was not structured as a bilateral mechanism to make specific proposals and respond to them.

The judge also found that these committee structures were implemented over the objections of the union. Although the union requested in contract negotiations with the company that a joint labor-management safety committee be developed and implemented, such proposal was rejected by the company because the company continued to resolve safety disputes directly with the committees. This enabled the company to bypass the union, in violation of Section 8(a)(5) of the Act.

The Board's majority affirmed the judge's opinion. However, Member Raudabaugh and I attempted to spell out where the employer's actions had gone amiss. Attempting to be instructive to the labor-management community, we stated that many employer-employee cooperative activities did not, in our view, violate the Act. We distinguished between "collective bargaining" and the term "dealing with" contained in the definition of labor organizations in Section 2(5) of the Act and interpreted in NLRB v. Cabot Carbon Co.

There, the Supreme Court found that the term "dealing with" was broader than the term "collective bargaining." We opined that collective bargaining is a process by which two parties "compromise their differences and arrive at an agreement" whereas "dealing with" does not require that the two sides seek a compromise. "Dealing with," in our view, is merely a "bilateral mechanism" between two parties where one makes a proposal and the other party responds by

232. Id. at 32-33.
233. Id. at 32.
234. Id. at 7.
235. Id. at 6.
236. DuPont, 311 N.L.R.B. No. 88 at 1 n.6.
238. Id. at 211.
239. DuPont, 311 N.L.R.B. No. 88 at 2 (emphasis added).
either making another proposal or rejecting the prior proposal, but compromise is not required as it is in collective bargaining. Acceptance or rejection may be, we noted, by word or deed. However, there is a distinction between "dealing" and "no dealing." For example, brainstorming or developing ideas, suggestion boxes and similar programs are not illustrations of "dealing" since no proposals are made but ideas merely generated; therefore, no response is expected.

Here we found the committee structure utilized by DuPont involved group, not individual, action communication. The committees made proposals to management outside the committees as well as inside the committees — such is inherent in the "consensus" system and it made no difference whether they were made inside or outside the committees.

The majority also noted that it made little difference that there were management representatives on the committee. If the management representatives did not form a majority of the committee membership and if the committee decision making authority was by majority vote, then there would not be "dealing" within the committee.

In his concurrence, Member Devaney stressed the conclusion he reached in Electromation, that the opportunities to develop these employer-employee cooperative programs is much broader than has been depicted by those in the labor-relations community who have criticized the Board's Electromation decision. He views the legislative history and precedent as leaving employers "significant freedom" to involve rank and file employees in matters which were formerly of management concern.

Most agree that under the current state of the law the Board had little choice in deciding these two cases. However, some argue that the Board was too narrow in its approach and that it should have interpreted the law to accommodate the present surge of cooperative labor-management program activity in the workplace as lawful.

240. Id.
241. Id.
242. Id.
243. Id.
244. Id. at 2-3.
245. Id.
246. Id.
247. Id. at 8.
248. Id. at 9.
249. Daniel Engelstein, Worker Participation Groups and Section 8(a)(2), in FUNDAMEN-
fact, there is little to suggest that the law after Electromation and DuPont is any different than it was before these two decisions were rendered. Clearly those disappointed with the Board’s unwillingness to rewrite Section 8(a)(2) have, by their outspoken criticism of the Board’s decisions, tended to chill management’s willingness to embark on cooperative labor or employee cooperative programs. The management labor bar has done little to develop suggestions for implementing employee involvement programs consistent with current law. Instead, legislative proposals have been introduced to correct what some view as antiquated interpretations of Section 8(a)(2). Only time will tell if any change will be adopted by Congress.

VI. WORK ASSIGNMENTS VS. CHANGES IN UNIT DESCRIPTION

Extant law provides that when an employer makes contract proposals which change the scope of the bargaining unit, such proposals are permissive subjects of bargaining only. Accordingly, if an employer insists upon obtaining such bargaining unit scope changes to the point of impasse, then it commits an unfair labor practice in violation of Section 8(a)(5).250 While the rule is relatively easy to state, the Board has historically had difficulty in clearly defining and applying the rule. Prior to the 1992 decisions in Antelope Valley Press251 and Bremerton Sun Publishing Corp.,252 the Board utilized an “either/or” test. Under that test, the Board was required to determine whether a company’s proposal to change the contract was a proposal to change the description of the unit or was instead a proposal to transfer work to non-unit employees.253 This is an important question for employers and unions particularly in the printing industry which is constantly confronted with changing technology.

