Collective Bargaining in the 80's: A Prospective Analysis

Stephen E. Tallent
Burton J. Fishman

Follow this and additional works at: http://scholarlycommons.law.hofstra.edu/hlelj

Recommended Citation
Available at: http://scholarlycommons.law.hofstra.edu/hlelj/vol1/iss1/8
COLLECTIVE BARGAINING IN THE 80's:
A PROSPECTIVE ANALYSIS

Stephen E. Tallent* & Burton J. Fishman**

INTRODUCTION

During the decade and a half following the Second World War, labor-management relations were in their halcyon years. Perhaps it was because the war had functionally suspended the normal operation of such relations and the end of the war provided the opportunity for expressing years of pent-up hopes and anxieties, but for any reason, the post-war period is marked by judicial decisions, Board rulings and Congressional actions which increased both the value of free collective bargaining as the means by which "labor peace" was to be achieved and the virtue of labor arbitration as the preferred vehicle for dispute resolution. It is our belief that during this period, and in large part because of the positions taken by the Board, the courts, and Congress, labor and management made substantial progress in establishing a structure which had the potential for solving some of the institutional problems which confront management and labor.

The next fifteen year period, however, produced something of a reaction. Both labor and management began to cast about for additional means by which to improve their relative positions. In this attempt, they joined the powerful trend that developed in the late 1950's of turning to the federal government for solutions to problems that had heretofore rested in their own hands. If anything, management and labor were both too successful, for they succeeded in codifying a variety of aspects of the workplace which traditionally had been the fruits of collective bargaining. As a result, a series of statutes were passed which changed the patterns of labor-management relations. Indeed, management may have started the trend by seeking and succeeding in winning the passage of the

---

** Gibson, Dunn & Crutcher (Washington, D.C.), J.D. Yale University, 1979.
2. E.g., General Shoe Corp. and Boat and Shoe Workers Union, A.F.L., 77 NLRB 124 (1949).
Landrum-Griffin Act in 1959. There followed in rapid succession the Equal Pay Act of 1963, Title VII of the Civil Rights Act of 1964, the Age Discrimination in Employment Act of 1967, the Vocational Rehabilitation Act, in its several iterations, the Occupational Health and Safety Act of 1970, and, as pervasive as any although not so widely known, the Employee Retirement Income Security Act (ERISA) in 1974. Although this list is extensive, it does not catalogue the many similar initiatives undertaken on the state level.

With each new statute, some part of the traditional armory of the parties to collective bargaining was removed, some consigned to the employees' benefit and some to the employers'. Each new piece of legislation removed something from the reservoir of offers and demands that constituted the collective bargaining process.

The courts, as well, contributed to the expansion of the role of non-parties to the collective bargaining process. An illustrative example of judicial intervention in the realm of collective bargaining is the development of the cause of action known as the "duty of fair representation." In a series of decisions culminating in Vaca v. Sipes, the courts effectively created a federal cause of action for individual employees who felt unfairly treated by their collective bargaining representatives or by the contract those representatives negotiated. The impact of "duty of fair representation" litigation is well known to all those familiar with grievance arbitration. Surely, no arbitrator is unfamiliar with receiving a grievance in which the "message" is also transmitted that the parties would not be arbitrating the grievance but for some legal advice that the possibility of a duty of fair representation suit alone makes arbitration a better and less expensive method of resolving the problem, even though the arbitrator and, perhaps, the parties realize that the grievance is without merit.

11. It is not possible within the narrow confines of this paper adequately to explore the development of case law in any one of the areas mentioned above. "Illustrative examples" must suffice. We recognize that examples illustrating a contrary point can be found, but maintain, nonetheless, that the general trend we identify accurately reflects the developing case law.
13. The Supreme Court has again made clear that a union refuses to pursue a member's grievance at its peril. In Bowen v. U.S. Postal Service, 51 U.S.L.W. 4051 (U.S. Jan. 11, 1983) (No. 81-525), the Court held that where the union has breached its "duty of fair representation"
If the passage of the Landrum-Griffin Act is a convenient marker for the beginning of the period of the growth of governmental involvement in matters previously the substance of collective bargaining, then, as convenient a marker for the end of the era is the failure of the Labor Law Reform Act of 1978.\textsuperscript{14} As is the case with most significant markers, it is really an event around which other events coalesce and give meaning to each other. It is our view that since 1978 it has been the tendency of the Burger Court and the Board to reflect the mood of Congress and join in the general trend of returning the burdens and benefits of collective bargaining to the parties.

\section*{The "Rules" Governing Collective Bargaining Will Not Be Changed}

\textit{Supreme Court Rulings}

Beginning, perhaps, in 1977 with \textit{TWA v. Hardison},\textsuperscript{15} in which the Court ruled that Title VII's ban against religious discrimination requires only that an employer make "reasonable" attempts to accommodate the religious needs of an employee, the Court has made clear that it was joining the movement to leave collective bargaining parties to their own devices with the "rules" more or less unchanged. \textit{Hardison} was followed soon thereafter by \textit{NLRB v. Catholic Bishop of Chicago}.\textsuperscript{16} Although broadly and properly construed as a First Amendment case, what was also at issue was the Board's continuing expansion of its jurisdiction over elements of the work force that were only questionably within the Board's Congressionally established ambit. In the \textit{Catholic Bishop} case, the Court held that the Board is not permitted to assert its jurisdiction over lay faculty at church-operated schools when such an assertion would necessarily entangle the Board in religious affairs in violation of the First Amendment.\textsuperscript{17}

\footnotesize{by failing to take a member's valid grievance to arbitration, the affected employee may sue both the employer and the union for damages and collect from both. See also \textit{Scott v. Anchor Motor Freight, Inc.}, 496 F.2d 576 (6th Cir. 1974), \textit{cert. denied}, 419 U.S. 868 (1974) (jury may properly determine the legal effect of the grievance procedures in a collective bargaining agreement). Discovering a means of limiting the countless arbitrations which the \textit{Bowen} ruling very likely will generate is one of the more pressing challenges facing collective bargainers in the '80's. See infra, for a discussion of \textit{UPS v. Mitchell}, 451 U.S. 56 (1981), which may define a limit to "duty of fair representation" causes of action.}

\textsuperscript{15} 432 U.S. 63 (1977).
\textsuperscript{16} 440 U.S. 490 (1979).
\textsuperscript{17} The Court, however, relied as much on the scope of the National Labor Relations Act [29 U.S.C. § 151 (1976)] as it did on the Constitution in rendering its decision: [J]n the absence
The holding in *Catholic Bishop* can be seen as foreshadowing the ruling in *NLRB v. Yeshiva University*.\(^8\) In *Yeshiva*, the Court took a rather traditional, albeit controversial, view of what constitutes a management employee. The Court held that college faculty members who play a significant role in determining the nature and substance of their work are outside the protections of the National Labor Relations Act. These rulings were not, we believe, “anti-Board.” Rather, they are part of a studied effort by the Court to read the Act as establishing legislative boundaries to the Board’s jurisdiction and not merely as having established Board authority over the uncharted territories of “employment.” That limiting attitude is further revealed in *NLRB v. Hendricks County Rural Electric Membership Board*.\(^9\) There, the Court refused to expand the “confidential employee” exclusion under § 2(3)\(^{20}\) of the Act to include an “executive secretary.” Rather, the Court ruled that only those who satisfy the Board’s “labor-nexus” test, e.g., those “who assist and act in a confidential capacity to persons who formulate, determine and effectuate management policies in the field of labor relations” can be excluded from the protections of the Act.\(^{21}\)

The recent ruling in *First National Maintenance Corp. v. NLRB*\(^{22}\) also has a role in the general trend we have been describing.

