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Craver, Charles B.

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6. THE NEED TO REFORM THE NATIONAL LABOR RELATIONS ACT

Throughout the first 150 years of its existence, the United States officially discouraged collective worker action. When individual employees joined forces with other workers, they were subject to antitrust or criminal conspiracy liability.\(^1\) Courts did not hesitate to enjoin such collective efforts.\(^2\) On those infrequent occasions when judicial edicts failed to prevent concerted employee conduct, affected employers might employ the national guard, the state militia, or private security forces to put an end to the employees’ efforts.\(^3\) When state legislatures attempted to pass laws proscribing yellow-dog contracts, which required employees to promise that they would not join unions, or provisions guaranteeing individuals more healthful work environments, pro-business courts invalidated those statutes as impermissible infringements upon the freedom of contract of both employers and employees.\(^4\)

When Congress attempted in the Clayton Act of 1914\(^5\) to divest federal courts of jurisdiction to issue injunctive orders pertaining to peaceful labor disputes, the Supreme Court narrowly construed that enactment to prevent striking employees from enlisting the sympathetic support of other workers by limiting the statutory exemption to disputants in direct employer-employee relationships.\(^6\) It was not until 1932, when the Norris-LaGuardia Act\(^7\) finally deprived federal judges of the authority to enjoin even sympathy action indigenous to labor disputes, that the federal government provided lasting affirmative support for collective worker behavior. In 1933, Congress tried to grant employees organizational rights through the enactment of Section 7a of the National Industrial Recovery Act,\(^8\) but the Su-
The Supreme Court found that act unconstitutional based on the impermissible legislative attempt to regulate intrastate commerce.\(^9\) Congress responded in 1935 by passing the National Labor Relations Act (NLRA),\(^10\) which successfully provided private sector personnel with organizational and collective bargaining rights.

Congress specifically indicated in Section 1 of the NLRA that “[t]he denial by employers of the right of employees to organize and the refusal by employers to accept the procedure of collective bargaining lead to strikes and other forms of industrial strife and unrest....”\(^11\) Congress further emphasized “[t]he inequality of bargaining power between employees who do not possess full freedom of association... and employers who are organized in the corporate [form]....”\(^12\) Congress sought to alleviate these problems “by encouraging the practice and procedure of collective bargaining.”\(^13\) The propriety of this theme was acknowledged by the Supreme Court when it sustained the constitutionality of the NLRA.\(^14\)

The NLRA has provided significant rights for millions of American workers. Over thirty-three million employees have voted in the 345,000 representation elections conducted by the Labor Board since 1935.\(^15\) The NLRB has processed almost 800,000 unfair labor practice charges and has issued more than 46,000 decisions.\(^16\) During the past fifty-seven years, millions of workers have taken advantage of the NLRA right to influence their wages, hours, and employment conditions through the collective bargaining process. Millions of collective agreements have been negotiated—most without resort to work interruptions. Even though the duty to bargain does not compel either party to agree to any proposal or make any concession,\(^17\) unionized employers and representative labor organizations have achieved innumerable accommodations of their competing interests pertaining to a multitude of topics.

During the first several decades of the NLRA, Labor Board and court decisions judiciously protected the Section 7 right of employees to form, join, and assist labor organizations and to select exclusive bargaining agents. The NLRA covered individuals with tenuous employment relationships who needed collective strength to counterbalance corporate power. Worker participation in management decision making through the bargaining process was expanded to include most relevant subjects pertaining to the employment relationship. Remedial orders were devised to rectify the effects of unfair labor practice violations. As the NLRA became more established,
however, employer groups lobbied in favor of amendments designed to curtail employee rights, and court decisions began to erode important statutory protections.

THE EARLY EXPANSION OF STATUTORY RIGHTS AND PROTECTIONS

NLRA coverage was initially extended to diverse groups of workers. In *NLRB v. Hearst Publications, Inc.*,\(^{18}\) for example, the Supreme Court upheld the extension of collective bargaining rights to newspaper sellers who would have been considered “independent contractors” under traditional legal principles. In *Packard Motor Car Co. v. NLRB*,\(^ {19}\) the Court sustained the authority of the Labor Board to provide statutory rights for supervisory personnel. In *Hearst Publications*, the Court adopted the “economic realities” test to determine which individuals really needed organizational strength to counterbalance the economic power possessed by those for whom they worked.

Unless the common-law tests are to be imported and made exclusively controlling, without regard to the statute’s purposes, it cannot be irrelevant that the particular workers in these cases are subject, as a matter of economic fact, to the evils the statute was designed to eradicate and that the remedies it affords are appropriate for preventing them. . . . Interruption of commerce through strikes and unrest may stem as well from labor disputes between some who, for other purposes, are technically “independent contractors” and their employers as from disputes between persons who, for those purposes, are “employees” and their employers. . . . Inequality of bargaining power in controversies over wages, hours and working conditions may as well characterize the status of the one group as of the other. The former, when acting alone, may be as “helpless in dealing with an employer,” as “dependent. . . . on his daily wage” and as “unable to leave the employ and to resist arbitrary and unfair treatment” as the latter. . . . In short, when the particular situation of employment combines these characteristics, so that the economic facts of the relation make it more nearly one of employment than of independent business enterprise with respect to the ends sought to be accomplished by the legislation, those characteristics may outweigh technical legal classification for purposes unrelated to the statute’s objectives and bring the relation within its protections.\(^ {20}\)

The Supreme Court thus concluded that seemingly independent newspaper sellers and lower level supervisors were entitled to “employee” status under the NLRA.
During the formative years of the NLRA, the Labor Board and the courts promptly defined and enforced basic substantive rights. Employers began to refrain from overt forms of intimidation as the NLRA proscribed coercive threats and discriminatory treatment. Labor organizations quickly used Section 8(a)(2) to challenge management-dominated employee committees, and the Labor Board directed these "company unions" to be disestablished. The NLRB and the courts developed legal doctrines to protect the unfettered choice of employees who were the targets of union organizing campaigns. The Labor Board determined that even conduct not constituting an unfair labor practice could provide the basis for setting aside election results where the challenged action may have prevented a fair representation election. Under the Hollywood Ceramics doctrine, elections that may have been influenced by pre-election distortions were nullified when material misrepresentations of fact emanated from parties in positions to know the correct facts and the opposing party did not have sufficient time to correct the misstatements before the balloting.

As the NLRA matured, the NLRB and the courts prohibited more subtle forms of employer restraint on employee collective action. For example, pre-election benefit increases that might induce workers to vote against representation were proscribed, even when there was no evidence that the employer intended to impermissibly influence the election process. Companies were also prohibited from discharging union supporters for alleged misconduct that occurred during organizing campaigns where no unprotected behavior actually occurred. Because the alleged misconduct was inextricably intertwined with the privileged organizing activities, the Court believed that those erroneous terminations would have a chilling effect upon other employees who desired to exercise their protected organizing rights.

