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# PREVENTION OF ANTIUNION DISCRIMINATION IN THE UNITED STATES

THEODORE J. ST. ANTOINE\*

## I. Introduction

Nearly all rank-and-file employees in private businesses of any substantial size in the United States are protected by federal law against anti-union discrimination. The Railway Labor Act applies to the railroad and airline industries.<sup>1</sup> The National Labor Relations Act (NLRA) applies to all other businesses whose operations "affect [interstate] commerce" in almost any way.<sup>2</sup> Supervisory and managerial personnel, domestic servants, and agricultural workers are excluded from this federal scheme.<sup>3</sup> Separate federal law covers the employees of the federal government.<sup>4</sup> About thirty of the fifty states have statutes ensuring the right to organize on the part of some or most of the state and municipal employees.<sup>5</sup> This paper will concentrate on the NLRA, by far the most significant legislation dealing with private sector employees.

The NLRA forbids antiunion discrimination in sweeping, comprehensive terms. Administrative and judicial decisions interpreting the statute have been generous, for the most part, in extending the reach of the substantive right. The principal deficiency is that remedies are often too little and too late. For example, a recalcitrant employer can frequently kill off an organizing drive with an intimidating series of discharges; and when the sanction comes, two or three years later, it may be barely more than a slap on the wrist.

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\* Degan Professor of Law, University of Michigan. Report given at the First American Regional Congress on Labor Law and Social Security, Buenos Aires, Argentina, April 27-30, 1987.

1. 44 Stat. 577 (1926), as amended, 45 U.S.C. § 151 (1982).

2. 49 Stat. 499 (1935), as amended, 29 U.S.C. § 151 (1982) (NLRA).

3. NLRA § 2(3), 29 U.S.C. § 152(3) (1982).

4. See, e.g., the Federal Relations Service Labor-Management and Employee Relations Law, 92 Stat. 1111 (1978), 5 U.S.C. § 7101 (1982).

5. Rehmus, *Labor Relations in the Public Sector*, in *LABOR RELATIONS LAW IN THE PUBLIC SECTOR* 3-5 (H. Edwards, R. Clark & C. Craver eds., 2d ed. 1979).

## II. *Protected Activities*

Section 7 of the NLRA<sup>6</sup> has been called the Magna Carta of workers in the United States.<sup>7</sup> It establishes the right of employees to “self-organization”, which includes not only the right to “form” or “join” labor organizations and to “bargain collectively” but also the right to engage in “other concerted activities” for “mutual aid or protection”. A “labor organization” is broadly defined as “any organization” or any “employee representation committee” in which employees participate, and which exists for the purpose of “dealing with employers” on almost any subject.<sup>8</sup> Employees also have the right under section 7 to refrain from unionization or other concerted activity.

Concerted conduct typically, but not necessarily, involves action by a union, such as a union-called strike or work stoppage. Informal groups of employees are also protected in banding together to better their economic lot or to protest undesirable working conditions.<sup>9</sup> A single employee is protected in seeking, even unsuccessfully, to persuade others too support a union or to participate in some other form of concerted activity.<sup>10</sup> An individual employee is also protected if he asserts an arguable claim under a collective bargaining agreement, even though he acts solely on his own behalf, since invoking the labor contract is deemed “an integral part of the process that gave rise to the agreement.”<sup>11</sup>

There are limits to this expansion of the concept of “concerted” activity. A single employee, or even several employees acting on an individual basis, are not protected in a nonunion setting if they go to their employer or to the public authorities to complain about a safety hazard.<sup>12</sup> The presence of a union as the employees’ representative may be critical for the existence of certain rights. The U.S. Supreme Court has held, for example, that section 7 covers the right to union representation at an investigatory interview which an employee reasonably believes could result in discipline.<sup>13</sup> But the National Labor Relations Board (NLRB), the agency created to administer the NLRA, does not recognize a section 7 right in a nonunion employee to be represented by a co-

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6. NLRA § 7, 29 U.S.C. § 157 (1982).

7. The Magna Carta was the great declaration of individual liberties which the barons of England secured from King John at Runnymede in 1215. See G. TREVELYAN, *ILLUSTRATED HISTORY OF ENGLAND* 169-73 (1956).

8. NLRA § 2(5), 29 U.S.C. § 152(5) (1982).

9. *NLRB v. Washington Aluminum Co.*, 370 U.S. 9 (1962).

10. *Mushroom Transportation Co. v. NLRB*, 330 F.2d 683 (3d Cir. 1964); see also *Root-Carlin, Inc.*, 92 N.L.R.B. 1313 (1951).

11. *NLRB v. City Disposal Systems*, 465 U.S. 822, 823 (1984).

12. *Meyers Industries, Inc.*, 281 N.L.R.B. No. 118, 123 L.R.R.M. 1137 (1986).