---

of a clear expression of Congress’ intent to bring teachers in church-operated schools within the jurisdiction of the Board, we decline to construe the Act in a manner that could in turn call upon the Court to resolve difficult and sensitive questions arising out of the guarantees of the First Amendment Religion Clauses.

Id. at 507.

21. 454 U.S. at 189 citing B.F. Goodrich Company, 115 NLRB 722, 724 (1956). See also Hi-Craft Clothing Company v. NLRB, 660 F.2d 910, 912 (3rd Cir. 1981); supervisor has no independent rights under the NLRA “chilling effect” argument of NLRB without merit).
22. 452 U.S. 666. The impact of *First National Maintenance* will apparently need time to affect the Board. In *Milwaukee Spring Division of Illinois Coil Spring Company*, 265 NLRB No. 28, 111 L.R.R.M. 1486 (1981), the Board found that the employer’s decision to close its assembly operations and move them to a plant in another state was a “midterm modification” of the collective bargaining agreement in violation of § 8 (d) of the Act, even though the employer’s decision was economically motivated and not the result of union animus. *First National Maintenance* was distinguished as pertaining solely to determining what issues are mandatory subjects of negotiation. The Board noted that negotiating about the planned relocation was not an issue in *Milwaukee Spring*, and, thus, *First National Maintenance* “has no bearing on this case.” (Slip op. at 11, N. 4). For a discussion of *Milwaukee Spring*, see Quarterly Report of NLRB General Counsel Lubbers (December 1981), Daily Labor Reporter No. 3 (BNA), §D (Jan. 5, 1983). The General Counsel indicates that the holding of *Milwaukee Spring* applies to subcontracting as well as relocating work under § 8(a)(1) and (5).

This area of the law promises to be one of the most active and contested in the coming months. See, e.g., Maietta Contracting, 265 NLRB No. 161 (Dec. 16, 1982) (subcontracting of

http://scholarlycommons.law.hofstra.edu/hlelj/vol1/iss1/8
In *First National Maintenance*, the Court ruled that the employer has no duty to bargain with the union as to the decision to close down all or part of its business. The decision becomes much less controversial when seen as part of a larger trend of not altering the basic "rules" of collective bargaining. The Court concluded that parties to a collective bargaining agreement will retain their traditional economic weapons and their obligations as partners in the undertaking but, the Court also stressed that the parties must maintain their roles as adversaries with individual aims and individual means.

**Circuit Court Rulings**

The lower courts and the Board, insofar as it is possible to find unifying themes in so diverse a body of cases as they decide, also have followed and participated in the trend we are describing. With a majority of the current Board determined to recognize the rulings of the circuit courts regarding the Board's decisions, the positions taken by the lower courts have a new significance in labor law. Principal among the recent decisions of the circuit courts are two concerning the distinction between hard bargaining and surface bargaining.

In these significant decisions, the Sixth and the Ninth Circuits both refused to enforce Board orders against employers that were based on the Board's conclusions that the employers had engaged in "surface bargaining" in an attempt to evade their bargaining obligations under the Act. In both cases, the appellate courts concluded that what was before them was simply "hard bargaining." The Circuit Courts found that the Board's conclusions were based on the incorrect assumption that the "acceptability" of an employer's proposals to the union is the touchstone for bad faith. Contrary to the Board's assumption, the Courts pointed out that good faith bargaining does not require either party to make proposals acceptable to its opponent.

In *Pease Company v. NLRB*,23 eighteen bargaining sessions were held between December 15, 1976 and March 13, 1977, at which date the case was heard by an Administrative Law Judge. The contract between the employer and the Ohio Valley Carpenters District Counsel had expired on February 28, 1977. Although the parties

---

exchanged proposals throughout January and February, on February 25, the union voted to strike as of March 1 and did so after an unproductive negotiating session on February 28. During the strike, the parties continued to meet. The parties were far apart on most major issues and, indeed, hardened their positions during the strike period. On April 13, six weeks after the strike began, the Company withdrew its cost-of-living proposal, proposed that the union security clause for employees hired after March 1 be eliminated, and proposed that supervisors be permitted to do union work. By mid-June, the company had hired approximately 220 replacements and its three unionized plants were operating.

The Board found that the company had violated §§ 8(a)(1) and (5) by failing to bargain in good faith and found, further, that the strike was an unfair labor practice strike from its inception. The appellate court reversed on all grounds. The court stated that "the 'acceptability' of its [the employer's] proposals to the Union is the touchstone from which all the Board's findings of bad faith emanate. This approach has led the Board astray, because good faith bargaining does not require the company to make proposals that are acceptable to the Union."25 Citing NLRB v. United Clay Mines,26 the court went on to state that "a lack of good faith may not be found merely because a party attempts to secure provisions that the other party deems unacceptable, but rather may be found only from 'conduct clearly showing an intent not to enter into a contract of any nature.'"27 As to whether the Company made enough concessions on issues of substance, the Court was extremely clear in finding the ALJ in error. Citing its earlier decision in McCort v. California Sports, Inc.,28 the Court stated "[N]othing in the labor law compels either party negotiating over mandatory subjects of collective bargaining to yield on its initial bargaining position; good faith bargaining is all that is required."29 On the vexing issue of the conduct of the parties in bargaining during the strike, the court held that simply because the employer withdrew a proposal made prior to the strike, this was no indication that the employer was seeking to insure that no agreement would be reached. The Sixth Circuit also held that "[A]n employer has the right to withdraw proposals made before a strike to reflect the

24. §§ 8(a)(1) and (5), 29 U.S.C. §§ 158(a)(1) and (5).
25. 666 F.2d at 1049.
26. 219 F.2d 120, 125 (6th Cir. 1955).
27. 666 F.2d at 1049. See also NLRB v. Insurance Agents, 361 U.S. 477, 485 (1960).
28. 600 F.2d 1193, 1200 (6th Cir. 1979).
29. 666 F.2d at 1050.
changed economic background.” Further, the mere fact that the union felt it must strike was not an indication of bad faith bargaining. The employees “have no right to insist that Company proposals be acceptable to them without the need to resort to a strike to attempt to gain desired concessions.” Summing up, the court cited NLRB v. American National Insurance Co., for the proposition that “the law is well-settled that ‘the Board may not, either directly or indirectly, compel concessions or otherwise sit in judgment upon the substantive terms of collective bargaining agreements.’”