When employers rejected union requests for voluntary recognition based on claims of majority support and then engaged in unfair labor practices designed to dilute the majority support that had been obtained by the organizing unions, remedial bargaining orders were generally issued. The Supreme Court subsequently intimated that where "outrageous" and "pervasive" employer unfair labor practices had significantly deterred employee organizing efforts, the NLRB could, in extraordinary circumstances, issue remedial bargaining orders even in the absence of evidence that the organizing labor entities had ever achieved majority support. The Court theorized that these labor organizations would have attained majority strength but for
the chilling effect of the employer's conduct. The Labor Board issued bargaining orders in favor of minority unions only in cases involving extraordinary circumstances, because of the need to balance an efficacious deterrent to flagrant employer unfair labor practices against the right of employees to be free from representation by non-majority unions.

The Labor Board expanded the definition of protected "concerted activity" to include individual conduct that was found to advance the employment interests of other employees. Thus, an individual employee asserting a right contained in a collective contract would automatically be considered to be acting on behalf of the other workers covered by that agreement. In *Alleluia Cushion Co.*, the Labor Board extended this doctrine, ruling that an individual's complaint under a safety and health statute constituted "concerted" activity even without a bargaining agreement or evidence of co-worker support.

In *NLRB v. Weingarten, Inc.*, the Supreme Court sustained the extension of Section 7 protection to employees requesting union representation during employer-initiated investigatory interviews that workers reasonably fear might result in disciplinary action. Whenever individual employees are called in for investigatory interviews that they believe may culminate in discipline, they may lawfully insist that a shop steward be present before any questioning may occur. The Labor Board subsequently extended the right to co-worker assistance at such investigatory interviews to persons employed in nonunion settings in *Materials Research Corp.*

Even though Section 10(c) of the NLRA, as amended by the Labor-Management Relations Act (LMRA), provides that the Labor Board shall not order the reinstatement of any employee who has been terminated for cause, the NLRB appropriately recognized that this rule should not preclude reinstatement orders in all cases of worker misconduct. When significant employer unfair labor practices provoked acts of unprotected misbehavior by employees protesting the unlawful employer actions, the Board balanced the seriousness of the protestor misconduct against the seriousness of the employer violations. If the antecedent employer unfair labor practices were far more serious than the unprotected employee responses, the Board directed reinstatement.

Section 8(d) expressly provided employees who selected an exclusive bargaining agent with the right to negotiate over "wages, hours, and other terms and conditions of employment." Although
the NLRA does not include a specific definition of mandatory bargaining topics, administrative and judicial decisions recognized the prerogative of representative labor organizations to insist upon discussions pertaining to such fringe benefits as vacations, pension plans, group insurance programs, and paid sick leave provisions. Other areas determined to be obligatory subjects of bargaining covered employee discounts, safety rules, employee workloads, grievance procedures, layoff and recall rights, and certain subcontracting decisions. By the late 1960s, labor organizations expected to negotiate about most topics that had any meaningful impact upon worker interests.

The Supreme Court acknowledged the need for representative unions to maintain bargaining unit solidarity during labor disputes in *NLRB v. Allis-Chalmers Manufacturing Co.*, by sustaining the right of labor organizations to impose judicially enforceable fines upon members who cross picket lines to work during lawful work stoppages. The *Allis-Chalmers* Court reviewed the legislative history underlying the LMRA amendments to the NLRA and concluded that Congress did not intend the Section 8(b)(1)(A) proscription against union restraint and coercion to preclude the enforcement of internal union disciplinary rules against strike-breaking members:

Integral to [the] federal labor policy has been the power in the chosen union to protect against erosion [of] its status...through reasonable discipline of members who violate rules and regulations governing membership. That power is particularly vital when the members engage in strikes. The economic strike against the employer is the ultimate weapon in labor's arsenal for achieving agreement upon its terms, and "[t]he power to fine or expel strike-breakers is essential if the union is to be an effective bargaining agent...."

In *NLRB v. Boeing Co.*, the Supreme Court held that the magnitude of the penalties imposed by labor organizations upon members who violate legitimate union rules does not affect the propriety of such actions under the NLRA. Even though an excessive fine is more coercive than a reasonable assessment, the Court believed that Congress did not authorize the Labor Board to regulate such internal union matters. The NLRB employed similar logic to find that it did not possess the power under the NLRA to evaluate the fairness of the internal union procedures through which a fine is imposed. By the early 1970s, it was clear that the Labor Board and the courts would not interfere with the right of labor organizations to impose discipline upon members who violated legitimate union rules.
Representative labor organizations were also provided with significant discretion with respect to the expenditure of dues money collected from employees pursuant to lawful union security arrangements. Although the Supreme Court held in *Railway Employees Dep't. v. Hanson* and *Machinists v. Street* that unions provided with exclusive bargaining rights under federal enactments could not constitutionally expend the compelled dues money of objecting bargaining unit members for political or ideological causes, the scope of these holdings was limited.

**THE EROSION OF NLRA PROTECTIONS**

**Judicial Limitations on Union Activities**

The NLRA was enacted during the depths of the Great Depression. The Supreme Court had recently invalidated the extension of bargaining rights to workers under the National Industrial Recovery Act, but it finally acknowledged the need for special legislation to help bring the country out of the depression. Although the Court began to sustain the constitutionality of various enactments that advanced the rights of working people, including the NLRA, it remained a conservative institution that did not believe that rank-and-file employees should be permitted to exert undue influence against their respective employers.

In *NLRB v. Mackay Radio & Telegraph Co.*, the Court decided to limit the primary economic weapon available to employees. Even though the *Mackay Radio* case directly concerned the propriety of an employer's refusal to reinstate along with other returning strikers several individuals who had been particularly active union supporters, the Court took the opportunity to address an issue that had not been raised by the parties.

Nor was it an unfair labor practice to replace the striking employees with others in an effort to carry on the business. Although §13 provides, "Nothing in this Act shall be construed so as to interfere with or impede or diminish in any way the right to strike," it does not follow that an employer, guilty of no act denounced by the statute, has lost the right to protect and continue his business by supplying places left vacant by strikers. And he is not bound to discharge those hired to fill the places of the strikers, upon the election of the latter to resume their employment, in order to create places for them.

The Court decided that an employer's need to continue operations during an economic strike outweighed the rather slight impact upon
the permanently replaced strikers. This opinion was a devastating infringement on the statutorily protected right to engage in concerted activity and clearly illustrated the Court’s determination to provide businesses with the leverage they needed to neutralize the strike weapon that Congress had granted to workers.

The Supreme Court was not willing, however, to allow employers to use any device to negate the efficacy of a lawful work stoppage. Economic strikers could not be terminated, because they were engaged in protected concerted activity. Even when they were lawfully replaced, economic strikers retained their “employee” status under the NLRA and enjoyed preferential recall rights as soon as positions for which they were qualified became vacant. Nonetheless, in 1959, Congress amended Section 9(c)(3) of the NLRA to provide that permanently replaced economic strikers may only vote in representation elections conducted within twelve months from the date the strike commenced. This statutory change made it easier for a business firm that had broken a work stoppage to decertify the incumbent union one year after the strike began, because only the replacement personnel and reinstated strikers, parties not necessarily amenable to unionization, could vote in that election.