13. *NLRB v. J. Weingarten, Inc.*, 420 U.S. 251 (1965).

worker at such an interview.<sup>14</sup>

It may seem anomalous that the existence of concerted activity and section 7 protections should sometimes turn on the almost accidental factor of whether an employee first tries to enlist the support of fellow workers, or instead acts spontaneously on his own in lodging a protest with the employer. However, one should realize that Congress' fundamental purpose for adopting the NLRA (the Wagner Act) was to legitimate and shield union organization;<sup>15</sup> not to pass an "unjust dismissal" law in disguise. Therefore, the requirement of some modicum of group action or attempted group action becomes understandable. The motives of the Wagner Act's principal sponsors were both idealistic and pragmatic. They wished to confer "equality of bargaining power"<sup>16</sup> on workers through collective action, thereby promoting "principles of social justice"<sup>17</sup> and at the same time end the bitter, spreading industrial strife of the mid-1930's.<sup>18</sup>

Not all concerted activity is protected by section 7. Protection is lost if the activity has an unlawful objective or is carried on in an unlawful manner. Employees may be discharged for engaging in an illegal secondary boycott or for striking to compel an employer to commit an unfair labor practice.<sup>19</sup> Even if the objective is lawful, there is no protection under the NLRA if the concerted activity is criminal or tortious. Examples would be violent picketing<sup>20</sup> or a "sitdown" strike, the forcible occupation of an employer's plant.<sup>21</sup>

Most difficult to classify are the cases in which the concerted activity is not illegal in the strict sense, but where it may seem so dubious, inappropriate or "indefensible" as an element of an ongoing employer-employee relationship that Congress would arguably not have intended to protect it against employer reprisals. Included in this category are slowdowns on the job, "quickie" intermittent strikes or unannounced work stoppages;<sup>22</sup> and such "disloyalty" as the sharp, public disparagement of the quality of an employer's product.<sup>23</sup> The NLRB and the courts have not provided satisfactory rationales for all of these decisions. Uncompli-

14. *Sears, Roebuck & Co.*, 274 N.L.R.B. 230, 118 L.R.R.M. 1329 (1985).

15. NLRA § 1, 29 U.S.C. § 151 (1982) (declaring the policy of the United States to be that of "encouraging the practice and procedure of collective bargaining and . . . protecting the exercise by workers of full freedom of association").

16. 78 CONG. REC. 3443 (1934) (remarks of Sen. Wagner).

17. *Id.* at 10559 (remarks of Sen. Walsh).

18. *Id.* at 10351 (remarks of Sen. Walsh).

19. *Hoover Co. v. NLRB*, 191 F.2d 380 (6th Cir. 1951).

20. *Clear Pine Mouldings, Inc.*, 268 N.L.R.B. 1044, 115 L.R.R.M. 1113 (1984).

21. *NLRB v. Fansteel Metallurgical Corp.*, 306 U.S. 240 (1939).

22. *See Elk Lumber Co.*, 91 N.L.R.B. 333, 26 L.R.R.M. 1493 (1950); *see also Pacific Telephone and Telegraph Co.*, 107 N.L.R.B. 1547, 33 L.R.R.M. 1433 (1954).

23. *NLRB v. IBEW Local 1229*, 346 U.S. 464 (1953).

mentary descriptions of an employer's output—especially that produced by strikebreakers—would not seem entirely unexpected or exceptionable in the course of a heated labor dispute, and not enough to justify the forfeiture of job rights on the basis of a standard as vague as “disloyalty”.

Some section 7 rights can be waived in certain circumstances. The most obvious example is the “no-strike” clause contained in almost every collective bargaining agreement, often negotiated as a *quid pro quo* for the grievance and arbitration procedure.<sup>24</sup> Most employees striking in violation of a no-strike pledge are subject to discharge by their employer.<sup>25</sup> However, certain section 7 rights are so sensitive that a union may not be permitted to waive them on behalf of the employees. These include the right to campaign at the work place during non-working time either for or against an incumbent union,<sup>26</sup> and the right to file unfair labor practice charges with the Labor Board against either union or employer.<sup>27</sup>

### III. Coercion and Discrimination

Specified types of employer and union conduct that impair employees' rights under section 7 are forbidden as “unfair labor practices” by section 8 of the NLRA.<sup>28</sup> The original Wagner Act of 1935 covered only actions by employers. The Taft-Hartley amendments of 1947 added a roughly parallel code of union unfair labor practices.<sup>29</sup> These prohibitions do not apply to the acts of third parties, such as public officials or local citizens, unless an employer or a labor organization somehow participates in them.<sup>30</sup>

Sections 8(a)(1) and 8(b)(1)(A) forbid an employer or a union respectively, to “restrain or coerce” employees in the exercise of section 7 rights. This general language plainly reaches behavior such as violence,<sup>31</sup> intimidation,<sup>32</sup> and spying on employees.<sup>33</sup> Such conduct was not entirely uncommon in the early days of the Wagner Act; fortunately, it is now relatively rare. Today the most frequent questions concern the limitations an employer may place on organizational activity in the work

24. *Textile Workers v. Lincoln Mills*, 353 U.S. 448 (1957).

25. *Mastro Plastics Corp. v. NLRB*, 350 U.S. 270, 292-95 (1956).

26. *NLRB v. Magnavox Co.*, 415 U.S. 322 (1974).

27. *Cf. NLRB v. Marine Shipbuilding Workers*, 391 U.S. 418 (1968).

28. NLRA § 8, 29 U.S.C. § 158 (1982).

29. 61 Stat. 136 (1947), as amended, 29 U.S.C. § 141 (1982).