The Ninth Circuit in Pittsburgh-Des Moines Steel Co. v. NLRB, came to a similar conclusion in an unusually similar situation. In Pittsburgh-Des Moines, the Teamsters struck two bargaining units of the company when the two separate contracts expired at the end of March 1979. A number of bargaining sessions had taken place prior to the strike. In mid-May, management proposed a two-year renewal of the old contract with two significant changes; one to permit discharge of violators of the no-strike clause, and the other to abandon the union’s welfare and pension fund in exchange for a qualified ERISA plan using a reliable insurance company. After considerable bargaining on these issues, the company prepared drafts, on June 10, incorporating the employer’s two changes. On July 12, after having heard nothing further from the union, the employer withdrew its last contract proposal but it suggested that negotiations continue “in the immediate future.” On July 16, in apparent response to the employer’s action, the union filed an unfair labor practice charge alleging that the company had refused to execute a contract already agreed to by the parties. The Regional Director advised the union that no complaint would be issued and the union withdrew its charge. The union then signed the draft agreements the company had sent on June 10 and forwarded them to the company. The company responded that the proposals in the drafts had been unconditionally withdrawn, and are, therefore, rejected. The company stated its continued readiness to bargain and further stated that a counterproposal would be forthcoming. On September 11, the company’s proposals were sent to the union. Throughout the following month, the company repeatedly offered to negotiate, to explain its present proposals, and to consider any union

30. Id. at 1051.
31. Id. at 1049.
32. 343 U.S. 395, 404 (1952).
33. 666 F.2d at 1051.
counterproposals. The union consistently refused to re-open negotiations on any grounds other than the June 10 proposals made and withdrawn by the company.

On the basis of these facts, the Administrative Law Judge concluded that the General Counsel's contention, which found that the company's conduct constituted "surface" bargaining, was totally without merit. The Board concluded otherwise and overruled the ALJ. The Board stated: "[w]e conclude that by withdrawal of its original proposals tentatively agreed upon and by the substitution without explanation of regressive proposals, Respondent has failed to bargain in good faith . . . ." The Ninth Circuit, exhibiting some impatience, unanimously refused to enforce the Board's order. On the contrary, the appellate court held that the record demonstrated a desire on the part of the company to reach agreement "and the union's unreasonable insistence to point of impasse that agreement had already been reached." Specifically, the court held that the unconditional withdrawal by the company of its earlier proposal can in no way be construed to constitute a tentative agreement by the parties. The court went on:

We must assume that the proposal, advanced in the course of the strike, was the result of compromise and that concessions may well have been tendered in some areas with the hope of securing agreement on those provisions which the Union chose to reject. "To bargain collectively' does not impose an inexorable ratchet, whereby a party is bound by all it has ever said."

**Board Rulings**

The influence of *Pease*, and *Pittsburgh-Des Moines*, on the Board regarding what constitutes "surface" bargaining is seen in the Board's recent decision in *Chevron Chemical Company*. In that case, the Board set aside the Administrative Law Judge's decision and dismissed a series of §§ 8(a)(3) and 8(a)(5) charges, specifically for the reasons stated in *Pease* and *Pittsburgh-Des Moines*. In *Chevron*, the Oil Chemical and Atomic Workers union was involved in

---

35. 663 F.2d at 959, citing the Board.
36. Id.
37. Id. at 960 citing NLRB v. Tomco Communications, Inc., 567 F.2d 871, 883 (9th Cir. 1978). See also NLRB v. Randle-Eastern Ambulance Service, Inc., 584 F.2d 720 (5th Cir. 1978); but see NLRB v. Pacific Grinding Wheel Co., 572 F.2d 1343 (9th Cir. 1978), enforcing 220 NLRB 1389, 90 L.R.R.M. 1557 (1975).
40. 261 NLRB No. 4, 110 L.R.R.M. 1005 (1982).
41. §§ 8(a)(3) and (5), 29 U.S.C. §§ 158(a)(3) and (5).
bargaining for an initial contract for clerical employees at one of Chevron's plants at which the union also represented the production and maintenance workers (P and M). OCAW had bargained successfully for the P and M Unit in the past. Over twenty bargaining sessions were held between August 1977 and February 1978. No contract was agreed to and, in late February, the clerical unit membership voted to strike. Fifteen of the twenty-three clerical employees remained on strike until May 17 when unconditional offers to return to work were made. By then, Chevron had permanently filled all but one of the strikers' positions. That position was offered to the union, as was another that came open subsequently.

Based on these facts, the ALJ found that Chevron had violated § 8(a)(5) by bargaining in bad faith or indulging in "surface" bargaining and that the strike was caused or prolonged by such unfair labor practices. Consequently, the ALJ found a § 8(a)(3) violation in that the employer failed to reinstate all strikers as unfair labor practice strikers.

The Administrative Law Judge agreed with the General Counsel's theory that the surface bargaining could be found on the basis of the company's proposal of a broad management-rights clause and a no-strike clause which were "predictably unacceptable" to the union. Despite the fact that the company modified its initial proposals, the ALJ concluded that even in its initial proposals, the company had demonstrated a lack of good faith. The basis for such a conclusion was stated by the General Counsel who noted that Respondent's wage offer was far below what a "self-respecting" union could take back to its members.

The Board reversed. Citing Pease and Pittsburgh-Des Moines, and relying as well on NLRB v. American National Insurance Co. and NLRB v. Insurance Agent's International Union, AFL-CIO the Board agreed with the employer's contention that the ALJ erred in basing his decision almost entirely on his own evaluation of the substantive terms of the company's proposals and his own assessment of whether the parties' economic weapons were "fairly" used. After analyzing each of the contract proposals at issue, the Board concluded that the proposals indicate hard bargaining by both sides, each desirous of improving its position, vis a vis the other as measured by the existing P and M contract . . . Apart from the contract proposals themselves, the conclusion that Respondent met its obligation to bargain in good

42. 343 U.S. 395 (1952).
43. 361 U.S. 477 (1960).
faith is supported by other factors which we deem relevant in our consideration of the totality of the circumstances revealed by the record. The record as to the actual negotiations reflects no refusal by Respondent to meet and confer to provide information. It reflects no adamant refusal by Respondent to make concessions in its bargaining positions, or failure or refusal to provide justification for its bargaining posture. Nor does the record suggest that the parties were at an impasse when a strike was called.\(^{44}\)

Although the annals of the Board reveal a number of instances in which an employer’s “hard bargaining” was not found to be a valid basis for an unfair labor practice charge, in recent years, the Board has been fairly consistent in finding that if an employer maintains a hard bargaining stance including and beyond a strike, as part of which more generous offers are withdrawn, a failure to bargain in good faith will be found.\(^{45}\) Thus, the decision in the \textit{Chevron} case is quite significant. However, the Board made clear that it was basing its decision on the facts before it [see n. 10 of the Board’s decision] and makes no reference to the continued validity of its earlier rulings. In any event, the reference to the recent appellate decisions indicates an awareness by the Board that its earlier ostrich-like posture is no longer viable. The Board’s decision in \textit{Chevron}, reflecting as it does a renewed adherence to the standards voiced by the Supreme Court in \textit{American National Insurance},\(^{46}\) indicates again a new pragmatism and a willingness to leave the parties to their own devices.\(^{47}\)

In a long-awaited decision, the Board ruled that a union may not restrict the right of members to resign before or during a strike nor fine such members if they do resign. In \textit{Machinists Local 1327, IAM (Dalmo Victor)},\(^{48}\) the union’s constitution made resignation within 14 days of a strike punishable by a fine. The Board held that it was an unfair labor practice for the union to link a restriction on resignation to the occurrence of a strike.\(^{49}\) The Board’s agreement ends there.