In Antelope Valley, the employer presented the union with a contract proposal which included the following demand in its reworked contract proposal:

Notwithstanding any other provision in this agreement, the Employer
reserves the right to assign the following work to persons outside
the bargaining unit:

1. Electronic markup of display and classified advertising matter;

2. Inputting of text and graphics into electronic systems for dis-
play and classified advertising matter; and

3. Electronic make-up of display and classified matter.\(^{254}\)

This language would be included under the company proposal in the
jurisdiction provision in the contract, in addition to the language in
the expiring contract which was to remain unchanged.\(^{255}\) That pres-
ent language provided that the employer recognize the union as the
representative of all employees covered by the agreement, and that
the "[j]urisdiction of the Union, . . . begins with the markup of copy
and continues until the newspaper clears the folder and the gross
Urbanite Press."\(^{256}\) The unit, described in the expiring contract, con-
stituted of "all employees performing any such work," and that provi-
sion was to remain unchanged in the employer's contract proposal.\(^{257}\)

The union refused to accept the company proposal, and the
employer’s final offer included the same language as was included in
its earlier proposal with the additional statement that no full-time
employee would be laid off as a result of the addition of new equip-
ment from the date of contract signing until December 31, 1991.\(^{258}\)

The union continued to reject the company’s proposal and im-
passe was reached. The company then implemented its proposal and
the language in question.\(^{259}\) Thereafter, some former unit work was
performed by employees in another plant and other former bargaining
unit work was performed by employees in another department of the
plant.\(^{260}\) No employee was laid off in the plant as a result of the
new equipment.\(^{261}\) The union filed Section 8(a)(5) unfair labor prac-
tice charges alleging that the company failed to bargain in good faith
by implementing a change in the unit description.\(^{262}\)

In Bremerton Sun, the circumstances were very similar except

\(^{254}\) Antelope Valley, 311 N.L.R.B. No. 50 at 1.
\(^{255}\) Id.
\(^{256}\) Id.
\(^{257}\) Id.
\(^{258}\) Id.
\(^{259}\) Id.
\(^{260}\) Id. at 1-2.
\(^{261}\) Id. at 2.
\(^{262}\) Id. at 3.
that the employer’s contract proposal was somewhat different. In the
course of negotiating a contract due to expire in 1978, the company
had proposed the elimination of a section of the Recognition and
Jurisdiction Article of the expiring contract. The section it pro-
posed to be deleted specified that the jurisdiction of the union com-
mences with “markup of copy and continues until the material is
ready for the printing press . . . and the appropriate collective bar-
gaining unit consists of all employees performing any such work.”

In its place, the company proposed that a provision be inserted
which provided that the company could utilize new technology which
was being introduced into the newspaper industry. The union in
those earlier 1978 negotiations rejected this proposal, but the parties
entered into a supplemental agreement which allowed the company to
utilize employees outside the bargaining unit to perform work on
some new technologically advanced equipment. Keyboarding, for
example, could be done by employees in the editorial department
during the process of editing wire service copy that was entirely
received by the company’s computers. These arrangements were to
become effective upon the installation of the specified new equip-
ment. If any disagreement or inconsistency between the supple-
mental and basic labor agreements existed, the supplemental agree-
ment provided that the basic agreement was to prevail. There was
also a provision providing lifetime employment until age seventy for
twenty-two of the unit employees. The parties continued to oper-
ate under this agreement until 1987.