30. *Compare Southland Mfg. Co.*, 94 N.L.R.B. 813, 28 L.R.R.M. 1104 (1951), with *Clarke Mills*, 109 N.L.R.B. 666, 34 L.R.R.M. 1402 (1954).

31. *Clover Fork Coal Co.*, 4 N.L.R.B. 202, 1-A L.R.R.M. 285 (1937).

32. *See Remington Rand, Inc.*, 2 N.L.R.B. 626, 1-A L.R.R.M. 585 (1937), *mod. and enforced*, 94 F.2d 862 (2d Cir. 1938), *cert. denied*, 304 U.S. 576 (1938).

33. *Baldwin Locomotive Works*, 20 N.L.R.B. 1100, 6 L.R.R.M. 59 (1940).

place or the types of communications an employer may address to its employees.

#### A. Union Organizing on Employer Premises

The NLRB and the courts have ordinarily been quite solicitous of the property rights of American employers in allowing them to bar non-employee union organizers from the premises as long as other channels of communication are reasonably available.<sup>34</sup> However, access may be required if the employer is operating in a remote, isolated location.<sup>35</sup> Unions have generally not fared well with the argument that employees who disperse widely at the end of the working day from large industrial complexes within metropolitan areas are effectively as "isolated" from off-premises organizing appeals as workers in a distant lumbering camp.<sup>36</sup>

An employer's own employees are entitled to be on the premises, and any restrictions on their efforts at self-organization must be justified by the employer's need to maintain efficient production.<sup>37</sup> Rules against union solicitation by employees during nonworking time (lunch periods, rest breaks) are presumptively invalid.<sup>38</sup> There are exceptions. A retail store, for example, may be able to ban solicitation in the public areas of the store even during employees' nonworking time, to prevent customer confusion.<sup>39</sup> In addition, an employer generally may ban the distribution of union literature in the working areas of a plant during nonworking time, because he has a legitimate interest in keeping the plant free of litter.<sup>40</sup> Off-duty employees may be barred from soliciting within the plant and other working areas, but not in parking lots, at gates, or in other outside nonworking areas.<sup>41</sup>

Are unions or employees entitled to equal treatment with employers in communicating with the work force? For instance, if an employer has its supervisors distribute antiunion but noncoercive literature within a plant during working hours, may the employer no longer enforce a rule forbidding a like distribution of literature by the employees? Decrying any attempt at "mechanical answers", the U.S. Supreme Court has answered, No; labor organizations are not "entitled to use a medium of

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34. NLRB v. Babcock and Wilcox Co., 351 U.S. 105 (1956).

35. NLRB v. Lake Superior Lumber Corp., 167 F.2d 147 (6th Cir. 1948).

36. See Monogram Models, Inc., 192 N.L.R.B. 705, 77 L.R.R.M. 1913 (1971); *but cf.* Scholle Chemical Corp., 192 N.L.R.B. 724, 78 L.R.R.M. 1009 (1971), *enforced*, 82 L.R.R.M. 2410 (7th Cir. 1972), *cert. denied*, 414 U.S. 909 (1973).

37. See *e.g.*, Marshall Field & Co. v. NLRB, 200 F.2d 375, 380 (7th Cir. 1952).

38. Republic Aviation Corp. v. NLRB, 324 U.S. 793 (1945).

39. Marshall Field & Co. v. NLRB, 200 F.2d 375 (7th Cir. 1952).

40. Stoddard-Quirk Mfg. Co., 138 N.L.R.B. 615, 51 L.R.R.M. 1110 (1962).

41. Tri-County Medical Center, 222 N.L.R.B. 1089, 91 L.R.R.M. 1323 (1976).

communication simply because the employer is using it.”<sup>42</sup> Yet, the NLRB has recognized that in certain circumstances an employer’s resort to an otherwise lawful but peculiarly effective mode of communication may obligate it to allow the union to respond in kind. Thus, when the management of a retail store which had imposed a broad but valid no-solicitation rule (applicable to both working and nonworking time on the premises) gave so-called “captive audience” speeches to amassed assemblies of employees on company property just prior to a union representation election,<sup>43</sup> this was held to create such a “glaring imbalance in communication” that the employer’s refusal of the union’s request for an equal opportunity to address the employees was considered an unfair labor practice.<sup>44</sup> The Board does not extend this right of reply to a union attempting to organize a manufacturing plant, where employees must be permitted to solicit on their nonworking time,<sup>45</sup> even though a good argument can be made that the work place is the most natural forum for *all* parties to debate the merits of unionization.<sup>46</sup>

## B. Communications to Employees

One of the most difficult problems confronting the NLRB is determining when employer communications are “coercive” and hence in violation of section 8(a)(1). Government regulation of any sort is, of course, subject to the U.S. Constitution’s guarantees of free speech.<sup>47</sup> Furthermore, the Taft-Hartley Act added section 8(c)<sup>48</sup> to the NLRA to confirm explicitly that the expression of any “views, arguments, or opinion” would not even be considered “evidence” of an unfair labor practice unless it contained a “threat of reprisal” or “promise of benefit”.

The Labor Board takes the position that employer statements must be viewed against the background in which they are presented. What might seem on its face an innocent expression of concern that unionization would ultimately inflict “serious harm” on the employees may be treated as a threat of retaliation if uttered in the context of “massive” unfair labor practices.<sup>49</sup> Similarly, the “totality of the circumstances”

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42. NLRB v. Steelworkers, 357 U.S. 357, 364 (1958).