\(^{44}\) 261 NLRB No. 4 Slip op. at 11-12, 110 L.R.R.M. at 1008.


\(^{46}\) 343 U.S. 395.

\(^{47}\) The renewed willingness to permit the parties to work out their own differences is seen also in the recent NLRB decisions in Minnesota Mining and Manufacturing Company, \textit{et al}, see infra notes 86–88.

\(^{48}\) 263 NLRB No. 141, 111 L.R.R.M. 1115 (1982).

\(^{49}\) \textit{Id.} slip op. at 11, 111 L.R.R.M. at 1118.
Members Fanning and Zimmerman go on to advise unions that if they include a 30-day notice for resignation in all circumstances, they would consider such a provision as "a reasonable accommodation between the right of union members to resign . . . and the union's responsibility to protect the interests of employees who maintain their membership . . . ."50 Chairman Van de Water and Member Hunter, however, absolutely rejected the presumptive validity of a 30-day limitation. Describing the promulgation by their colleagues of such a rule as "arbitrary" and "contrary to fundamental principles of the Act," Van de Water and Hunter announced that they would regard "the imposition of any fines or other discipline premised upon such restrictions to be violative of Section 8(b)(1)(A)."51

The result in Dalmo Victor is particularly unsatisfying, as a conclusive decision on this issue had been awaited since the Board first ruled in 1977.52 It appears that a "more final" ruling will have to wait for the next "restriction on resignation case," as the issue in Dalmo Victor is not one that will disappear. If unions can make resignation so costly as effectively to assure that no member will resign against the wishes of the union, then employers will be certain to consider union security clauses as effecting a critical shift in economic leverage and will take a bargaining position regarding such clauses accordingly.

In another of its more recent rulings, the Board has resolved, at least for now, the treatment of campaign propaganda along the pragmatic lines set out in Chevron.53 In Midland National Life Insurance Company,54 the Board held that in a representation election, the parties are free to engage in campaign propaganda and puffery, the employees are free to separate the fruit from the chaff, and the Board will not intervene to set an election aside absent the presence of forged documentary campaign materials. In short, the decision in Midland National Life returns the Board's position regarding misrepresentations during an election campaign to that taken previously in Shopping Kart Food Market, Inc.55 That short-lived refinement of the holding in Hollywood Ceramics Company, Inc.,56 was itself supplanted in General Knit of California

50. Id. at 12, 111 L.R.R.M. at 1118.
51. Id. at 15, 111 L.R.R.M. at 1119.
53. 261 NLRB No. 4, 110 L.R.R.M. 1005.
54. 263 NLRB No. 24, 110 L.R.R.M. 1489 (1982).
55. 228 NLRB 1311, 94 L.R.R.M. 1705 (1977).
56. 140 NLRB 221, 51 L.R.R.M. 1600 (1962).
With Midland National Life, the Board again adopts the position that employees involved in a representation election are no longer the wards of the Board’s paternalism. The Board now will take “a view of employees as mature individuals who are capable of recognizing campaign propaganda for what it is and for discounting it.”

Of course, we recognize that no trend is without contra-indicators. In a number of rulings of the Board, the forces of the mid-70’s (in this little schema) have prevailed. In Conair Corp. for example, the Board established a new and expansive precedent. Dividing 3-2, the Board granted a bargaining order to a union which had never demonstrated majority support, citing, as its basis, a record of “outrageous and pervasive” misconduct by the employer. The Board stated that:

It is clear . . . that this case is the “exceptional” type envisioned in Gissel which warrants the issuance of a remedial bargaining order ‘without need of inquiry into majority status on the basis of cards or otherwise.’ We find that neither our traditional remedies nor even our extraordinary access and notice remedies can effectively dissipate the lingering effects of [the employer’s] massive and unrelenting coercive conduct.

Chairman Van de Water and Member Hunter dissented sharply. In another case decided on the same day, however, United Supermarkets, Inc., a unanimous Board rejected a bargaining order when there was no demonstrated union majority despite “extensive and serious” misconduct by the employer. Although it is true that the

57. 239 NLRB 619, 99 L.R.R.M. 1687 (1978). The “‘Hollywood Ceramics saga’ is a topic that by itself is a worthy subject for an article. It is an enlightening example of the application of the Board’s assumptions and preconceptions. See Getman, Goldberg and Herman, Union Representation Elections: Law and Reality (1976) and the comments of the NLRB in Shopping Kart, supra. Whether the Board respects the precedent established in Midland National Life and the trend a number of its decisions have set out is an open question. It is made all the more problematical by the fact that Chairman Van de Water’s appointme... has never been confirmed by the Senate and, thus, his term ended when the 97th Congress adjourned. It is likely, but by no means certain, that Van de Water’s successor will follow a similar approach to the issues as that discussed in this paper.

58. 263 NLRB No. 24 slip op. at 19, 110 L.R.R.M. at 1493, citing Shopping Kart, 228 NLRB at 1313, 94 L.R.R.M. at 1705. Midland National Life was followed in Affiliated Midwest Hospital (Local 73, Hospital Emp. Labor Program), 264 NLRB No. 146 111 L.R.R.M. 1425 (1982) (permitting a union misstatement of Board action) and in Daniel Constr. Co. (No. Caro. St. Bldg. Constr. Council), 264 NLRB No. 79 (Sept. 30, 1982) (employer statement of need to remain “competitive” is not a threat).


60. Id. Slip op. at 16, 110 L.R.R.M. at 1166.

Board's positions are unusually affected by the force of rhetoric.\textsuperscript{62} the line between "outrageous and pervasive misconduct" and "extensive and serious misconduct" is one that the courts are likely to find difficult to discern.\textsuperscript{63}

Other recent Board cases which reflect what seems to be an outmoded viewpoint also demonstrate a similar disregard for the practical realities of the workplace. For example, in \textit{Cardinal Systems},\textsuperscript{64} the Board ruled that an employer who unlawfully solicited workers to revoke dues checkoff authorizations must reimburse the union for dues lost as a result of the subsequent revocations. The Board ordered the employer to reimburse the union even though the solicitations occurred after the expiration of the contract, at which time the employer could lawfully have suspended dues checkoffs entirely.

Members Zimmerman and Jenkins, overruling the decision of the Administrative Law Judge, found the situation analogous to that in which employees were unlawfully influenced or coerced by employers into paying dues, joining a union, or maintaining union membership. Further, although the majority recognized that the employer could lawfully have discontinued the contractual checkoff mechanism for all employees upon the expiration of the contract without first securing any individual revocations, it points out that that was not the course this employer chose to follow. Rather, the employer here elected to seek individual revocations which were solicited in an unlawful manner. The majority reaches the conclusion that, but for the employer's unlawful conduct, the union would have continued to receive dues from employees who were persuaded by the employer to revoke.