In its final offer during negotiations for a successor to its labor
agreement, the company proposed to change the contractual Recogni-
tion and Jurisdiction Article by deleting the statement that “the ap-
propriate collective bargaining unit consists of all employees perform-
ing any such work”; to eliminate any reference to the supplemental
agreement; to include a statement that the employer, by the inclusion
of the new jurisdiction clause, does not intend to change either the
definition of the union’s jurisdiction or the bargaining unit and that

263. Bremerton Sun, 311 N.L.R.B. No. 51 at 1.
264. Id.
265. Id.
266. Id.
267. Id.
268. Id.
269. Id.
270. Id.
271. Id. at 2.
the company "reserves the right to determine how much of the work within the jurisdiction of the Union is to be performed by bargaining unit members"; and lastly, to reserve for itself the right to assign work within the union's jurisdiction, particularly any work on new equipment, to anyone including a non-employee.272

The employer argued that the proposed language did not, and was not, intended to modify the jurisdiction provision but was only intended to incorporate what the parties had agreed upon in the supplemental agreement and that the proposal was intended to address work assignments and not unit placement.273 It stated that it would recognize the union as the representative of employees to whom the work was assigned upon a Board determination in a unit clarification proceeding.274

The Board fashioned a new test mindful of the comments of Judge Easterbrook in Hill-Rom275 in his references to attempting to categorize these types of proposals as either changes in job assignment or changes in jurisdiction.276 He said "when the same facts can be put in either category with equal plausibility, the distinction collapses . . . . Neither choice can be condemned as wrong, because in rhetorical contests of this variety there is no right or wrong."277

Thus abandoning its either/or test of job assignment, the Board determined that the question of legality would be made by first determining whether any change in unit description was proposed.278 If none was requested, but the employer sought the right to transfer work out of the unit, then the clause would be found lawful if there was no evidence that the employer tried to deprive the union of the right to include the people performing the work in the unit.279 The latter would be available to the union in a unit clarification proceeding or in a refusal to bargain context.280

The Board then turned to the application of the test in Antelope Valley and Bremerton Sun. In Antelope Valley it was found that the employer's proposal was not an effort to change the unit description;

272. Id.
273. Id.
274. Id.
276. Antelope Valley, 311 N.L.R.B. No. 50 at 38 n.7.
277. Hill-Rom, 957 F.2d at 460.
279. Id.
280. Antelope Valley, 311 N.L.R.B. No. 50 at 3.
in fact, it continued the language of the prior contract. The Board further found that the statement in the proposal under challenge, that work could be assigned to "persons outside the bargaining unit," did not mean that those persons could not be considered members of the unit. This question could be determined by a unit clarification petition, for instance. Thus, under the newly fashioned test, the Board found no violation in Antelope Valley.

In Bremerton Sun the Board did find a violation. It found that the company’s proposal had eliminated the prior contractual unit description by eliminating Section 1 of the prior agreement and that the additional language expressing the intention not to modify the definition of the bargaining unit was meaningless because in fact it was the company’s view that there was no unit description whatsoever in the agreement. Thus, the Board held that by insisting upon the deletion of the description of the bargaining unit in Article I, Section 3, the company had improperly insisted to impasse on a change in the bargaining unit — a permissive subject of bargaining.

The application of the new Board test was clearly easier to apply in Antelope Valley than in Bremerton Sun. The test’s application was significantly less clear in Bremerton Sun but still determinative. Certainly, the test was an effort to respond to the difficulty with the either/or test which Judge Easterbrook had referred to in Hill-Rom. Only time will tell whether it withstands the test of time and labor lawyer contract-drafting ingenuity.

VII. CONTRACT REPUDIATION AND THE APPLICATION OF THE SIX MONTH 10(A) STATUTE

The question in A & L Underground was whether, when an employer totally repudiates a collective bargaining agreement, that repudiation begins the running of the six month statute of limitations period of Section 10(b), so that a charge filed more than six

281. Id.
282. Id. at 3-4.
283. Id. at 4.
285. Id.
286. Id.
287. 302 N.L.R.B. 467 (1991) (Chairman Stephens, Member Cracraft and myself formed the majority. Member Devaney dissented.).
months after the repudiation would be untimely.