In the 1963 Erie Resistor case, the Supreme Court held that an employer could not offer striker replacements twenty years of “super seniority” to use in future years during layoffs to displace reinstated strikers with greater actual seniority. In Giddings & Lewis, Inc. v. NLRB, however, the Seventh Circuit completely ignored the Erie Resistor rationale. It decided that an employer that had hired permanent replacements during an economic strike did not violate the NLRA when it promulgated a rule providing that members of the existing workforce would be recalled in the order of their seniority, ahead of more senior, unreinstated strikers, in the event of a layoff. This practice effectively provided replacement personnel with the “super seniority” that the Erie Resistor Court had found impermissible.

In Trans World Airlines, Inc. v. Independent Fed’n. of Flight Attendants, the Supreme Court established a new rule that further undermines worker solidarity during strikes. A closely divided Court held that less senior “crossover” employees who either refuse to honor the initial strike call or decide to return to work during the work stoppage may retain the higher positions they obtain while their more senior colleagues remain on strike, even after the labor dispute has been resolved. This decision encourages less senior per-
sonnel to work during a strike to obtain an employment advantage over more senior employees who choose to strike, and causes more senior workers to fear that their participation in a lawful work stoppage may jeopardize the job status they previously earned through years of seniority.

**Congressional Restrictions on Labor Organization Strength**

Businesses also petitioned Congress for relief from the economic weapons made available to employees under the NLRA. For example, the NLRA had allowed labor organizations to utilize secondary tactics to further worker interests. A union involved in a labor dispute could lawfully picket a supplier or customer of the affected employer even if the supplier or customer was not directly involved in the labor discord, to pressure the affected employer. The LMRA amended the NLRA in 1947 to prohibit most forms of secondary activity. New Section 10(1) directed the Labor Board to seek immediate injunctive relief against unions employing secondary tactics to prevent the continuation of the secondary conduct during the pendency of NLRB unfair labor practice proceedings. The LMRA also provided primary and secondary employers that were affected by unlawful secondary boycotts with the right to seek monetary damages in federal court.

Congress further expanded the area of proscribed secondary activity in the 1959 Labor Management Reporting and Disclosure Act amendments to the NLRA. One provision outlawed peacefully obtained “hot cargo” agreements in which a secondary employer and a union agree that the employer will not do business with a business firm directly involved in a labor dispute. The 1959 amendments also imposed severe restrictions on peaceful picketing designed to organize employees or to obtain voluntary recognition of a representative labor organization from the employer, making it more difficult for labor entities to unionize new workers.

**Narrowing the Scope of NLRA Coverage**

In 1947, businesses induced Congress to amend the NLRA definition of “employee” to exclude both “independent contractors” and “supervisors.” Congress thus rejected the “economic realities” test formulated in *Hearst Publications* to determine those individuals most in need of NLRA protection. The Supreme Court further nar-
rowed the statutory definition of “employee” in *Allied Chemical & Alkali Workers Local 1 v. Pittsburgh Plate Glass Co.* At issue was whether retired individuals continued to enjoy “employee” status following their retirement to the extent they wished to bargain over their pension rights. The Court ruled that these people were not “employees” within the meaning of the NLRA, because they were no longer actively seeking reemployment with their former employer.

In *Yeshiva University,* the Supreme Court substantially reduced the NLRA protection available to white-collar personnel. The Court noted that “managerial” employees, who “formulate and effectuate management policies by expressing and making operative the decisions of their employer," have historically been excluded from NLRA coverage by Labor Board decisions due to their close alignment with corporate management. Since the university professors who sought to organize for collective bargaining purposes fit this definition of “managerial” employees, despite their lack of control over their “wages, hours, and other terms and conditions of employment,” they were found ineligible for NLRA coverage. In *College of Osteopathic Medicine & Surgery,* the Labor Board extended *Yeshiva University* by finding that organized college faculty members who obtain meaningful control over academic matters through collective bargaining become “managerial” personnel and thus, ironically, forfeit their negotiation rights under the NLRA.

**Thwarting Organizational Tactics**

Over the past two decades, the Labor Board and the courts have made it easier for corporations to prevent the unionization of their employees. Under the traditional *Hollywood Ceramics* approach, the NLRB refused to permit employers to use material misrepresentations to adversely affect the manner in which employees voted in representation elections. Following the publication of a limited empirical study that suggested that employee voting was not meaningfully influenced by employer misrepresentations or threats, the Labor Board abandoned the *Hollywood Ceramics* doctrine. In *Shopping Kart Food Market,* the NLRB announced that election rules “must be based on a view of employees as mature individuals who are capable of recognizing campaign propaganda for what it is and discounting it.” As a result, the Board no longer evaluates the impact of misleading campaign statements upon worker free choice.
It simply assumes that individuals whose employment destiny is substantially controlled by their employer are not influenced by employer campaign recitations suggesting that unionization may cause a loss of business and jobs.\textsuperscript{78}

The Labor Board recently decided that it will no longer issue bargaining directives in favor of nonmajority unions under \textit{Gissel Packing}.\textsuperscript{79} A labor entity seeking such an order must now demonstrate that it actually achieved majority support. An employer that quickly thwarts an incipient organizing campaign through unlawful threats and discharges may thus be able to chill the organizational propensities of the remaining workers sufficiently to prevent the campaigning union from attaining majority support. Even though this employer would incur backpay liability for the unlawful discharges, it would succeed in avoiding the duty to recognize and bargain with a labor union.

In its 1984 \textit{Meyers Industries} decision,\textsuperscript{80} the Labor Board narrowed the Section 7 protection afforded to individuals who protest adverse employment conditions. The NLRB determined that individuals who question safety conditions or file complaints with state or federal regulatory agencies are no longer insulated from retaliatory employer discipline under the NLRA, unless they either act in direct concert with other workers or assert rights codified in existing bargaining agreements. Personnel who are not covered by a collective contract or do not associate themselves with other workers are thus unable to challenge resulting discharges under the NLRA. In 1985, the NLRB decided that the right of employees to request representation at investigatory interviews would no longer be available to unorganized employees despite the absence of language in Section 7 restricting the definition of concerted activities to those in which formally organized employees participate.\textsuperscript{81}

The NLRA protection afforded to individual employees was eroded further in \textit{Clear Pine Mouldings}.\textsuperscript{82} The Labor Board discarded the “provocation” doctrine that had preserved the reinstatement rights of employees who engaged in nonflagrant misconduct in response to serious employer unfair labor practices. Strikers who protest extreme employer unfair labor practices now forfeit their right to reinstatement if they engage in “excessive” behavior.