It is difficult not to be persuaded by Member Fanning's dissent. Fanning noted that the employer's conduct could not have caused monetary loss to the union; thus, reimbursement of some dues when the employer could lawfully have refused to deduct all dues seems an odd way to effect the purposes of the Act. Further, the Board has made it clear to all employers that they have but one meaningful response at the expiration of a contract; their right to refuse to check off dues. It is unlikely that the Board majority wanted to impose this

\textsuperscript{62} Surely the evocative power of phrases such as "laboratory conditions" in the Board's adjudicatory process is a worthy subject for a Ph.D. dissertation in literature or communications.

\textsuperscript{63} For additional comments on Conair and United Supermarkets by Chairman Van de Water, see his speech to the ABA Labor and Employment Law Section, August 10, 1982, reprinted in \textit{Legal Times of Washington}, August 16, 1982 at 16.

\textsuperscript{64} 259 NLRB No. 65, 109 L.R.R.M. 1005 (1981).
policy on all employers, but the decision in *Cardinal Systems* leaves employers little choice. In addition, the decision broadens widely (and not rationally) the actions for which an employer can be held legally and monetarily responsible. Again, enforcement of this Board ruling will likely be difficult to secure.

In other decisions that appear to be moving against the current trend, the Board in *T.R.W., Inc.* and in *Hammary Manufacturing Corp.*, effectively eliminated the efficacy of "no-solicitation" rules. In *TRW*, the Board, which had only three members at the time, unanimously held that any rule forbidding solicitations during "working time" must specifically define what "non-working time periods" are so as to avoid all possibilities of confusion and/or discretionary enforcement. Chairman Van de Water and Member Hunter have bluntly stated their disagreement with the *TRW* ruling. In *Intermedics*, Van de Water and Hunter said that any no-solicitation rule referring to "working time" is presumptively valid. In *Hammary*, it was held that even a sole exception to a non-solicitation rule, in this case a solicitation for contributions to the United Way, can invalidate the no-solicitation rule and make its enforcement during a union campaign a violation of the Act. The Board recently amended its order in *Hammary*, making clear that a sole exception to a "no-solicitation" rule for the United Way campaign would not be a *per se* violation.

**COLLECTIVE BARGAINING HAS BEEN STRENGTHENED**

The decisions identified in the preceding section do more than return the collective bargaining mechanism to the hands of the parties with the "rules" unchanged; those decisions, and others to be discussed herein strengthen the collective bargaining process considerably. As part of that task, the adjudicatory bodies have shown a laudable willingness to confront the "hard" cases and bring to them an uncommon jolt of pragmatism. Principal among the cases representing this new view are those dealing with seniority.

**Supreme Court Rulings**

The role of seniority in hammering out any collective bargaining agreement is, not unexpectedly, of extraordinary significance. Both the employers and the unions view length of service, loyalty, and

---

67. 262 NLRB No. 178 slip op. at 6, 110 L.R.R.M. 1441, 1443 (1982).
68. 258 NLRB No. 182 slip op. at 2, 108 L.R.R.M. at 1200.
experience as attributes to be specially recognized. It is also true, however, that seniority called by another name, incumbency, represents perhaps the largest barrier to equal participation in our society from the viewpoint of women and minorities. In short, when the “pipeline” is full, there is no place for new entrants — even without a breath of discriminatory intent. The Supreme Court has turned to this problem in a series of cases beginning in 1977 with Teamsters v. United States. In sum, the Court has held on repeated occasions that only when seniority is used as the intentional vehicle to establish or to maintain discrimination in its workforce can it be challenged. In cases decided this term, for example, Pullman-Standard v. Swint, and American Tobacco Company v. Patterson, the Court appears to have written the final paragraph in this chapter. By deciding in Patterson that the seniority exception in § 703 of Title VII of the Civil Rights Act of 1964 is not limited to seniority systems adopted before the effective date of that Act, and in Swint by again noting that disparate impact alone is insufficient to invalidate a seniority system, the Court has removed any claim based on an alleged discriminatory seniority system as a cause of action except in certain clearly defined cases. Behind the Court’s decisions in Patterson and Swint is what was in the fore in its ruling in California Brewers Association v. Bryant. There, the Court made clear that it would uphold a seniority system even when and, indeed, precisely because it was one of those gnarled, peculiar, odd constructs that could only be the product of free collective bargaining over a long period of time. The adjustments made to the seniority system at issue

70. For a more extended examination of this topic, see Tallent and Kilberg, From Bakke to Fullilove: The Use of Racial and Ethnic Preferences in Employment, 6 EMP. REL. L.J. 364 (1980-81).
75. One of the remaining aspects of the seniority issue, that pitting the mandates of affirmative action against the principles of incumbency, may soon be resolved by the Supreme Court. The Court has recently agreed to hear Boston Firefighters Union Local 718 v. Boston Chapter NAACP, 679 F.2d 965 (1st Cir. 1982), cert. granted 51 U.S.L.W. 3339 (U.S. Nov. 2, 1982) (No. 82-185). At issue is whether the State Civil Service law authorizing seniority-based layoffs could be overridden to assure adequate minority representation in the workforce in accordance with the provisions of a consent decree. Shortly before accepting the Boston Firefighters case, the Supreme Court denied cert. in a similar case regarding the layoffs of white teachers in the city school system under the terms of a 1974 busing order. Local 66, Boston Teachers Union v. Boston School Com. et al., 671 F.2d 23 (1st Cir. 1982), cert. denied 51 U.S.L.W. 3258 (U.S. Oct. 5, 1982). The divisions within the Court that are revealed by these apparently contradictory decisions regarding what cases it would hear presage another splintered ruling in this area of the law.
76. 444 U.S. 598 (1980).
in *Bryant* appeared to the Court to be accommodations to requirements of the work situation which could only have found expression through the idiom of collective bargaining. Absent proof of discriminatory intent, such seniority systems will not be invalidated.

The Court’s support for these collectively bargained seniority systems, however, should not be construed as creating a blanket validation for any such discrimination as bargaining may yield. On the contrary, the holding in *United Steelworkers v. Weber* made clear that a collectively bargained apprenticeship program that gave preference to minorities did not violate Title VII. Private parties to collective bargaining agreements are, thus, generally free to negotiate affirmative action programs as they see fit without the fear of themselves violating either Title VII or the National Labor Relations Act. In short, the Court, in its decisions from *Teamsters* through *Bryant* and *Weber* to *Swint* and *Patterson*, has made clear that the parties are free to negotiate as they see fit those aspects of the workplace which are creatures of collective bargaining, so long as they do not otherwise violate the law. Thus, for the most part, collective bargaining agreements are once again no different from any other contracts.