43. Section 9 of the NLRA, 29 U.S.C. § 159 (1982), provides for secret-ballot elections to be conducted by the NLRB to resolve “questions concerning representation” among employees in appropriate bargaining units.

44. May Department Stores Co. v. NLRB, 136 N.L.R.B. 797, 49 L.R.R.M. 1862 (1962). *enforcement denied*, 316 F.2d 797 (6th Cir. 1963).

45. Livingston Shirt Corp., 107 N.L.R.B. 400, 33 L.R.R.M. 1156 (1953).

46. See generally Bok, *The Regulation of Campaign Tactics in Representation Elections under the NLRA*, 78 HARV. L. REV. 38 (1964).

47. Dal-Tex Optical Co., 137 N.L.R.B. 1782, 1787 n.11, 50 L.R.R.M. 1489 (1952).

48. NLRA § 8(c), 29 U.S.C. § 158(c) (1982).

49. J.P. Stevens & Co. v. NLRB, 380 F.2d 292 (2d Cir. 1967).

may indicate that employer references to plant closings elsewhere in the area following unionization and strike activity were designed to instill a fear of reprisals and thereby coerce employees.<sup>50</sup> Employers are entitled, however, to make reasonable "predictions" based on "objective fact" concerning the "demonstrably probable consequences" of unionization, including a plant shutdown.<sup>51</sup>

In my judgment, this search for the elusive element of veiled "threats" in employer statements is often a futile and perhaps misguided task. The frequent disagreements between the NLRB and the reviewing courts reflect the difficulty.<sup>52</sup> The most extensive empirical study ever undertaken on the subject casts serious doubt on whether employer statements, however intimidating in tone, actually have much influence on the employees' behavior in a representation election.<sup>53</sup> It might prove better to spend less time worrying about the subtle psychological implications of employer speeches and instead devote more effort to enabling unions to get their own messages across effectively—if necessary, by granting unions access to employer premises in appropriate circumstances;<sup>54</sup> for example, when the work force is too large for employees to be contacted in person away from the plant, or when an employer gives a captive-audience speech so shortly before an election that the union has no time for an adequate response by other means.

Interrogation of employees about their union activities was once regarded as coercive *per se*.<sup>55</sup> Now, if the questioning is not itself threatening, the NLRB will take into account "all the circumstances" to see whether the interrogation may "reasonably" be said to interfere with section 7 rights.<sup>56</sup> Various factors are considered, including (1) any history of employer discrimination, (2) the nature of the information sought,

50. *NLRB v. Gissel Packing Co.*, 395 U.S. 575 (1969).

51. *Id.*

52. As an illustration, in *NLRB v. Herman Wilson Lumber Co.*, 355 F.2d 426, 429 (8th Cir. 1966), the employer's speeches included the following remarks: "I will fight the Union in every legal way possible. . . . If the Union calls an economic strike, you place your job on the line. You can be permanently replaced. You can lose your job. . . . In dealing with the Union I'll deal hard with it—I'll deal cold with it—I'll deal at arm's length with it." The NLRB held (2-1) that this statement violated § 8(a)(1), but the court of appeals denied enforcement. (2-1).

53. See J. GETMAN, S. GOLDBERG, & J. HERMAN, *UNION REPRESENTATION ELECTIONS: LAW AND REALITY* 128-30, 146-52 (1976); but cf. Freeman, *Why are Unions Faring Poorly in NLRB Representation Elections?*, in *CHALLENGES AND CHOICES FACING AMERICAN LABOR* 45, 54-59 (and authorities cited) (T. Kochan ed. 1985).

54. The proposed Labor Reform Act of 1978, H.R. 8410, 95th Cong., 1st Sess. (1977), which was defeated by a Senate filibuster, would have directed the NLRB to use its rule-making authority to establish guidelines providing unions an equal opportunity to reply to an employer's antiunion speeches on company premises during an organizing drive. See also Bok, *supra* note 46, at 101-03; GETMAN *et al.*, *supra* note 53, at 156-59 (and authorities cited).

55. *Standard-Coosa-Thatcher*, 85 N.L.R.B. 1358, 24 L.R.R.M. 1575 (1949).

56. *Rossmore House*, 269 N.L.R.B. 1176, 116 L.R.R.M. 1025 (1984) *aff'd*, *Hotel & Restaurant Employees Local 11 v. NLRB*, 760 F.2d 1006 (9th Cir. 1985).

(3) the rank of the questioner in the company hierarchy, (4) the location [i.e., the boss' office] and method of the interrogation, and (5) the truthfulness of the reply.<sup>57</sup> It is impermissible, however, to ask employees questions of a "probing, inquisitive and focused nature."<sup>58</sup> At least before the advent of today's more pro-management "Reagan Board", a systematic poll of employees concerning their union allegiance generally had to be conducted by secret ballot and had to be accompanied by certain safeguards, including assurances against reprisal.<sup>59</sup>

The offer of an outright bribe to individual employees to refrain from or oppose union activity is plainly an unlawful interference with organizational rights.<sup>60</sup> More controversially, the U.S. Supreme Court has sustained the Labor Board in holding that even an employer's *unconditional*, permanent grant of economic benefits to its employees shortly before a representation election violated section 8(a)(1), where the employer's purpose was to affect the outcome of the election.<sup>61</sup> Although there was no hint that the benefits would be withdrawn if the workers voted for the union, the Court concluded that the inherent danger of "well-timed increases" is the "suggestion of a fist inside the velvet glove."<sup>62</sup> One might well ask whether this wasn't an excessively paternalistic attitude toward the perceptiveness and good judgment of mature workers.