When the doctrine enunciated in \textit{Clear Pine Mouldings} is combined with the remedial rule established in \textit{Gourmet Foods}, it becomes clear that immoral employers willing to ignore their legal obligations under the NLRA can significantly disenfranchise em-
ployees exercising their protected right to organize. A company can instruct its supervisory personnel to alert it to incipient organizing efforts. It can readily ascertain the names of the primary union organizers and terminate them in a public and humiliating manner. If the employer is fortunate, its openly provocative method of termination may precipitate unprotected responses from those discriminated against, causing them to forfeit their right to reinstatement under Clear Pine Mouldings. Such overtly intimidating conduct would discourage further organizing activity by the remaining workers. This would probably prevent the campaigning union from attaining majority support. The Gourmet Foods doctrine would thus preclude issuance of any remedial bargaining order.

Restricting the Issues Subject to Bargaining

Currently organized employees may no longer influence their employment circumstances to the extent unionized workers could in the past, due to recent Labor Board and court decisions that have narrowed the scope of mandatory collective bargaining. In First National Maintenance Corp. v. NLRB, the Supreme Court held that a company decision to close part of a business does not constitute a mandatory subject for bargaining. The Court used language that could potentially preclude employee participation in many other important management decisions affecting terms and conditions of employment:

Management must be free from the constraints of the bargaining process to the extent essential for the running of a profitable business. It also must have some degree of certainty beforehand as to when it may proceed to reach decisions without fear of later evaluations labeling its conduct an unfair labor practice.... [I]n view of an employer's need for unencumbered decisionmaking, bargaining over management decisions that have a substantial impact on the continued availability of employment should be required only if the benefit, for labor-management relations and the collective bargaining process, outweighs the burden placed on the conduct of the business.

The Court now requires collective bargaining of management decisions having a significant impact upon employment security only when it is likely that the representative labor organization will be able to satisfy employer concerns at the bargaining table.

In Dubuque Packing Co., the Labor Board held that a business entity is only obligated to bargain about a prospective decision to
relocate production from one facility to another when (1) the management decision does not involve a change in the basic operation of the business; (2) the work to be performed at the new location will not differ substantially from that performed at the existing plant; (3) labor costs are a significant factor with respect to the company’s proposed relocation; (4) the representative union may be able to offer concessions that will satisfy the employer’s financial concerns; and (5) there are no unusual circumstances that require a prompt corporate decision that would be unduly delayed by collective negotiations.

Intrusions into Internal Union Affairs

Recent Labor Board and Court decisions have eroded union disciplinary authority. In *NLRB v. Textile Workers Granite State Joint Board*, the Supreme Court held that a union could not discipline individuals who had crossed a lawful picket line to return to work during a strike when they had resigned from the labor union prior to their strike-breaking activities. Following this decision, several labor organizations amended their constitutions to restrict the right of members to resign during ongoing labor disputes. In *Pattern Makers’ League of North America v. NLRB*, however, the Supreme Court held that the proviso to Section 8(b)(1)(A), which gives unions the right “to prescribe [their] own rules with respect to the acquisition and retention of membership,” did not indicate a congressional intent to permit labor organizations to restrict member resignations. The Court further determined that the Section 7 right of an employee to cross a picket line to work during a strike could not be limited by union provisions limiting membership withdrawals.

In *Ellis v. Brotherhood of Railway, Airline & Steamship Clerks*, the Supreme Court held that while unions could expend the dues money received from objecting bargaining unit members to support conventions and social activities, they could not use such resources to organize other groups of workers or to prosecute civil suits that did not directly involve members of the bargaining unit. The Court simply ignored the fact that a union’s capacity to organize the employees of competitor firms directly affects the job security and employment benefits enjoyed by organized personnel. It also disregarded the fact that test litigation prosecuted on behalf of one bargaining unit may inure to the direct benefit of employees in other units. For example, a victory under the wage and hour laws, the
health and safety statutes, or the civil rights acts could establish a precedent that would greatly advance the employment rights of all employees.

_Lehnert v. Ferris Faculty Ass'n._ further restricted the right of labor organizations to use the funds received from objecting bargaining unit members. The Court determined that for challenged activities to constitute properly chargeable endeavors, they must (1) be "germane" to collective bargaining; (2) be justified by the government's vital interest in labor peace while avoiding "free riders" who benefit from representational efforts without paying for union services; and (3) not significantly add to the burdening of free speech inherent in the allowance of a union security agreement. The Court disallowed expenditure of compelled dues money for lobbying, electoral, or other political activities. In 1992, President Bush increased the pressure on labor organizations through Executive Order 12,800 that requires federal contractors to post notices apprising employees of their right to object to the impermissible expenditure of their union dues. Proposed Department of Labor regulations will require unions to break down the expenditures contained in annual LMRDA reporting forms into distinct categories: contract negotiation and administration, organizing, safety and health, strike activities, political maneuvers, lobbying, promotional efforts, and other. These rules are designed to make it easier for workers to challenge union dues expenditures, and they will create expensive accounting problems for many labor organizations.

**NECESSARY LABOR LAW REFORMS**

Over the past several decades, business and government antipathy toward unions have combined with demographic, industrial, and global factors to threaten the continued viability of the American labor movement. If this negative trend is not reversed in the near future, labor organizations will become relatively insignificant institutions by the beginning of the 21st century. Union officials need to modify their organizing techniques to appeal to white-collar employees, women, minorities, and managerial personnel. Labor leaders must also develop techniques that will increase the economic and political strength of their organizations.

Union leaders cannot revitalize organized labor without the crucial assistance of Congress, the White House, and the judiciary. Organized labor should use its new-found economic and political
power to persuade Congress to amend the NLRA to provide affirmative support for trade unions. The United States must reconfirm the congressional objectives underlying the original Wagner Act if it seriously believes that vital labor organizations constitute an important component of a strong democracy. The amended NLRA should expand the rights of employees, protect employee choice in representation elections, enhance the economic options available to representative unions, broaden the scope of bargaining, and modify the remedial provisions of the NLRA to discourage illegal employer opposition to employee organization.

Substantive Changes

Statutory Coverage. Congress must amend Section 2(3) of the NLRA, which defines the term "employee" to reflect the economic realities characteristic of the post-industrial society America has become. Individuals who perform services for businesses and might constitute "independent contractors" under archaic legal doctrines should be provided with statutory coverage to reflect the true economic relationship between them and the entities for whom they work. Modifying Section 2(3) to incorporate the Hearst Publications "economic realities" test would enable individuals who do not fall within the traditional definition of "employee" but nevertheless retain little or no control over the terms and conditions of their employment to benefit from the protections of the NLRA.

Congress must also amend Section 2 to limit the scope of the supervisory exclusion. The Labor Board presently finds supervisory status in individuals who possess the authority to influence the terms and conditions of other employees, even when that authority is rarely exercised. The statutory definition should be altered to exclude only those persons who actually make determinations with respect to the employment of other employees and who do so regularly. Lower level "supervisors" who exercise such powers infrequently or merely make recommendations to higher management officials should not be excluded from NLRA coverage. Their employment interests are more closely aligned with their rank-and-file colleagues than with corporate managers, and they require collectivization to advance their employment rights.