The Court’s positive attitude toward collective bargaining was not limited in recent years to the issue of seniority or to the matter of Title VII. A number of other equally important decisions make clear that the collective bargaining process is to be given renewed significance. In *Teamsters v. Daniel*, for example, the Court decided that collectively bargained, non-contributory pension plans did not create rights and obligations under the federal securities laws. Thus, the employer and the union can bargain about pensions as they would work hours, vacations, or any other term and condition of employment, free from the contemplated burdens of § 10(b)(5). Indeed, some employers, struggling to understand their obligations under ERISA, may very well be willing to trade the requirements of ERISA for those of the ’34 Act. The shadow of *Daniel* was seen recently in another Supreme Court case, *UMW Health and Retirement Funds v. Robinson*. There, the court held that the

---


80. See supra note 10.

provisions of a collective bargaining agreement cannot be reviewed for “reasonableness” under § 302(c)(5) of the LMRA.\(^{82}\)

Finally, on an occasion of some significance, the Court found the challenge of technology to be one ideally suited for solution through the collective bargaining process.\(^{84}\) The Court reminded the Board that it should leave to bargaining the possibility that the parties can negotiate an agreement that would accommodate their interests and the demands of advanced technology:

[Any determination about the Work Rules] will, of course, be informed by an awareness of the Congressional preference for collective bargaining as the method for resolving disputes over dislocations caused by the introduction of technological innovations in the workplace. Thus, in judging the legality of a thoroughly bargained and apparently reasonable accommodation to technological change, the question is not whether the Rules represent the most rational or efficient response to innovation, but whether they are a legally permissible effort to preserve jobs.\(^{85}\)

**Board Rulings**

The positions taken by the Supreme Court toward collective bargaining also have been reflected by the Board. In a series of decisions that are certain to return strength and vigor to the collective bargaining process, the Board unanimously ruled that a union, as part of its collective bargaining responsibility, is to be given very broad information concerning employee health and safety. In *Minnesota Mining and Manufacturing Company;*\(^{86}\) *Borden Chemical;*\(^{87}\) and *Colgate-Palmolive Company,*\(^{88}\) the Board ruled that information concerning monitoring and testing systems, devices and equipment, including statistical data concerning such information, was required for the union properly to meet its bargaining obligations. Furthermore, the parties are to bargain in good faith regarding a union's request for information which constitutes proprietary trade secrets. Significantly, the Board reached this conclusion not because of “the obligations imposed by other agencies or statutes, but solely

---

83. When neither the collective bargaining process nor its end product violates any command of Congress, a federal court has no authority to modify the substantive terms of a collective bargaining contract. —U.S. at—, 102 S. Ct. at 1234.
85. Id. at 511. [citation omitted]
87. 261 NLRB No. 6, 109 L.R.R.M. 1358 (1982).
upon the bargaining obligations imposed by the National Labor Relations Act."89 The Board's action in "3M" is as creative as the solutions Member Hunter, in his concurrence, hoped would be forthcoming, such as a Board-granted Protective Order.90 Of course, as with all attempts at innovative decision-making, the ruling in "3M" creates some problems. As Member Hunter notes, the Board has stated it is now prepared to answer the very difficult question of how the validity of a "trade secret" defense will be determined, but he aptly notes that this is an area in which the Board has little expertise.91 Neither Hunter nor the majority goes on to note that the area of trade secrets may very well be one in which the Board lacks jurisdiction as well as experience.

More significantly, the Board's decision raises the problem of what course can be followed if the parties bargain in good faith and still cannot reach a resolution. The Board has stated that "[i]f necessary, we shall undertake the task of balancing the Union's right of access to data relevant to collective bargaining with Respondent's expressed confidentiality concerns in accordance with the principles set forth in the Supreme Court's Detroit Edison decision."92 What remains at issue in any attempted resolution by the Board is the well-settled principle that when the parties have bargained in good faith on a mandatory subject, no external entity, including the Board, can either insist that the parties reach agreement or impose an agreement upon them.93

NEW REMEDIES AND CAUSES OF ACTION WILL NOT BE CREATED

As part of the general trend of leaving the parties involved in collective bargaining to their own devices, the courts and the Board

89. Id. slip op. at 10, n. 13, 109 L.R.R.M. at 1356, n. 13. In NLRB v. Tamara Foods, Inc., 692 F.2d 1171 (8th Cir. 1982), the Eighth Circuit, although not citing "3M," affirmed the Board's ruling that the OSH Act does not limit its jurisdiction and that the rights guaranteed to employees by the NLRA are superior to the provisions of the OSH Act.

90. If they cannot agree, we are then faced with the very difficult question of how the Board will determine the validity of a trade secret defense since this is an area in which we have little expertise—and the extent to which the Board can alleviate an employer's concerns about confidentiality by issuing a protective order. These are problems which may require creative solutions from the Board if we are to follow the command of the Supreme Court in Detroit Edison not to permit "union interests . . . [to] predominate over all other interests, however legitimate . . . ." 440 U.S. at 318, 100 LRRM 2728. We must accommodate the competing concerns of both parties.

Id. at No. 2 slip op. at 27, n. 30, 109 L.R.R.M. at 1352, n. 30.

91. Id.

92. 261 NLRB No. 7 slip op. at 18-19, 109 L.R.R.M. at 1358.

93. See 361 U.S. 477. The Oil and Chemical Workers have based their appeal of the Board's ruling, in part, on the lack of certainty created by relegating the disclosure issue to bargaining. OCAW, Local 6-418 v. NLRB, 232 DAILY LAB. REP. (BNA) at D (Dec. 2, 1982).
also have demonstrated a singular reluctance to create new remedies and/or causes of action that might weaken the central role of collective bargaining in dealing with workplace problems.

**Supreme Court Rulings**

The recent ruling of the Supreme Court in *Summit Valley Industries v. Local 12, United Brotherhood of Carpenters,*\(^94\) is instructive. There, in the face of a number of circuit court decisions to the contrary,\(^95\) the Supreme Court ruled that attorneys’ fees incurred in prior Board proceedings are not a proper element of damages under § 303(b) of the LMRA.\(^96\) Basing its decision on the preeminence of the “American Rule,” the Court held that in the absence of clear support for damages in the statute or in the legislative history, there would be no alteration in the traditional damages awards.\(^97\) Again, students of the Court’s recent rulings in the labor field might well have anticipated its decision in *Summit Valley.* Since at least its decision in *Carbon Fuel Company v. UMW,*\(^98\) where the Court held that an international union could not be held liable for damages arising from the unauthorized strikes of local unions, the Court has shown that it intends to read and construe labor statutes narrowly. This course was followed in *United Parcel Service, Inc. v. Mitchell,*\(^99\) In *Mitchell,* a grievant, found to have been properly discharged under the collectively bargained grievance and arbitration procedure, brought a suit against the employer and the union under § 301(a) of the LMRA\(^100\) alleging a breach of the duty of fair representation and of the contract. In a potentially far-reaching decision, the Court held that such a suit must be filed within the statute of limitations for vacating arbitration awards and not the usually more generous limitation period for breach of contract actions.\(^101\) The Court went out of its way to indicate that one of the bases for its decision was that to rule otherwise would be to

---

95. Texas Distributions, Inc. v. Local Union No. 100, 598 F.2d 393 (5th Cir. 1979); Associated General Contractors of Minnesota v. Construction and General Laborers Local No. 553, 612 F.2d 1060 (8th Cir. 1979); and Local Union No. 984, International Brotherhood of Teamsters v. Humko 287 F.2d 231 (6th Cir. 1961), cert. denied 366 U.S. 962 (1961), all holding that attorney’s fees can be recovered. F.F. Instrument Corp. v. Union de Tronquistas de Puerto Rico, 533 F.2d 607, 611 (1st Cir. 1977) expressing approval, in dicta, of the recovery of attorney’s fees. Mead v. Retail Clerks Local 839, 523 F.2d 1371 (9th Cir. 1975) holding that attorney’s fees are not recoverable under § 303(b) 29 U.S.C. § 187(b).
97. 50 U.S.L.W. 4560, 4561.
101. Tallent and Fishman: Collective Bargaining in the 80's: A Prospective Analysis

Published by Scholarly Commons at Hofstra Law, 1983
undermine and to debilitate the collective bargaining process. The Court noted that a collectively bargained grievance and arbitration process “could easily become unworkable if a decision which has given ‘meaning and content’ to the terms of an agreement, and even effected subsequent modifications of the agreement, could suddenly be called into question as much as six years later.”