The facts were as follows. On June 3, 1985, the company executed a collective bargaining agreement which included an "Interim Agreement" which set forth certain changes and additions to the parties' 1981-1984 collective bargaining agreement.\(^\text{289}\) The Interim Agreement stated that the company agreed to be bound by its terms and that the company "would later, on completion of the printing of the new agreement, execute a copy of it."\(^\text{290}\) The company, a construction employer, told the union that it believed the Interim Agreement it had signed applied only to a single project.\(^\text{291}\) Some time after it signed this Interim Agreement, the company decided "not to sign another project agreement" and stopped complying with the terms of the Interim Agreement.\(^\text{292}\) In mid-July 1985, it received a copy of the new collective bargaining agreement but did not sign it and returned it to the union.\(^\text{293}\) The union first learned of the company's noncompliance in early 1986 and took no action to compel enforcement with the contract for most of that year.\(^\text{294}\) The parties stipulated that the union had actual notice of the company's repudiation not later than December 4, 1986.\(^\text{295}\) On that date, the company notified the union by letter that it was repudiating the contract in its entirety.\(^\text{296}\) Then, in August 1987, the union filed refusal to bargain charges against the company for failure to comply with the contract.\(^\text{297}\)

Until A & L was decided, the leading case on whether a charge was filed within the Section 10(b) period had been Al Bryant, Inc. which espoused the continuing violation theory.\(^\text{298}\) Under this approach, when a complaint alleges that a respondent has violated the Act by repudiating a collective bargaining agreement, the complaint is not time-barred as long as a charge is filed during the term of the agreement.\(^\text{299}\)

\(^{289}\) A & L, 302 N.L.R.B. at 467.

\(^{290}\) Id.

\(^{291}\) Id.

\(^{292}\) Id.

\(^{293}\) Id.

\(^{294}\) Id.

\(^{295}\) Id.

\(^{296}\) Id.

\(^{297}\) Id.


\(^{299}\) A & L, 302 N.L.R.B. at 467 n.4.
In A & L, the Board overruled Al Bryant. The Board reasoned that the continuing violation theory undermines the important policy goal underlying Section 10(b) by permitting dilatory conduct by the injured party that impedes the stability of collective bargaining relationships and impairs the process for adjudicating charges.\(^{300}\)

The Board further reasoned that the continuing violation theory leaves the status of the entire agreement and the parties' obligations under that agreement open for an extended period.\(^{301}\) It thus creates a lengthy period of uncertainty as to the legal effect of the repudiated agreement.\(^{202}\)

The Board also found that the continuing violation theory permits the litigation of distant events.\(^{303}\) Since the Board should look at the contract repudiation at the time of repudiation, this would naturally become more difficult to analyze as time passes.\(^{304}\)

Under A & L, once a party clearly repudiates a contract, the Section 10(b) period starts to run and a charge must be filed within six months of the date of repudiation for the charge to be timely.\(^{305}\) This rule is plainly grounded in the realities of industrial practices. When one party unequivocally states that it will no longer be bound by the contract in any way, the message is clear. The other side is on notice that the contract will no longer be honored and if there is some objection to that, a charge must be filed within six months of the unequivocal statement of refusal to follow the contract in any respect.

VIII. THREATS TO PICKET AND 8(A)(7)(C)

In United Mine Workers, Local 2236 (Hatfield Dock & Transfer, Inc.),\(^{306}\) the question of whether a certifiable union violates Section 8(b)(7)(C)\(^{307}\) by making a single, unretracted threat to picket for recognition was considered by the Board.

In September 1986, shortly after the company began operating a coal storage facility, the respondent's organizer visited the facility and

\(^{300}\) Id. at 468.

\(^{301}\) Id.

\(^{302}\) Id.

\(^{303}\) Id.

\(^{304}\) Id. at 468-69.

\(^{305}\) Id. at 470.

\(^{306}\) 302 N.L.R.B. 441 (1991) (Chairman Stephens, Member Devaney and myself formed the majority in this case. Member Cracraft dissented.).

spoke with the company’s vice president. The organizer told the employer that he would like the employer “to be UMWA.” The vice president responded that this was a decision for the employees to make. One week later, the organizer contacted the company’s vice president and repeated his recognition request. When the vice president replied that he was not interested and requested that the organizer not come on to the company’s property in the future, the organizer concluded the conversation by stating that he had done all he could to keep the pickets from shutting down the company and that picketing would begin the following Monday. While no picketing occurred the threat to picket was never retracted.

Section 8(b)(7)(C) incorporates the phrase “to picket or cause to be picketed, or threaten to picket or cause to be picketed.” Thus, it is at least arguable that this section proscribes threats to picket to the same extent it proscribes actual picketing. The Board here, however, construed Section 8(b)(7)(C) to mean that once picketing for a recognitional or organizational purpose by a certifiable union has continued for a reasonable period (not to exceed thirty days) without a petition being filed, any additional picketing or picketing threats will violate the section.