### C. Disparate or Adverse Treatment

Violations of section 8(a)(1) may occur regardless of an employer's intent. For example, an employer may have established a broad no-solicitation rule many years ago to prevent quarrels among his workers over political or religious issues. Nonetheless despite the absence of any antiunion animus, the objective tendency of such a rule, if applied to union solicitation on nonworking time, would be to inhibit the exercise of section 7 rights.<sup>63</sup> On the other hand, almost any job decision an employer can make—to hire, to promote, to discharge, even to relocate operations—may become an unfair labor practice if it has an antiunion motivation, or if it treats certain employees differently because of their union activities.<sup>64</sup> In the language of section 8(a)(3) of the NLRA,<sup>65</sup> an em-

57. See, e.g., *Bourne v. NLRB*, 332 F.2d 47 (2d Cir. 1964).

58. *Raytheon Co.*, 279 N.L.R.B. No. 131, 121 L.R.R.M. 1291 (1985).

59. *Struksnes Construction Co.*, 165 N.L.R.B. 1062, 65 L.R.R.M. 1385 (1967).

60. See *Reliance Mfg. Co.*, 28 N.L.R.B. 1051, 7 L.R.R.M. 165 (1941); see also *Sterling Cabinet Corp.*, 109 N.L.R.B. 6, 34 L.R.R.M. 1289 (1954).

61. *NLRB v. Exchange Parts Co.*, 375 U.S. 405 (1964).

62. *Id.*

63. *Republic Aviation*, 324 U.S. 793 (1945).

64. There is one major exception to the rule that nearly any employer decision may be unlawful if triggered by antiunion bias—an employer may go completely out of business even if it acts to avoid

ployer may not engage in "discrimination" as to any employment term to "encourage or discourage" union membership. Almost half of all the unfair labor practice charges filed annually against employers involve allegations of discrimination.<sup>66</sup>

In the classic section 8(a)(3) case, the most difficult issue is a "simple" (but often deeply perplexing) question of fact: Why did the employer fire this employee? Why did this employer treat this employee less well than that employee? Was it because this employee has been a habitual absentee or drunkard for twenty years, and today's absence or intoxication was the "last straw"? Or was it because this employee was seen wearing a union button for the first time last week? What was the employer's real reason? Motivation is key to a section 8(a)(3) violation.

In the processing of an unfair labor practice case, the charging party is represented by the staff of the NLRB's General Counsel.<sup>67</sup> The initial hearing is held before an administrative law judge.<sup>68</sup> As the moving party, the General Counsel has the burden to prove by a preponderance of the evidence that the employer has violated the NLRA.<sup>69</sup>

Suppose the employer acted out of "mixed motives", one motive union-related and the other not. Once the General Counsel establishes that the employer's action was based, at least in part on antiunion animus, then the employer will be liable unless it can show as an affirmative defense by a preponderance of the evidence that it would have taken the same adverse action even if the employee had not engaged in protected activities.<sup>70</sup>

#### IV. *Employer Responses to Protected Activity*

A strike or other concerted activity is protected by statute but at the same time it is an economic weapon whereby employees can bring bargaining pressure to bear on their employer. An employer cannot take reprisals against employees for exercising section 7 rights. Yet, an employer retains the right, according to the Court, to try to continue production in the face of a strike, and to bring bargaining pressure of its own to bear on the union and the employees. Over the years, the Court has

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unionization. See *Textile Workers v. Darlington Mfg. Co.*, 380 U.S. 263 (1963). But an employer may not relocate a plant if the reason for doing so is antiunion hostility. See *Garwin Corp.*, 153 N.L.R.B. 664, 59 L.R.R.M. 1405 (1965), *enforced in part*, 374 F.2d 295 (D.C. Cir. 1967).

65. NLRA § 8(a)(3), 29 U.S.C. § 158(a)(3) (1982).

66. NLRB, FORTY-FIFTH ANNUAL REPORT 225 (1980).

67. See NLRA § 10, 29 U.S.C. § 160 (1982); see also R. SMITH, L. MERRIFIELD, T. ST. ANTOINE & C. CRAVER, *LABOR RELATIONS LAW: CASES AND MATERIALS* 58-63 (7th ed. 1984).

68. *Id.*

69. *Id.* see also *Miller Electric Mfg. Co. v. NLRB*, 265 F.2d 225 (7th Cir. 1959); *NLRB v. West Point Mfg. Co.*, 245 F.2d 783 (5th Cir. 1957).

70. *NLRB v. Transportation Management Corp.*, 462 U.S. 393 (1983).

developed an approach, by no means wholly consistent and surely not as predictive as might be desired, for harmonizing these various strains of analysis in different contexts.