Section 2(3) should explicitly exclude "managerial officials," defined to include only those persons "who regularly and meaningfully participate in the formulation or effectuation of fundamental labor
or personnel policies directly pertaining to wages, hours, or other
terms and conditions of employment.” Employees who may be able
to influence company rules not immediately related to basic em­
ployment conditions should not be excluded from NLRA coverage.97
Because such individuals lack the capacity to decide those issues
that would be the subject of collective bargaining, they should have
the statutory right to advance their employment interests through
organized efforts.

**Representation Elections.** The statutory right of employees to or­
ganize is meaningless without the opportunity to participate in fair
representation elections. The Labor Board should prohibit tactics by
employer or union agents that are likely to infringe employee free
choice. Employers should be prohibited from disseminating inform­
ation that even intimates to employees that if they vote in favor of
unionization, they may endanger their job security. Individuals who
depend on their employers for their continued economic existence
are unlikely to ignore suggestions that their continued employment
security is in jeopardy. The NLRB should require that company rep­
resentations regarding possible adverse effects of collectivization be
based upon objective factual circumstances and be limited to as­
sessments concerning demonstrably probable consequences beyond
the control of the firm.98

Intentional misrepresentations should be similarly proscribed. The *Midland National Life Insurance Co.*99 doctrine that permits the
dissemination of pre-election misrepresentations is based upon the
naive premise that employees are not meaningfully influenced by
such factors. Employers would not use these techniques if they did
not believe they could influence the election outcome. The Labor
Board should return to the *Hollywood Ceramics*100 approach and
refuse to allow representation election outcomes to be determined
by the ability of either business or labor entities to distort the truth.

If workers are to vote intelligently in representation elections, they
must have the opportunity to become familiar with the arguments
for and against unionization. Employers presently enjoy a clear ad­
vantage in this regard. They may promulgate rules preventing em­
ployees from proselytizing during work time, while their supervisors
inform employees about the negative aspects of unionization during
the same work time.101 Employers can lawfully address the issue of
unionization at captive audience sessions that workers are required
to attend, read anti-union statements over intercom systems, post
election propaganda on company bulletin boards, include negative information about unionization in employee pay envelopes, and mail campaign material to worker homes. Labor organizations are generally unable to employ any of these forms of communication to provide employees with a balanced perspective.

Proposals that this communication imbalance be reduced by providing union organizers with limited access to company premises during election drives\textsuperscript{102} have been countered by understandable employer concerns with theft, sabotage, and drug usage. A less drastic means of lessening the communication advantage enjoyed by employers would be to provide union organizers with access to prominently displayed bulletin boards. Unions should also be permitted to include information in employee pay envelopes and to mail campaign material to worker homes if employers utilize these communication channels. When company officials give captive audience speeches in person or through public address systems, employees who support the union organizing drive should be provided with the opportunity to respond to the employer's anti-union message. If these channels of communication are available to union supporters, the likelihood of informed voting would increase.

Union officials should be given the names and addresses of employees in the unit being organized at a reasonably early date. Although unions are currently provided with this information after a Labor Board election has been directed,\textsuperscript{103} the names and addresses of unit personnel should be made available in a more timely manner. This approach would enable organizers to make home visits and to mail campaign literature to worker homes. To ensure that employee privacy would only be compromised during serious organizing drives, the Labor Board could limit the disclosure of this information to cases in which union agents can demonstrate that they have obtained signed authorization cards from 20 or 30 percent of the workers in the proposed unit.

To increase the probability of fair balloting, the Labor Board should mandate that elections be held within two weeks after representation petitions have been filed. NLRB notices could be immediately posted to apprise affected employees of their rights under the NLRA, and Regional Offices could swiftly determine voter eligibility. In most cases in which the employer contests the appropriateness of the bargaining unit proposed by the petitioning union, Regional Directors could decide the possible combinations and direct immediate elections. The votes of different employee groups could
be segregated until the Regional Directors resolve the unit questions, and the Labor Board would then aggregate the votes of the relevant groups and certify the results. Because employers are generally aware of union organizing drives well before any election petition is filed from supervisors who inform managers of incipient campaign efforts, company officials would have ample time to disseminate their anti-union message before the election.

The statutory right of employees to organize for collective bargaining purposes is meaningless if workers lack the economic power to support their negotiating demands. Without some degree of meaningful empowerment, unionized personnel are forced to engage in collective begging, rather than collective bargaining. The Supreme Court decision in NLRB v. Mackay Radio & Telegraph Co. severely undermined the statutorily protected right of employees to strike. The Mackay Radio permanent replacement doctrine is being employed with greater frequency since President Reagan decided in 1981 to terminate 11,000 air traffic controllers who illegally struck against the federal government. A recent AFL-CIO study found that approximately 11 percent of the 243,300 workers who participated in major strikes during 1990 were permanently replaced. Most were forced to seek other employment, and their representative labor organizations ceased to function as viable bargaining agents for the new personnel.

The Mackay Radio holding ignored two crucial propositions embodied in the NLRA—“that the law should protect the individual worker as the weaker party, and that the best protection against individual weakness [is] collective action.” By permitting employers to hire permanent replacements for striking employees, the Court effectively destroyed the economic balance that Congress established in the NLRA.

The Strike Weapon. Some commentators argue that struck employers should not be permitted to hire temporary or permanent replacements for striking employees, because the retention of such replacements would impermissibly interfere with the unfettered right of workers to resort to work stoppages. A complete prohibition against the employment of any replacement personnel, however, would unduly prevent companies from protecting themselves against truly excessive union demands. A policy that would balance the interests of both struck employers and striking employees is necessary to resolve these competing issues. For example, the NLRA
could be amended to bar the hiring of any replacements during the first one, two, or three months of an economic strike. The affected employer could continue to function with regular managerial employees, but could not employ replacement workers during the specified period. After the designated interval elapsed, the struck firm would be permitted to employ temporary or permanent replacements. This type of restriction would preclude the displacement of striking employees during the initial period of a job action, but it could create major problems for business entities unable to maintain minimal operations through the use of managerial personnel.

A more reasonable alternative would involve the balancing approach frequently utilized to determine the degree to which employers may curtail protected employee rights due to business exigencies.109 Struck employers could be allowed to continue to operate through the hiring of temporary replacement workers who would be laid off as soon as the striking employees terminated their job actions. In most situations, struck companies desiring to maintain operations would be able to locate a sufficient number of qualified temporary replacements to reduce the economic impact of the work stoppages. Struck employers would only be permitted to hire permanent replacements when they could demonstrate by clear and convincing evidence that local labor market conditions preclude the employment of qualified temporary workers. To prevent the Labor Board or courts from permitting the premature hiring of permanent replacements, Congress could enact a statutory provision proscribing the employment of permanent replacements during the first month or two of any work stoppage.

A rule preventing or restricting the hiring of permanent replacements would prevent struck businesses from using employee job actions as an excuse to eliminate the jobs of individuals who engage in concerted activity or to decertify incumbent bargaining representatives through the employment of permanent replacement personnel. Such a rule would also deprive firms countering union organizing campaigns of the ability to caution employees that if their selected bargaining agent calls a work stoppage, workers who participate can be permanently replaced.110 Disallowing permanent strike replacements would simultaneously prevent "crossover" employees of the existing bargaining unit—who refuse to strike with their fellow workers or who return to work during an ongoing job action—from retaining the positions they obtained ahead of more senior strikers whom they replaced. A rule prohibiting permanent
replacements would enable all of the individuals who engaged in a strike to displace temporary replacements, including crossover personnel, who momentarily occupied their positions.