Similarly, in *Complete Auto Transit, Inc. v. Reis*, individual employees were not liable for damages under § 301(a) of the Act for violating the no-strike provision of the collective bargaining agreement. The Court refused to create a new avenue of recovery under color of the Act. The anomalous creation of a group of people apparently free from the threat of monetary recovery, analyzed in the dissent, was without effect on the majority, who chose in this case, as in others, to construe the reach of federal labor law narrowly.

Much the same impulse underlies *Northwest Airlines v. Transport Workers Union of America*. There, the Court was asked to deal with the vexing problem of a collectively bargained pay scale which was found to be in violation of the Equal Pay Act. The employer, relying on the fact that the offending pay scale was the product of collective bargaining, asked the Court to recognize a right of contribution from the union even though the plaintiff had chosen to sue only the employer. The Court, following traditional lines, held that an employer found liable for damages has neither a statutory nor a common law right of contribution from the union with whom it bargained, even though the Court recognized that the bargaining process was a bipartite endeavor.

**Board Rulings**

These decisions of the Supreme Court construing the labor law statutes narrowly, have recently made an impact on the decisions of the Board. A number of decisions by the Board during the last two years have had the dual effect of strengthening collective bargaining

---

102. *Id.* Several Circuit Courts of Appeal have relied on *Mitchell* to limit litigation of arbitral decisions. See, e.g., *Adams v. Gould, Inc.*, 687 F.2d 27 (D.C. Cir. 1982) (arbitrator’s decision is not justiciable); *McNutt v. Airco Indus’1 Gases Div.*, 687 F.2d 539 (1st Cir. 1982) (action barred by Massachusetts’ 30-day statute of limitations), and *San Diego County District Council of Carpenters v. Cory*, 685 F.2d 1137 (9th Cir. 1982) (California’s 100-day limitations period operates to bar the action). *But see*, *Bowen v. U.S. Postal Service*, 51 U.S.L.W. 4051 (U.S. Jan. 11, 1983) (No. 81-525), and *discussion at note 13, supra*.


106. 451 U.S. at 93. *But see* *Bowen v. U.S. Postal Service*, *supra* note 13, in which the Court held that the union and the employer were each responsible for a share of the monetary damages growing from a breach of the duty of fair representation.
and of preserving the traditional roles of parties to collective bargaining. In *GTE Automatic Electric Inc.*\(^{107}\) the Board appears to have set itself on a new path regarding the validity of "zipper clauses." Although the Board specifically does not disturb earlier cases,\(^{108}\) in this instance it reverses the position it took in 1979 in this very case. In the earlier instance,\(^ {109}\) the Board ruled that the employer was obligated to bargain with the union because the waiver or zipper clause was not effective to extinguish the right to negotiate about a benefit that was neither in existence nor proposed at the time of the contract. After the circuit court denied enforcement of the Board's order, on reconsideration the Board found that the employer did not violate the Act by invoking the "zipper clause as a shield against the Union's mid-term demand for bargaining over a new benefit and by giving literal effect to the parties' waiver of their bargaining rights, . . ."\(^ {110}\) Noting that the employer seeks nothing more than to have what the parties had agreed to, the Board concludes that the union "has waived its right to require [the employer] to bargain midterm about new subject matter not specifically covered by the terms of the existing contract. Certainly, our decision properly adds and accords stability and dignity to the parties' collective-bargaining relationship and the contract negotiated therefrom."\(^ {111}\)

Although ideologues may maintain that the Board's ruling in *Pacific Telephone and Telegraph Company*,\(^ {112}\) in which the Board extended the protections of *Weingarten*, was at a polar remove from the Board's ruling in *GTE Automatic Electric Inc.*, *Pacific Telephone*, in fact, serves as another example of the Board's attempt to support collective bargaining agreements. In *Pacific Telephone*, the Board found that an employer violated § 8(a)(1) by refusing to inform employees or their union representative of the nature of a matter being investigated as well as by refusing to allow the employees a consultation with a union steward before their interviews. The Board found not only an employee right to consultation with a union steward prior to an employer interview, but the Board also required that the subject matter of the interview be indicated to the employees and the

110. 261 NLRB No. 196 slip op. at 4, 110 L.R.R.M. at 1193.
111. Id. at 5, 110 L.R.R.M. at 1194.
union steward prior to their consultation. The inevitable result of Pacific Telephone is to strengthen the role of the bargaining representative and to maintain and support the provisions of the collectively bargained grievance procedure. Some will agree with the dissent of Member Hunter that Pacific Telephone improperly extends the rule in Weingarten, but it appears that whatever the precedential base for Pacific Telephone, the decision reached there by the Board will draw the parties to a collective bargaining agreement into closer interdependence.

A "counter-trend" exists here, as well. In Materials Research Corp., the Board, in a 3-2 vote, ruled that "Weingarten rights" apply to unorganized employees. The majority held that the § 7 right to mutual aid and protection is not created by the presence of a union. The Board pointed out that where there is no union, "Weingarten rights" are likely to be more necessary. Chairman Van de Water and Member Hunter dissented with Van de Water focusing on the threat of a multiplicity of employee representatives that the Board's decision creates. Now, if an employer is required to deal with representatives of individual, non-unionized employees, rather than deal freely with such employees, then the spectre of splinter group bargaining appears. The Board's reasoning in Materials Research is difficult to reconcile with the Supreme Court's ruling in Emporium Capwell Co. v. Western Addition Community Org. In Emporium Capwell, the Court supported an underlying Board ruling that § 7 rights inhere in the duly elected representative and that representative could not be circumvented by splinter groups of employees. If individual employees now enjoy such rights absent any union, by what rational principle are splinter groups within organized units to be refused?