The starting point is that, although a section 8(a)(3) violation requires a discriminatory motive, specific evidence of subjective intent is not always necessary. The “natural foreseeable consequences of certain actions may warrant the inference” of the proscribed intent.<sup>71</sup> In its most definitive exposition of this doctrine, the Court divided employers’ conduct into two categories: that which is “inherently destructive” of employee rights, and that which has a “comparatively slight” effect on those rights.<sup>72</sup> An employer that has engaged in conduct of either type has the burden of establishing that it was motivated by “legitimate objectives”. Then, if such proof is forthcoming, and the adverse effect of those objectives is “comparatively slight”, there is no violation of section 8(a)(3), unless a subjective antiunion motivation is proved. But there is a violation if the employer’s conduct was “inherently destructive” of employee rights, without proof of improper motivation, although the conduct may have been prompted by valid business considerations. This reasoning has been applied to the award of “super-seniority” and to bargaining lockouts, and in retrospect it would appear applicable to replacement strikers.

#### A. Strike Replacements and “Super-Seniority”

In very strong dictum the Court has declared that it is not an unfair labor practice for an employer to hire “permanent” replacements during an economic strike in an effort to carry on his business.<sup>73</sup> But the NLRB, with judicial approval, has attached an important qualification to this principle. Even though economic strikers whose positions have been filled by permanent replacements need not be given their jobs back at the end of the strike, they remain employees and they are entitled to full reinstatement upon the departure of the replacements.<sup>74</sup> In addition, if a strike is called to protest an employer’s unfair labor practices rather than to improve economic conditions, the employer may not hire permanent replacements and must reinstate the strikers upon request.<sup>75</sup> Neither the

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71. *NLRB v. Erie Resistor Corp.*, 373 U.S. 221, 227 (1963).

72. *NLRB v. Great Dane Trailers, Inc.*, 388 U.S. 26 (1967).

73. *NLRB v. Mackay Radio & Tel. Co.*, 304 U.S. 333 (1938).

74. *Laidlaw Corp.*, 171 N.L.R.B. 1366, 68 L.R.R.M. 1252 (1968), *enforced*, 414 F.2d 99 (7th Cir. 1969), *cert. denied*, 397 U.S. 920 (1970); *see also NLRB v. Fleetwood Trailer Co.*, 389 U.S. 375 (1967).

75. *See Collins & Aikman Corp.*, 165 N.L.R.B. 678, 65 L.R.R.M. 1484 (1967); *see also American Cyanamid Co. v. NLRB*, 592 F.2d 356 (7th Cir. 1979) (union right to demand reinstatement on behalf of the strikers based on unfair labor practices strike upheld; even if the strike had been an economic strike, the workers had a right to reinstatement until they were permanently replaced).

Court nor the Labor Board has ever explained why an employer should be able to hire “permanent” strike replacements—without at least some showing that temporary replacements were inadequate or unobtainable.

An employer involved in an economic strike may not go further and grant so-called “super-seniority” to strike replacements and strikers returning to work.<sup>76</sup> The employer in one case awarded this special credit to ensure itself a sufficient supply of workers by guaranteeing them protection against future layoff. No specific evidence of subjective antiunion intent was found. Nonetheless, despite the claimed business justification, the Court concluded that the conduct was “inherently discriminatory” and that “preferring one motive to another is in reality the far more delicate task . . . of weighing the interest of the employees in concerted activity against the interest of the employer in operating his business in a particular manner.”<sup>77</sup> The NLRB, which had the primary responsibility for striking this balance was entitled to treat the grant of super-seniority as violative of sections 8(a)(1) and (3) for several reasons. It would, for instance, affect the status of all strikers, whereas permanent replacements would affect only those actually replaced. And it would, unlike permanent replacements, create a cleavage in the work force which would continue long after the strike was ended. In spite of these nice distinctions, strikers who have been permanently replaced might understandably think the Court had strained at a gnat and swallowed a camel.

## B. Bargaining Lockouts

Relying on the Supreme Court’s “inherently discriminatory” theory of employer conduct, the Labor Board formerly held that a bargaining lockout—the withdrawal of work from employees to pressure them into a contract settlement—was prohibited by sections 8(a)(1) and (3). The Supreme Court ultimately disagreed, stating that the section does “not give the Board a general authority to assess the relative economic power of the adversaries in the bargaining process and to deny weapons to one party or the other because of its assessment of that party’s bargaining power.”<sup>78</sup> Since there was no showing of actual antiunion motivation, there was no statutory violation.

The Supreme Court’s purported reconciliation of these decisions is gravely flawed. What, exactly, does it mean to say that the NLRB may determine that certain conduct is so “destructive” of employee rights as

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76. *NLRB v. Erie Resistor*, 373 U.S. 221 (1963).

77. *Id.* at 228.

78. *American Shipbuilding Co. v. NLRB*, 380 U.S. 300, 317 (1965); *see also NLRB v. Brown*, 380 U.S. 278, 283 (1965).

to "carry its own indicia of intent,"<sup>79</sup> but then say that the Board may not "deny weapons to one party or the other because of its assessment of that party's bargaining power"? Why, more specifically, does super-seniority fall within the unlawful "inherently destructive" category and permanent replacements and lockouts within the lawful "bargaining weapon" category? What particular evidence should union, employer or Board counsel assemble to demonstrate that "employee rights" are threatened with "destruction" or, conversely that challenged conduct is a mere exercise of "bargaining power"? In this area, the Supreme Court has clearly defaulted on its principal obligation of articulating intelligible standards for the guidance of the NLRB and the lower courts.