In construing the section in this manner, the Board looked to the congressional purpose which was to limit “top down” and “blackmail” organizing tactics through which unions use economic weapons to force themselves on employees, regardless of employee wishes. The Board found nothing in the legislative history, however, that indicated Congress wanted to limit the use of threats to a greater extent than actual picketing. Because Congress was willing to permit picketing for “a reasonable period of time not to exceed thirty days,” the Board found it reasonable to infer that Congress must also have been willing to permit a warning that such picketing could or would happen. Since, in this case, no picketing had preceded the

309. *Id.*
310. *Id.*
311. *Id.*
312. *Id.*
313. *Id.*
316. *Id.* at 443.
317. *Id.*
318. *Id.*
threat to picket, the Board found no violation. Additionally, since picketing had never been conducted in this case, a prerequisite to the Board’s finding that a later threat if unretracted for thirty days was a violation, the Board found there to be no violation in this case.

Apart from the legislative history analysis, the Board’s result appears practical. Without picketing ever having occurred, can an employer realistically feel coerced if there is a single threat to picket and after thirty days, or some other reasonable period of time, there still has not been any picketing?

IX. RIGHTS TO REVOKE DUES — CHECK-OFF AUTHORIZATION

In International Brotherhood of Electrical Workers, Local 2088 (Lockheed Space Operations Co.), the charging party signed a check-off authorization directing the employer to deduct from his wages his “regular membership dues” owed to the union. The authorization provided that it would be irrevocable for a one-year period or until the expiration of the present collective bargaining agreement. There was no requirement that the employee be a member of the respondent union. During the irrevocability period, the charging party sent a note to the union requesting that he be dropped from union membership. He indicated in his note that he had sent a notice to the Lockheed payroll department cancelling his union dues check-off. The union did not accept the letter as effecting a valid resignation and continued receiving membership dues deducted from the charging party’s wages.

In deciding that the union had violated Sections 8(b)(1)(A) and (2), the Board first considered the language of Section 302(c)(4). Section 302(c)(4) permits union membership dues deductions, “[p]rovided, that the employer has received from each employee, on whose account such deductions are made, a written assignment which shall not be irrevocable for a period of more than one

319. Id. at 442.
321. Id. at 322.
322. Id.
323. Id.
324. Id.
325. Id.
326. Id. at 322-23.
year, or beyond the termination date of the applicable collective bar-
gaining agreement, whichever occurs sooner.\textsuperscript{329} The Board found
that the legislative history of this section and the section's language
were ambiguous.\textsuperscript{330}

The Board relied instead on the policy of "voluntary unionism"
that, as the Supreme Court explained in \textit{Pattern Makers},\textsuperscript{331} was incor-
porated into the Act by the 1947 Taft-Hartley amendments.\textsuperscript{332} The Board also relied upon the principle that a waiver of a statutory
right must be clear and unmistakable and noted that Section 7 of the
Act protects an employee who wishes to refrain from engaging in
union activity.\textsuperscript{333} Further, the Board noted that it will not lightly im-
ply a waiver of Section 7 rights absent explicit language thereof.\textsuperscript{334}
The Board found that in this case no such waiver was present in the
check-off language, reasoning that the check-off language dealt gen-
erally with the \textit{method} by which dues payments were to be made so
long as dues payments were properly owed.\textsuperscript{335} The Board did not
deal with the question of whether such dues payments were properly
owed after a person resigned his membership.\textsuperscript{336} In essence, the
Board held that, absent explicit waiver language, when an employee
resigned his membership in the union he is absolved of any obliga-
tion to pay dues.\textsuperscript{337}

The result appears to comport to the reality of the workplace.
The average employee understands that he pays dues only for as long
as he is a union member and thus, he should not be expected to
parse the technical check-off language.