In 1991, bills were introduced in Congress that would have either prohibited the hiring of permanent replacement workers or limited the employment of such persons to circumstances in which temporary replacements could not be retained. Although the House of Representatives voted to adopt H.R. 5, which would have barred the employment of permanent replacements, congressional supporters were unable to overcome business and White House opposition to the proposed legislation.

Secondary Labor Activities. In enacting the NLRA, Congress recognized that workers could only effectively counter the economic power of corporate entities through concerted action. At the present time, employees involved in a labor dispute against an employer are only permitted to direct economic pressure toward that firm. Section 8(b)(4)(B) prohibits workers from inducing employees of secondary business entities to cease handling products going to or coming from the struck company, or from threatening or coercing secondary parties to convince them to cease doing business with the primary company. Employees may engage in consumer picketing at retail stores that request customers not to purchase goods produced by the struck business, so long as the struck goods do not constitute the principal items carried by the secondary retail establishment. They may also distribute handbills asking prospective customers to refrain from patronizing those shops if they continue to carry the struck goods during the labor dispute, but they may not precipitate any cessation of work by the individuals employed by secondary retail establishments. These restrictions on the use of secondary actions by employees in labor disputes severely curtail the economic weapons available to unionized personnel.

The NLRA should be amended to permit some forms of secondary activity. Congress must acknowledge the significant imbalance in bargaining power that has developed over the past two decades as a result of industrial and technological changes that have diminished the efficacy of conventional work stoppages and the ability of struck business enterprises to hire temporary and permanent replacements. Congress must also recognize that a strike at one firm generally has an impact on other unrelated entities.

A successful work stoppage shuts down the operations of the target
company. As a result, the business may be forced to suspend its purchases of raw materials and to reduce its shipment of finished goods. When striking employees are unable to generate a complete cessation of primary operations through a strike, they should be able to expand their concerted activities to reach secondary companies that deal directly with the struck employer as suppliers or customers. Workers engaged in a work stoppage should be able to induce the employees of secondary firms to refuse to handle the raw materials destined for the struck firm or the finished goods coming from that establishment during the controversy. If an employer attempts to limit primary employee picketing of suppliers or customers by creating an artificial middle enterprise through which it funnels raw materials or finished goods, the firms dealing directly with that enterprise should be susceptible to primary employee picketing. Congress should also amend Section 8(e){{116}} of the NLRA to permit primary employees and their union to ask secondary parties having direct relationships with the primary employer to enter into agreements in which they promise to cease doing business with the primary company during lawful work stoppages.

Congress should amend Section 8(b)(4)(B) to permit striking individuals to appeal to customers of secondary retail stores. If a struck firm is unable to produce during an industrial dispute, retail stores are unable to obtain the products normally manufactured by that company. Strikers should be able to use placards or handbills to induce prospective customers to cease shopping at retail stores that continue to carry the products of the struck firm during the existing labor controversy. No distinction should be drawn between peaceful consumer picketing and peaceful consumer handbilling. Nor should the amount of revenue derived from sales of the struck goods affect the legality of such consumer appeals, since a complete shutdown of the struck company would force the retail establishment to explore the availability of products from alternative firms regardless of the profits lost due to the unavailability of the goods at issue. If the secondary retail store is a direct customer of the primary employer, the striking employees should be permitted to ask the retail workers to cease handling the primary party’s goods. If there is no immediate relationship between the two entities, the consumer picketing and handbilling would lose its statutory protection if the participants cause secondary retail employees to stop work.

Were corporate leaders concerned about production losses caused
by more effective work stoppages, they could support other innovative alternatives. For example, an NLRA amendment could prohibit economic strikes, but mandate the resolution of collective bargaining impasses through binding interest arbitration procedures. Tri-partite arbitral panels could be empowered to select the more reasonable final offer made by the employer or the union, either on an "issue-by-issue" or a "total package" basis. Various state public sector bargaining laws have successfully employed interest arbitration procedures as a substitute for proscribed strike activity.\[^{117}\]

Employers could alternatively support an amendment to the NLRA that would permit only "statutory strikes" that would not involve actual work stoppages.\[^{118}\] After a bargaining impasse was reached, the employer or the labor organization could declare a "strike." Production and services would continue as usual, but employee wages would be reduced by a specific amount (e.g., 25 percent) and company revenues would be reduced by the same percentage. If the parties resolved their dispute promptly, the withheld compensation and revenues would be returned to the workers and the firm. If the controversy were not settled quickly, however, the withheld funds would be permanently transferred to the public treasury. The financial incentives associated with "statutory strikes" would encourage labor and management representatives to resolve their bargaining impasses expeditiously without disrupting production or depriving workers of their livelihood.

**Protections for Nonunion Personnel under the NLRA.** Individuals who question safety conditions or file complaints with state or federal regulatory agencies are not insulated from retaliatory employer discipline under the NLRA unless they either act in direct concert with other workers or assert rights codified in existing bargaining agreements.\[^{119}\] Congress should amend the NLRA to clearly provide that unorganized individuals who raise issues of obvious interest to other employees with their employer or with regulatory bodies shall be considered engaged in "constructive concerted activity" and be entitled to protection under Section 7.\[^{120}\]

The distinction between union and nonunion personnel established by the Labor Board in *Sears, Roebuck & Co.*,\[^{121}\] with respect to employees who request the assistance of fellow employees during investigative interviews they reasonably fear may result in discipline, has no foundation in the language of Section 7. Congress
should amend that provision to indicate that both organized and unorganized employees have the right to ask for the support of other persons during such investigatory interviews.

**The Scope of Bargaining.** The Supreme Court and the Labor Board have unduly restricted the scope of bargaining available to representative labor organizations. The NLRA was designed to enable represented personnel to deprive corporate officials of their ability to make unilateral determinations with respect to issues of direct relevance to bargaining unit members.\textsuperscript{122} Congress should amend Section 8(d)\textsuperscript{123} to make it clear that designated bargaining agents possess the statutory prerogative to expect negotiations over all company decisions that will meaningfully impact employee “wages, hours, and other terms and conditions of employment.” Proposed decisions pertaining to such topics as subcontracting, production transfers, partial closures, and the introduction of new technology should all be subject to mandatory bargaining.