#### V. *Procedures and Remedies*

The major failings of the antidiscrimination scheme of the NLRA are inadequate remedies and excessively slow and cumbersome procedures. Any party aggrieved by a decision of an administrative law judge has the right to appeal the five-member Board, itself. This clogs the process; the result is that the average contested unfair labor practice case takes almost a year and a half before final Board disposition.<sup>80</sup> A better method would be to allow the full Board to grant review on a discretionary basis, or at least provide for some form of summary affirmance procedure.<sup>81</sup>

Even a final order of the NLRB is not self-enforcing. If a party does not voluntarily comply, legal enforcement must be sought in a federal court of appeals.<sup>82</sup> Which adds at least another year, on the average, to the ultimate disposition of the claim.<sup>83</sup> Then there is still the possibility of a petition for certiorari to the Supreme Court.

The remedies eventually provided are often woefully deficient. Employees who were discharged discriminatorily can theoretically be reinstated with back pay (less interim earnings).<sup>84</sup> But such relief, some two to five or more years after the fact, is not likely to mean much. The organizing effort has collapsed and the fired workers have moved elsewhere. The employer will probably treat any back pay award as a license to maintain its "union-free" environment.

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79. *NLRB v. Erie Resistor*, 373 U.S. 221, 231 (1963). How should the Court's test be applied if an employer, as a bargaining tactic, not only locks out its union employees but also resumes operations with replacements either temporary or permanent? A divided Labor Board held that the use of temporary replacements was allowable. *Harter Equipment, Inc.*, 280 N.L.R.B. 71, 122 L.R.R.M. 1219 (1986); *order upheld* 829 F.2d 458 (3d Cir. 1987).

80. NLRB, FORTY-SIXTH ANNUAL REPORT 228 (1981).

81. H.R. 8410, *supra* note 54, would have provided for summary affirmances.

82. NLRA §§ 10(e) and (f), 29 U.S.C. §§ 160(e) and (f) (1982).

83. Miller, *Routes to Reform*, NLRB Release R-1297 (1973).

84. NLRA § 10(c), 29 U.S.C. § 160(c) (1982).

Under section 10(j) of the NLRA, the Board is actually empowered to seek a temporary injunction from the federal district court to restore an alleged discriminatee to his job pending disposition of the complaint against the employer.<sup>85</sup> But the Board rarely petitions for such interim relief,<sup>86</sup> apparently under the impression that the courts are reluctant to grant such relief. Aggressive use of section 10(j) would be a significant step forward. Another would be a legislative authorization of the sort unsuccessfully proposed in Congress in 1978,<sup>87</sup> for the award of double back pay to certain victims of discrimination, for example victims of "willful" discrimination or discrimination during an organizing campaign.

Perhaps most distressing of all is the impunity with which an intransigent employer can flout its duty to bargain with a union which represents a majority of its employees.<sup>88</sup> Instead of seeking a secret-ballot election conducted by the NLRB, which is its right,<sup>89</sup> suppose an employer responds to a union request for recognition by firing all the union leaders, and by threatening to fire any others who take their places. The union files a battery of unfair labor practice charges. In due course, *i.e.*, two or three years later, the employer will confront a series of court-enforced Board orders, one of which will simply direct the employer to begin bargaining with the union. That the employer has successfully avoided negotiations for several years, and has managed to deprive the employees of the economic gains they could have realized from a collective bargaining agreement during that period, will be almost totally ignored. No make-whole remedy will be provided to the victims of even a flagrantly unlawful refusal to bargain.<sup>90</sup> That too is a defect that would have been addressed by the ill-fated labor reform legislation of 1978.<sup>91</sup>

The collective bargaining agreement of a unionized employer will often contain a provision prohibiting antiunion discrimination. Alleged violations, like alleged violations of other provisions of the contract, are customarily subject to the parties' grievance and arbitration procedure. The difference is that the contractual commitment against antiunion discrimination overlaps the statutory prohibition of analogous unfair labor

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85. NLRA § 10(j), 29 U.S.C. § 160(j) (1982).

86. NLRB, *supra* note 80, at 139.

87. H.R. 8410, *supra* note 54.

88. See NLRB v. Gissel Packing Co., 395 U.S. 575 (1969) (employer was ordered by the NLRB to recognize a union which represented a majority of its employees when the employer's unfair labor practices prevented a fair representation election from being held).

89. See generally *Linden Lumber Div., Summer. & Co. v. NLRB*, 419 U.S. 301, 307-09 (1974).

90. See *Ex-Cell-O Corp.*, 185 N.L.R.B. 107, 74 L.R.R.M. 1740 (1970); see also *Tiidee Products, Inc., v. NLRB*, 194 N.L.R.B. 1234 (1972), *enforced*, 502 F.2d 349 (D.C. Cir. 1974), *cert. denied*, 421 U.S. 991 (1975).