The unique statutorily sanctioned relationship between the employer and the Board-certified collective bargaining representative was emphasized in two other recent decisions by the Board: RCA Del
Caribe, Inc.\textsuperscript{119} and Abraham Grossman \textit{d/b/a} Bruckner Nursing Home.\textsuperscript{120} In both instances, the Board concluded that the Midwest Piping\textsuperscript{121} doctrine of employer neutrality necessarily need not apply when a rival union merely appears on the scene. In Bruckner Nursing Home, two unions, Local 144, Hotel, Hospital, Nursing Home & Allied Health Services Unions, S.E.I.U., and Local 1115, Joint Board, Nursing Home and Hospital Employees Division, were in the process of organizing the employer. Local 144 notified the employer that it possessed a majority of signed authorization cards whereas Local 1115 informed the employer that it was engaged in organizational activity and that the employer should not extend recognition to any other labor organization. Local 1115 then filed charges against the employer and its rival union alleging violations of the Act. A subsequent card count conducted by an extension specialist of the New York State School of Industrial and Labor Relations indicated that Local 144 represented a majority of the employees. The employer, however, refused to recognize any union pending the outcome of the unfair labor practice charges. Those charges were dismissed by the Regional Director and negotiations between Local 144 and the employer commenced, culminating in a collective bargaining agreement. Local 1115 then filed new charges.

Identifying its decisions in this and in the companion case, \textit{RCA del Caribe}, as re-evaluating the Midwest Piping doctrine, the Board, taking note that circuit courts refused to enforce many of the decisions based on the doctrine, announced that it will no longer find 8(a)(2) violations in rival union, initial organizing situations when an employer recognizes a labor organization which represents an uncoerced, unassisted majority, before a valid petition for an election has been filed with the Board [by the rival union]. However, once notified of a valid petition, employer must refrain from recognizing any of the rival unions.\textsuperscript{122}

In \textit{RCA del Caribe}, the Board set forth a new policy with respect to the requirements of employer neutrality when an incumbent is challenged by an "outside" union. The Board specifically overruled \textit{Shea Chemical Corporation},\textsuperscript{123} which held that an employer faced with a pending petition from an outside union must cease collective bargaining with the incumbent and maintain a posture of strict

\begin{footnotes}
\item[119.] 262 NLRB No. 116, 110 L.R.R.M. 1369 (1982).
\item[120.] 262 NLRB No. 115, 110 L.R.R.M. 1374 (1982).
\item[121.] Midwest Piping and Supply Company, Inc., 63 NLRB 1060, 17 L.R.R.M. 40 (1945).
\item[122.] 262 NLRB No. 115 slip op. at 9-10, 110 L.R.R.M. at 1376-77.
\item[123.] 121 NLRB 1027, 42 L.R.R.M. 1486 (1958).
\end{footnotes}
neutrality with respect to both the incumbent and the challenging labor organization. In *RCA del Caribe*, the Board established a new precedent and determined that "the mere filing of a representation petition by an outside, challenging union will no longer require or permit an employer to withdraw from bargaining or from executing a contract with an incumbent union."\(^{124}\) The Board demonstrated a new awareness of the economic realities facing an employer in reaching this conclusion. Noting that an employer with an existing bargaining relationship will find it virtually impossible to observe strict neutrality and observing further that either to stop bargaining or to continue to bargain may be construed as an activity in favor of either the incumbent or the rival union, the Board decided to permit the employer to continue to bargain with the incumbent union as the best way to "approximate employer neutrality."\(^{125}\)

This more practical and realistic attitude of the Board also is seen in some "procedural" decisions that, taken together, promise to "streamline" proceedings and to permit labor and management to proceed to bargaining, when appropriate.

In *Hydro Conduit Corporation*,\(^ {126}\) the Board voted 3-2 to change its policy regarding its treatment of unambiguous but improperly marked ballots. In *Hydro Conduit*, the Board reversed a policy of some 11 years standing, first stated in *Columbus Nursing Home Inc.*,\(^ {127}\) and decided to honor ballots on which the voter's intent was clearly marked even though that intent had not been indicated in the proper place. In recognizing the refusal of several courts of appeal to respect the old Board doctrine, and in responding to the appellate courts' views, the *Hydro Conduit* decision exhibits practicality not often exhibited by the Board\(^ {128}\) in the past.

\(^{124}\) 262 NLRB No. 116 slip op. at 10-11, 110 L.R.R.M. at 1371.

\(^{125}\) Id. at 10. Using its decision in *RCA del Caribe* as its rationale, the Board, in *Dresser Industries, Inc.*, 264 NLRB No. 145, 111 L.R.R.M. 1436 (1982), has further limited the occasions which permit the parties to refuse to bargain. In *Dresser*, the Board held that the filing of a decertification petition, standing alone, does not provide reasonable grounds to question a union's majority status and to refuse to bargain. *Dresser* explicitly over-rules the Board's decision in *Telautograph Corp.*, 199 NLRB 892, 81 L.R.R.M. 1337 (1972).


\(^{127}\) 188 NLRB 825, 76 L.R.R.M. 1417 (1971).

\(^{128}\) In *Columbus Nursing Home, Inc.*, the Board declared its policy of not counting a ballot which contains no marking on its face regardless of how clearly the intent of the voter was indicated on the reverse side of the ballot. The courts of appeal have been unmoved by the Board's reasoning. In *NLRB v. Manhattan Corporation, Manhattan Guest House, Inc.*, 660 F.2d 53 (5th Cir. 1980), *Robert Door and Window Company v. NLRB*, 540 F.2d 350 (9th Cir. 1976), *Mycalex Division of Spaulding Fibre Company, Inc. v. NLRB*, 480 F.2d 248 (4th Cir. 1972) and *NLRB v. Titch-Goettinger Company*, 433 F.2d 1045 (5th Cir. 1970), the appellate courts decided that the Board was not free to ignore a ballot when it was unambiguously marked.
In *The Broyhill Company*, the issue was whether an employer adequately had repudiated the unlawful statements of a supervisor which were made during an election campaign. Specifically, a supervisor admitted making statements to the effect that the employer would "probably shut the doors" if the union came in, coupled with other less serious threats. Five weeks after the statements were made, but only one day after the employer learned of them, the employer posted a notice to all employees specifically disavowing the statement made by the supervisor, and stating that it would not in any manner interfere with the employees' § 7 rights.

At issue was whether this repudiation was sufficient to "cleanse" the employer of the unfair labor practice committed by its supervisor. Van de Water, Zimmerman, and Hunter decided that it did. Emphasizing the rapidity with which the employer acted once it learned of the supervisor's comments and the breadth of the employer's disavowal, the Board concluded that the employer did all it reasonably could do to disavow the unlawful conduct of the supervisor. Thus, the Board decided that the employer met the standards set forth in *Passavant Memorial Area Hospital*.

**CONCLUSION**

Additional instances of the new trend in the law of labor-management relations could be added almost endlessly, but the aim of this paper is not to walk the path the trend has taken but, rather, to mark it and to note its significance. As believers in the collective bargaining process and believing that through the process we can arrive at cogent approaches even to difficult social and economic problems, we welcome any measures that return real authority to the parties to collective bargaining. Some approaches very well may affect only a few plants, some a whole industry, but those who believe that collective bargaining can be carried out in a framework which lets the parties deal with their own real problems, free from additional external impediments, have no reason to fear the future.

---

regardless of where on the ballot the marking appeared. The Supreme Court refused to grant certiorari [NLRB v. Manhattan Corporation, Manhattan Guest House, Inc. 452 U.S. 916 (1981)] and the matter was left in an uneasy balance until the *Hydro Conduit* decision.