The inconvenience of such negotiations to employers is irrelevant, because the relatively slight infringement of managerial authority associated with mandatory bargaining is outweighed by the need for unionized employees to participate in the decision-making process that bears directly on their continued economic well-being. This expanded scope of bargaining would not enable labor organizations to prevent management decisions that simply displease bargaining unit personnel, but would merely obligate employers to notify representative unions of proposed changes and provide them with the opportunity to discuss the pertinent issues. Businesses would not be required to make any concessions or to agree to any proposals.\textsuperscript{124} Management would be free to implement the position rejected by union leaders at the bargaining table, if employee representatives refused to accommodate employer needs and a good-faith impasse were reached.\textsuperscript{125}

The ability of representative labor organizations to obtain beneficial contract terms is directly related to their capacity to preserve bargaining unit solidarity. Congress should recognize that labor organizations are democratic institutions and that while members may oppose proposed concerted activity, they should not be able to ignore the affirmative vote of a majority of their fellow members. Unions should be permitted to impose reasonable restrictions upon the right of members to resign during ongoing job actions, to preserve the
concerted strength of those organizations. Congress can achieve this end by amending the proviso to Section 8(b)(1)(A)\textsuperscript{126} to provide that member resignations would not take effect until thirty days after their submission to the union. Such a rule would preserve the worker solidarity that is essential during the early stages of economic strikes, and would reasonably allow dissenters to escape the disciplinary authority of their labor entities after thirty days.

Labor organization solidarity has been similarly undermined by Supreme Court decisions restricting the right of such entities to expend dues money received from nonmember employees covered by lawful union security agreements. Even though private sector labor organizations derive their representational status from the NLRA, they are not governmental entities. The NLRA should thus be amended to permit unions to expend dues money for nonpolitical and nonideological purposes that advance worker rights, such as union organizing, litigation not related to the immediate bargaining unit, or lobbying efforts, even if these purposes do not immediately concern the negotiation and administration of the collective contract covering the instant unit of employees.

Representative unions should certainly be able to use the dues money received from objecting members to organize new groups of workers. The job security, compensation levels, and employment terms enjoyed by unionized personnel are directly threatened by the ability of unorganized companies to obtain a competitive advantage through the availability of reduced labor costs. To the extent labor organizations are able to organize most or all members of an industry, they greatly protect the job security and working conditions provided to employees covered by collective contracts.

Litigation involving external bargaining units may similarly inure to the benefit of individuals in the immediate unit. Test cases involving wage and hour laws, health and safety regulations, civil rights statutes, and other employment-related enactments generate judicial precedents that will assist all workers. This indirect benefit makes it appropriate to permit representative labor unions to expend dues money received from one bargaining unit to finance litigation involving the employment rights of other groups of workers. In most, if not all, such cases, the labor union would merely attempt to obtain through litigation benefits and protections it would otherwise have to achieve through the collective bargaining process.

Unions should also be allowed to spend dues money to support lobbying efforts designed to advance the employment rights of all
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workers. While it would be improper under the First Amendment to permit labor entities to expend the dues money of objecting employees to finance political parties or particular candidates, or to proselytize for or against such ideological issues as abortion or aid to parochial schools, unions should be able to utilize dues revenues to support lobbying intended to enhance the employment interests of all workers. Efforts to increase the minimum wage, to improve health and safety protections, to extend unemployment compensation coverage, to proscribe discrimination, or to protect employees displaced by new technology or job relocations are germane to collective bargaining. To the extent labor organizations can obtain legislation to cover these employment-related topics, representative unions will be able to focus on the advancement of other worker objectives through the bargaining process.

Remedial Changes

The Need for More Balanced NLRA Remedies. The remedial scheme of the NLRA favors employers. The primary reason for this statutory imbalance is that the most potent unfair labor practice remedies were added to the NLRA in 1947 by an extremely pro-business Congress. Most of the new remedial provisions added by the LMRA pertained to violations committed by labor organizations, not employers. For example, the new Section 10(1)\[127\] specified that charges involving secondary union activity under Section 8(b)(4) or 8(e) or regarding organizational or recognitional picketing under Section 8(b)(7) shall be handled on a priority basis. Whenever a charge alleging a violation of one of those provisions is filed, the Labor Board is directed to seek an immediate injunctive order against the offending union, to protect the employer's interests while the subsequent unfair labor practice proceedings are conducted. If the NLRB fails to seek a restraining order against the proscribed union activity, the affected business firm may petition a district court for a writ of mandate ordering the Board to do so.\[126\] Section 303 of the LMRA\[129\] provided employers with additional protection against secondary conduct by authorizing federal courts to award damages to parties injured by Section 8(b)(4) violations.

Employers that commit unfair labor practices are not subject to mandatory injunctive orders. If a union files a charge alleging a violation of Section 8(a) by a business entity and the NLRB decides to issue a complaint, the Board may seek a preliminary injunction
against the offending conduct under Section 10(j). The Board is not statutorily obligated, however, to seek injunctive relief, and if the NLRB declines to pursue an injunction, the adversely affected employees or labor organization cannot compel that agency to do so. The Labor Board rarely seeks injunctive relief against employer unfair labor practices under Section 10(j).

The number of employer unfair labor practices has increased dramatically over the past ten to fifteen years. It has become relatively common for companies counteracting union organizing drives to discharge the employees leading the collectivization efforts. If firms terminate such individuals publicly and flagrantly, they may be able to provoke an unprotected response from the fired employees and avoid the obligation to reinstate them, thus dampening union support among the remaining workers. If the labor entity is thus prevented from attaining majority status, the company does not have to worry about any remedial bargaining order, no matter how outrageous its violations.

Corporations that ignore the rights of their employees under the NLRA are generally motivated by the fact that the relatively minimal costs associated with unfair labor practice liability are outweighed by the overall costs associated with worker unionization. These corporations ignore the moral and systemic ramifications of their unlawful conduct, and take advantage of the fact that Labor Board remedies with respect to discriminatory terminations are wholly inadequate. The sole monetary remedy available to unlawfully discharged employees is a Board order requiring the offending party to make whole those who have been discriminated against for the compensation they have lost. Unlawfully fired individuals are even required to seek interim employment to mitigate their economic losses during the pendency of the NLRB proceedings. Furthermore, Labor Board reinstatement orders are not particularly effective. Only about 40 percent of those discriminated against actually accept offers of reemployment, and, of those who do, approximately 80 percent leave their employer within two years.

Companies that commit serious unfair labor practices during organizing drives may find themselves encumbered by remedial bargaining orders, if the adversely affected labor organizations can demonstrate that they obtained majority support from the workers despite the employer violations. Even these remedial directives are often ineffectual. Only about 35 to 40 percent of unions that obtain remedial bargaining orders ever achieve collective contracts. The
more vigorously employers oppose such remedial orders through judicial appeals, the less likely the chance that the labor union will be able to achieve an initial bargaining agreement.\textsuperscript{137}

Even when companies do not employ coercive tactics and unions successfully obtain Labor Board certification, fruitful negotiations do not always result. Recalcitrant employers can simply refuse to accede to worker demands. A good faith bargaining impasse is unactionable under the NLRA. Even if employers refuse to agree to union demands in bad faith, the most they need fear from the NLRB is a cease-and-desist order that will take several years for the petitioning labor organization to obtain and have judicially enforced.\textsuperscript{138} By the time meaningful relief is provided, crucial organizing momentum is lost and union effectiveness is irretrievably diluted.