However in \textit{United Postal Service},\textsuperscript{338} another case reviewed up-
on remand from the Ninth Circuit,\textsuperscript{339} the Board interpreted the Postal
Reorganization Act of 1970 (hereinafter "PRA").\textsuperscript{340} The Board had
originally found prior to appeal that where an employee resigned his

\textsuperscript{329} Id.
\textsuperscript{330} \textit{Lockheed}, 302 N.L.R.B. at 325.
\textsuperscript{331} \textit{Pattern Makers' League v. NLRB}, 473 U.S. 95 (1985).
\textsuperscript{332} Id. at 106.
\textsuperscript{333} \textit{Lockheed}, 302 N.L.R.B. at 327. \textit{See also} \textit{Metropolitan Edison Co. v. NLRB}, 460
\textsuperscript{334} \textit{Lockheed}, 302 N.L.R.B. at 327 n.18.
\textsuperscript{335} Id. at 328.
\textsuperscript{336} Id. at 329.
\textsuperscript{337} Id.
\textsuperscript{339} 827 F.2d 348 (9th Cir. 1987).
membership, his check-off authorization ceased. Section 1205(a) of the PRA contains different wording from the NLRA with respect to the deduction of periodic dues. The PRA wording provides that dues may be deducted if the Postal Service "has received from each employee, on whose account such deductions are made, a written assignment which shall be irrevocable for a period of not more than one year." The Board found that, under the PRA, some period of check-off irrevocability was required, while the words of the NLRA allow for, but do not mandate, a period of irrevocability. Under this plain meaning, the PRA, according to the Board, permits the employer to continue to check-off dues independent of union membership. The Board also observed that, unlike the NLRA, Congress did not want postal employees to be bound by any form of compulsory unionism. Thus, while there was a broad proscription against any form of union security arrangement, Congress gave back to the unions some part of what they had lost in the union security area when it provided for dues check-off irrevocability.

X. OTHER DECISIONS

Irrespective of the method used to select cases in a review of this type, there are those who may view my conclusion reached in this discussion the result of the selection of the decisions analyzed. Therefore, to provide additional breadth, a brief mention of the following cases is also helpful.

In W. A. Krueger Co., the Board found that an employer may not unilaterally change wages, hours and working conditions prior to the certification of the results of a decertification petition without violating Section 8(a)(5) of the Act.

In Catalytic, Inc., the Board deferred to a contractual grievance settlement between the employer and the union prior to arbitration. The settlement was opposed by the grievant and a different union which was neither the bargaining representative of the grievant

343. Id.
346. Id.
348. Id. at 918.
nor a party to the contract.\textsuperscript{350}

In Solar Turbines, Inc.,\textsuperscript{351} the Board held that the employer had permanently replaced striking employees, even though the replacements were required to satisfactorily pass a physical examination after the strikers had applied for reinstatement.\textsuperscript{352}

In Stockton Roofing Co.,\textsuperscript{353} the Board found that a recently expired Section 8(f) contract was an adequate showing of interest to process a representation petition.\textsuperscript{354}

In Makro Inc.\textsuperscript{355} and Oakwood Hospital,\textsuperscript{356} the Board found state court jurisdiction was preempted when the General Counsel filed an unfair labor practice complaint.\textsuperscript{357}

In Southwick Group,\textsuperscript{358} the Board found that the merger of two local unions was lawful since there was continuity of representation and benefits.\textsuperscript{359}

In Laidlaw Waste Systems, Inc.,\textsuperscript{360} the Board overruled Hutchison-Hayes International, Inc.,\textsuperscript{361} and Westbrook Bowl,\textsuperscript{362} to the extent that they were inconsistent with Laidlaw. Laidlaw held that an employer must show a loss of majority status by a preponderance of the evidence rather than "clear, cogent, and convincing" evidence, a standard previously applied.

In Gitano Group, Inc.,\textsuperscript{363} the Board overruled its spin-off theory of Coca Cola Bottling Co. of Buffalo\textsuperscript{364} and found that the obligation of an employer to recognize a union at a new location will be determined by the number of employees represented by the union at the former location who were employed at the new location, and if such constituted a majority of the employees at the new location, recognition would be required at the new location.\textsuperscript{365}
Finally, in *Sunland Construction Co.* and *Town & Country Electric, Inc.*, the Board ruled that an employer violates the Act when it refuses to hire fully qualified applicants who are announced paid union organizers who would continue their organizational activities while employed by the company.

**XI. A SUMMARY OF THE BUSH BOARD**

After the above review and a study of the cases decided by the Bush Board has been made, is there any common stream that can be perceived? Was it administratively efficient? Was the Bush Board pro-management, or pro-labor? Did it protect the rights of employees and their individual desires? Was it proactive, or did its decisions reflect constraints?