91. H.R. 8410, *supra* note 54.

practices under section 8(a)(1) and (3). The NLRA expressly provides that the Labor Board's power to prevent unfair labor practices will "not be affected by any other means of adjustment . . . established by agreement."<sup>92</sup> Nevertheless, in appropriate circumstances, the Board will defer to or honor the parties' arbitration procedures or the arbitral awards emanating from them, even with regard to alleged unfair labor practices.

The NLRB's current position is to accept an existing arbitration award if (1) the contractual issue is factually parallel to the unfair labor practice issue, (2) the arbitrator was presented generally with the facts relevant to resolving that issue, and (3) the arbitrator's decision can be interpreted consistently with the statute.<sup>93</sup> Moreover, the Board will suspend its own processes and await an award from the parties' arbitration procedure where (1) the action challenged was not designed to undermine the union, (2) it was based on a substantial claim of contractual privilege, and (3) it appears that the arbitral award will resolve both the unfair labor practice issue and the contract interpretation issue in a manner compatible with the policy of the NLRA.<sup>94</sup> Unions and employers are thus enabled, if they wish, to "keep their own houses in order" without excessive governmental intervention. The NLRB may be overly obliging, however, when it applies the second doctrine dealing with deferral prior to an award, to individual employees' claims of antiunion discrimination.<sup>95</sup>

## VI. Concluding Comments

Article 2 of the International Labour Organization's Convention 87 on Freedom of Association reads like a more succinct (though more broadly applicable) version of section 7 of the NLRA where it states, "Workers and employers, without distinction whatsoever, shall have the right to establish and, subject only to the rules of the organization concerned, to join organizations of their own choosing without previous authorization."<sup>96</sup> It can fairly be said that substantive law in the United States embodies the protections against antiunion discrimination envisaged by the ILO.<sup>97</sup> Similarly, the employees' organizational rights in this country compare favorably with those guaranteed by the laws of a cross-

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92. NLRA § 10(a), 29 U.S.C. § 160(a) (1982).

93. *Olin Corp.*, 268 N.L.R.B. 573, 115 L.R.R.M. 1056 (1984).

94. *Collyer Insulated Wire*, 192 N.L.R.B. 837, 77 L.R.R.M. 1931 (1971).

95. *United Technologies Corp.*, 268 N.L.R.B. 557, 115 L.R.R.M. 1049; *but cf. Hendrickson Bros.*, 272 N.L.R.B. 438, 117 L.R.R.M. 1440 (1984), *aff'd*, 762 F.2d 990 (2d Cir. 1985) (there is no deferral if it appears that the union will not represent the individual grievant diligently).

96. INTERNATIONAL LABOUR ORGANIZATION, INTERNATIONAL LABOUR CONVENTIONS AND RECOMMENDATIONS, 1919-1981, 4 (1982).

97. Even the public employees in states not authorizing collective bargaining for them have a federal constitutional right to free association and organization. *See McLaughlin v. Tilendis*, 398

section of the nations of Western Europe.<sup>98</sup> The deficiencies, as discussed earlier, lie chiefly in the area of remedies and procedure for enforcement.

More profoundly, the problem in the United States is a matter of employer attitude. The intensity of opposition to unionization, which is exhibited by the American employer, has no parallel in the Western industrial world.<sup>99</sup> There is keen irony here. Ours is the most conservative, least ideological of all labor movements, traditionally committed to the capitalistic system and to the principle that management should have the primary responsibility for managing.<sup>100</sup> Yet, employers will pay millions of dollars to experts in "union avoidance" in order to maintain their nonunion status.<sup>101</sup> In part, this resistance is explained by the highly decentralized character of American industrial relations. Because of this decentralization, an employer typically must confront a union on a one-to-one basis, without the protective shield of an association to negotiate on behalf of all or substantially all of the firms in a particular industry, as is true in Western Europe. In part, the resistance to union organization may result, among both employers and employees, from an ingrained American attitude of rugged individualism and the ideal of the classless society.<sup>102</sup> Until there is a more widespread and genuine acceptance of the legitimacy of worker organization, law can at best provide only partial protection against antiunion discrimination.

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F.2d 287 (7th Cir. 1968). That leaves only a handful of private sector, nonagricultural workers in purely intrastate businesses with no organizational rights.

98. See generally Wedderburn, *Discrimination in the Right to Organise and the Right to be a Non-Unionist*, in *DISCRIMINATION IN EMPLOYMENT* 367-90 (F. Schmidt ed. 1978); see also Pankert, *Freedom of Association*, in *COMPARATIVE LABOUR LAW AND INDUSTRIAL RELATIONS* 146-65 (R. Blanpain ed. 1982).

99. Bok, *Reflections on the Distinctive Character of American Labor Law*, 84 HARV. L. REV. 1394, 1409-11 (1971).

100. See, e.g., *LABOR AND AMERICAN POLITICS* 4-5, *passim* (C. Rehmus, D. McLaughlin & F. Nesbitt eds. 1978).

101. STAFF OF HOUSE SUBCOMM. ON LABOR-MANAGEMENT RELATIONS OF THE COMM. ON EDUCATION AND LABOR, 98TH CONG., 2D SESS., *REPORT ON THE FAILURE OF LABOR LAW—A BETRAYAL OF AMERICAN WORKERS* (Comm. Print 1984).

102. Bok, *supra* note 99, at 1458-62.