If the proliferating negation of NLRA rights by business entities is to be reversed, Congress must provide more efficacious remedies. To deter the crippling impact of Section 8(a)(3) discharges, Congress should adopt a liquidated damages provision similar to Section 16(b) of the Fair Labor Standards Act\textsuperscript{139} that authorizes double backpay awards to employees whose rights have been violated. If the Labor Board were empowered to award double or triple backpay to individuals terminated unlawfully during organizing campaigns, this would increase the cost of employer noncompliance.

To minimize the loss of organizing momentum associated with the illegal termination of key union supporters, Congress should amend Section 10(1) to make mandatory injunctions applicable to Section 8(a)(3) discharges that occur during organizing campaigns. As soon as a meritorious charge is filed, the NLRB should be statutorily obligated to seek an immediate injunctive order directing the offending employer to reinstate the adversely affected individuals. If such persons were promptly returned to their former positions, the negative impact of the employer's violations would be minimized.

Congress should amend the NLRA to authorize the Labor Board to issue remedial bargaining orders in favor of labor organizations that were unlawfully prevented from obtaining majority support because of extreme employer unfair labor practices. To avoid imposing an exclusive bargaining agent on employees who do not desire such representation, remedial bargaining orders should only be employed in extraordinary situations. Nonetheless, when the Board is satisfied that majority status would almost certainly have been achieved in the absence of the company's egregious violations of the NLRA, it

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should be empowered to protect the rights of the discouraged union supporters through the issuance of a bargaining directive. When employers indefensibly refuse to bargain in good faith with newly certified unions or labor organizations that will clearly become the recipients of remedial bargaining orders precipitated by flagrant company unfair labor practices, the Labor Board should be similarly directed under Section 10(1) to seek preliminary injunctive orders. These would force the recalcitrant business firms to bargain with the designated labor organizations during the unfair labor practice proceedings. Business enterprises would thus be denied the opportunity to disregard the collective rights of their employees during the several years it takes under current law to obtain a judicially enforced Labor Board order.

When employers unjustifiably refuse to bargain, make-whole relief should be available to place the unlawfully disenfranchised workers in the economic position they would have attained in the absence of the company's outrageous disregard for their NLRA rights. Because the NLRB has decided that it lacks the statutory authority to provide such relief, Congress should amend Section 10(c) of the NLRA to empower the Board to require compensatory relief. Petitioning labor organizations could present Bureau of Labor Statistics data to support their requests for make-whole compensation.

Limiting Labor Board Deferral to Arbitral Procedures. Although the NLRB is empowered in Section 10(a) of the NLRA to resolve unfair labor practice disputes, and that provision states that its power in this regard "shall not be affected by any other means of adjustment or prevention that has been or may be established by agreement, law, or otherwise," the Labor Board has increasingly declined to perform this function. In Spielberg Manufacturing, the Labor Board decided that in unfair labor practice cases it would defer to previously issued arbitral determinations that involved the same factual circumstances and effectively resolved the issues raised in the unfair labor practice case. The NLRB would accept the prior arbitral results where the proceedings were "fair and regular, all parties had agreed to be bound, and the decision of the arbitration panel [was] not clearly repugnant to the purposes and policies of the [NLRA]." The party that sought NLRB deferral to a prior arbitral decision was obliged to demonstrate that the Spielberg prerequisites were satisfied.

The Spielberg deferral policy was significantly expanded in Olin
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We would find that an arbitrator has adequately considered the unfair labor practice if (1) the contractual issue is factually parallel to the unfair labor practice issue, and (2) the arbitrator was presented generally with the facts relevant to resolving the unfair labor practice. ... [W]ith regard to the inquiry into the "clearly repugnant" standard, we would not require an arbitrator's award to be totally consistent with Board precedent. Unless the award is "palpably wrong," i.e., unless the arbitrator's decision is not susceptible to an interpretation consistent with the Act, we will defer.

Finally, we would require that the party seeking to have the Board reject deferral and consider the merits of a given case show that the above standards for deferral have not been met. Thus, the party seeking to have the Board ignore the determination of an arbitrator has the burden of affirmatively demonstrating the defects in the arbitral process or award. 147

The Olin formulation makes it exceedingly difficult for parties to challenge prior arbitration decisions that are not entirely compatible with NLRA policies. The burden of proof has been inexplicably transferred from the party seeking acceptance of the previous arbitral findings to the party opposing such acceptance. So long as the arbitral determination was not "palpably wrong," it is entitled to NLRB affirmation. In addition, courts reviewing arbitral decisions are obligated to enforce such awards so long as they "draw their essence" from the bargaining agreement and are not clearly repugnant to law or public policy. 148 Such judicial deference is far greater than that accorded to the review of Labor Board unfair labor practice determinations. 149 The expansive Labor Board deference to arbitral decisions has caused the development of inconsistent legal principles that do not provide individual employees with protection as broad as that envisioned by Congress when it enacted the NLRA.

Spielberg deferral is appropriate where purely factual issues are in dispute, because it reasonably enhances the federal labor policy favoring the private resolution of labor controversies 150 and prevents unnecessarily duplicative litigation. To ensure that the prior arbitral proceedings were truly "fair and regular" and that the award is not "repugnant to the purposes and policies of the [NLRA]," however, deferral should only be employed where the party seeking deferral can demonstrate that the traditional Spielberg prerequisites have been satisfied. Congress should amend Section 10(a) to codify the original Spielberg standards, and to reject the overly expansive Olin
Corporation approach, making it clear that the Labor Board should not accept a prior arbitral award if there is any reason to believe that the Spielberg criteria have not been completely met.

The NLRB frequently refuses to consider unfair labor practice claims where no previous arbitral determinations have been issued, if the charges raise issues that might be resolved through available contractual grievance-arbitration procedures. Under the Collyer Insulated Wire\textsuperscript{151} doctrine, if the respondent is willing to have the controversy submitted to the arbitral process, the Board usually withholds its statutory authority and directs the parties to utilize that means of adjudication. In General American Transportation Corp.,\textsuperscript{152} the NLRB appropriately acknowledged that such a pre-unfair labor practice hearing deferral is proper where Section 8(a)(5) or 8(b)(3) refusal to bargain charges are involved. In these cases, the rights of the representative labor organization as an institution are to be determined, and the resolution of the underlying contractual question, which will simultaneously dispose of the unfair labor practice issue, will be made in the forum that the parties specifically established to hear such controversies. Where individual rights are raised under provisions such as Section 8(a)(1), 8(a)(3), 8(b)(1)(A), or 8(b)(2), however, the interests of the aggrieved employee may not coincide with those of either the employer or the representative union which control the arbitral process. Application of the Collyer deferral policy to such cases effectively deprives allegedly coerced individuals of access to the administrative agency that Congress created to resolve unfair labor practice cases. Congress should amend Section 10(a) to codify the General American Transportation approach and limit pre-arbitration deferral to cases involving refusal-to-bargain allegations. Such an amendment would guarantee individual employees the right to have their claims presented by independent Labor Board attorneys before the tribunal that possesses substantial NLRA expertise and whose members have not been selected by the employer and the labor organization involved.