**A. Administrative Effectiveness**

Commencing with a review of the Board's record of case issuance, it is clear that the Board did make an effort to reduce the number of old cases which clearly should have been decided by previous Boards. Its reduction in cases over five and two years old, from the earlier high of sixty unfair labor practice cases and six representation cases, to nine unfair labor practice cases and one representation case, is noteworthy. It clearly indicates a commitment to efficiency and industry as most of these aged cases contained difficult factual situations with thorny issues. It also evidences a sensitivity to congressional and judicial concern.

On the other hand, the Bush Board was blessed with no turnover during the 1990-1993 period except for the loss of Member Cracraft in 1992, reducing the Board to four members. However, even operating one member below normal strength, the Board continued to reduce its aged case backlog. It was not afflicted with the time delaying need to reassign cases to a newly appointed Board Member, or a review and restudy of proposed decisions as would have been the case had it been necessary to construct new three-member panels to

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369. See supra text accompanying notes 12-16.
accommodate a new Board member. Since there was no appointment made by the President to replace Member Cracraft, the four members learned each other's views on various subjects and were able to expedite the decision-making process. Thus, for whatever combination of reasons, the Board's record of case production and backlog reduction should be commended.

Some argue that even having nine unfair labor practice complaint cases and one representation case over two years old is inexcusable and indicates inefficiency of substantial proportion. I would agree that the Board should not have any cases which are over one year old except in the rarest of circumstances. In the main, the Bush Board should be given more than a passing grade on its case production during its term.

B. Decisional Record

Irrespective of the Bush Board's decisions which one selects to evaluate, a number of conclusions can be reached. Initially, it seems clear that the Board's decisions resulted in a number of instructive rules which advised the parties how to govern their future actions. Still, direction was provided by some decisions. For example, in Willamette and Dubuque labor and management were instructed when and how to fulfill their obligation to bargain; in Sunland and Town & Country, employers were advised of unlawful hiring procedures; in Makro and Oakwood parties were notified when continued processing of state court litigation would constitute an additional violation of the Act; and in Gitano direction was given on how an employer should determine whether it has an obligation to bargain with an old union.

Secondly, it seems that the Bush Board acted in more of a judicial than legislative capacity for it followed established case law and distinguished prior decisions. In Electromation and DuPont it

373. See supra text accompanying notes 88-94, 117-20, 138-44.
378. See supra text accompanying notes 355-57.
380. See supra text accompanying notes 363-65.
The Bush NLRB in Perspective resisted the temptation to rewrite the law (or to redefine the parameters of previous decisions as some suggested it should). In *Sunland* and *Town & Country*, it followed long established legal principles even though the tactics the unions adopted were repugnant to some. The Bush Board could not be viewed as pro-active, but rather as one that performed its duties consistent with the standards of judicial constraint, irrespective of whether its members were always comfortable with a given decision.

Thirdly, its decisions attempted to speak to the realities of time and the workplace. *Willamette*, the case which overruled *Walter Pape*, provided a more appropriate standard which addressed the practicalities of modern purchase and sale negotiations. In *Stockton*, the Board found a realistic solution to the showing of interest question presented by Section 8(f) contract situations by finding that the expired Section 8(f) contract provided a showing of interest sufficient to support a Section 9 representation petition. While the Board could have embarked on a circuitous road to find other evidence of employee interest, it instead adopted a simple, straightforward rule providing that the expired contract was sufficient.

Lastly, regardless of the method one uses when selecting Bush Board cases to examine (by topic, by section of the Act considered, by date of issuance or union involved, etc.), it is impossible to conclude that the decisions of the Bush Board favored the employer over the union or vice versa. In sum, while members of the labor-management community, including Board members, may have differences of opinion as to the result in a given case, most, if not all, will agree that members of the Bush Board "called 'em as they saw 'em."

It cannot be persuasively argued that the Bush Board's decisions created giant deviations in the law under the Act. Although it obviously made interpretive refinements, it deferred, as it should have under our constitutional system, any major changes or corrections in direction of the law to the Congress. If this Bush Board leaves any

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383. See supra text accompanying notes 200-05, 236-49.
386. See supra text accompanying notes 366-68.
389. See supra text accompanying notes 117-20, 138-44.
391. See supra text accompanying notes 353-54.
message to history it will be that, though it was sorely tempted to
make or rewrite the law, it is the Board's obligation to only interpret
the law and to be mindful of workplace reality and the practical
ramifications of its decisions as it exercises its statutory obligations.
Therefore, the Bush Board should receive "good marks" on the man-
ner in which it fulfilled its decisional obligations.

XII. CONCLUSION

A More Efficient Playing Field is Needed

The purpose of this discussion has been not to critique or com-
mend the Bush Board but rather to attempt to evaluate the efficacy of
the present rhetoric from some academics, union leaders, and even
some in the current administration, that America needs to level the
playing field between management and labor.

With the percentage of unionized employees in America currently
lower than at any time in recent history and with the economy still
floundering, concededly, we all seem to wonder if there is not a
better way to operate and compete amongst ourselves and with our
foreign competitors. However, there is little proof to date that a
change in the labor law will allow us to compete more effectively.

There are those who claim that one of the reasons for the mal-
aise in our economy is that the Act is outdated and antiquated. They
claim the Act does not accommodate the needs of the workplace,
exemplified in cooperative labor-management programs as they exist
today, new forms of employment (i.e., leased employees and the like)
and other recent employment practices prevalent in the workplace of
the 1990's.

These critics conclude that the only solution is a wholesale
amendment to the Act by instituting such changes as:

• Arbitration of the terms of a first contract when the parties cannot
reach an agreement.

• Employer recognition of a union to represent all of the employer's
employees in a unit, if 55-60% of those employees sign cards pro-
ferred by the union, authorizing the union to represent them.

• Employer recognition of minority unions.
- Strengthening the right of associations so employer property rights would become subservient to those association rights.

- Eliminate management prerogatives.\textsuperscript{392}

However, the adoption of changes such as those suggested by Professor William Gould would not be amendments to the current law; it would result in a reconstruction of the statute. Essentially, it would require a new law, with new parameters and new doctrines, which would burden the economy and the labor-management community with new concepts. These new legal concepts and requirements would probably spawn additional litigation aimed at testing the legality of the new statutory concepts.

If the labor-management community had just experienced a Board that was decidedly impartial, toward either management or labor, or one that revised the current body of workplace law, there might be a justification for such a drastic change in the law. But, until those proposing these changes in the law can document the need for such drastic legislative reform, for reasons other than the unions' inability to organize a greater number of new employees, Congress should not seriously consider the suggested changes of the Act. Our energies as a nation, in both Congress and the workplace, should be aimed at solving the problems of crime, unemployment, foreign competition, racial tension and respect and not at changing the law so that another special interest group can prosper.

However, there is no question that our energies should be directed to developing a more efficient decisional process, a process that attempts to curtail, not generate, litigation. In this regard, if labor and management are truly anxious to improve the manner in which we resolve disputes, the following are but a few suggestions of action that could increase decisional efficiency:

- Reconstruct the manner in which Board Orders are enforced. Change the present procedure by providing that Board Orders would be self-enforcing sixty days after issuance unless a party files a notice of appeal and processes such an appeal. This would eliminate the need for the Board to seek enforcement in most cases.

• Adopt an amendment to the law which provides that a Certification of Representative after an election shall be a final decision and shall also contain an Order that the certified representative and the employer be required to commence bargaining unless an appeal of the election process is filed within thirty days from the Board's dismissal of the objections or its decision concerning them.

• Amend the Act so that Board lawyers need not take time, while preparing decisions, to read the entire transcript in a given proceeding, but rather empower the Board to hire other personnel, such as para-professionals, to read and digest transcripts of testimony as is the practice elsewhere.

• Change the statute to provide that any Board member who does not act on a decision for three weeks after the majority has voted on the case shall be instructed that the decision will issue within one week with his or her dissent noted. Thereupon, the decision would be issued without dissenting opinion.

I suggest that the aim should be to improve the manner in which the National Labor Relations Board administers and delivers its decisions to the workplace parties, not to change the law. By further expediting the delivery of decisions to the parties, the Act will become more relevant to the issues with which the parties are confronted, and thus, in this writer's view, make the field more playable.