A Touchstone for Labor Board Remedies

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A TOUCHSTONE FOR LABOR BOARD REMEDIES

THEODORE J. ST. ANTOINE†

I

INTRODUCTION

FASHION dictates what lawyers argue about, and law professors write about, more than we may care to admit. In labor law, especially, the styles change with a rapidity that would impress a Paris couturier. During the past decade the spotlight has moved from union democracy to labor contract enforcement to the union organizing campaign. Today the “in” topic is National Labor Relations Board (NLRB) remedies. Yet if any subject deserves immunity from the vagaries of fashion, this is the one; for all rights acquire substance only insofar as they are backed by effective remedies. Coke said it long ago: “[W]ant of right, and want of remedy are in one equipage.”¹

This article will not focus upon any particular type of Labor Board remedy. Instead, I shall discuss certain general tests for determining the validity and propriety of Board orders, and then try to show how these tests might apply in various circumstances.²

II

GENERAL PRINCIPLES GOVERNING NLRB REMEDIES

Section 10(c) of the National Labor Relations Act (NLRA)³ empowers the NLRB to issue a cease-and-desist order against a statutory violator. This is a standard administrative remedy,⁴ and its use

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2. I do not intend to deal with the NLRB’s power under § 10(j) of the amended National Labor Relations Act, 29 U.S.C. § 160(j)(1964), to seek federal court injunctions against alleged unfair labor practices, pending Board disposition of the matter. This power, once little used, has been increasingly resorted to in recent years. The courts, however, have not been warmly receptive. See Minnesota Mining & Mfg. Co. v. Meter, 385 F.2d 265 (8th Cir. 1967); McLeod v. General Elec. Co., 366 F.2d 847 (2d Cir. 1966), rev’d and remanded, 385 U.S. 533 (1967); McCulloch, Past, Present and Future Remedies Under Section 8(a)(5) of the NLRA, 19 Lab. L.J. 131, 137-38 (1968).


4. See, e.g., Kauper, Cease and Desist: The History, Effect, and Scope of Clayton

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by the Board has provoked relatively little dispute.\(^5\) In addition, section 10(c) authorizes the Board to order persons guilty of unfair labor practices "to take such affirmative action including reinstatement of employees with or without back pay, as will effectuate the policies of this [Act] . . . .\(^6\) It is this power to issue affirmative orders which presents the Board with the greatest opportunity to fashion carefully tailored, effective remedies, and at the same time presents the Board with the greatest temptation to exceed proper statutory bounds.

The language of section 10(c) is so general that it provides little guidance on whether a given order is authorized or not. But over the years the courts and the NLRB have supplied an extensive interpretive gloss. Any remedy can now be evaluated in accordance with some fairly well-developed standards.

A. A Remedy and Not a Penalty

The first thing to be said about an NLRB remedy is that it must be a remedy, and not a penalty.\(^7\) Board orders have to be "related to the proven unlawful conduct."\(^8\) It is not enough to demonstrate that a particular order would deter future violations of the Act, because "if such a deterrent effect is sufficient to sustain an order of the Board, it would be free to set up any system of penalties which it would deem adequate to that end.\(^9\)

This limitation is doubtless most galling to the Board in situations where a remedy confined to the particular conduct that triggered the case is simply inadequate to deter repeated offenses. A good example is the discriminatory hiring hall. A recalcitrant union (and employer accomplice) may well regard an occasional back pay award to a single complaining employee as nothing but a license fee for continuing the violations.\(^10\) The Eisenhower Board took dead aim

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\(^5\) However, even negative orders have been successfully challenged when they were overly broad, e.g., in forbidding violations against the charging party "or any other party." Communications Workers v. NLRB, 362 U.S. 479 (1960).


\(^7\) Carpenters Local 60 v. NLRB, 365 U.S. 651, 655-56 (1961); Consolidated Edison Co. v. NLRB, 305 U.S. 197, 235-36 (1938).

\(^8\) NLRB v. Express Publishing Co., 312 U.S. 426, 433 (1941).

\(^9\) Republic Steel Corp. v. NLRB, 311 U.S. 7, 12 (1940).

\(^10\) A violation of an NLRB cease-and-desist order that has been enforced by a court of appeals (Board orders are not self-enforcing) theoretically subjects the offender to a contempt citation. But the Board has traditionally been hesitant to petition for contempt. There were ten proceedings in fiscal year 1965, and sixteen in fiscal year 1966. See 30 NLRB Ann. Rep. 212 (1965); 31 NLRB Ann. Rep. 222 (1966).
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at this practice when it formulated the famous *Brown-Olds* remedy. Instead of merely ordering back pay to the individual employee discriminated against, the Board required the respondent, either union or employer, to reimburse all employees for all dues and fees collected under an illegal union security arrangement during the six months prior to the filing of charges. The problem, of course, was that such a remedy bore no necessary relation to the wrong. Men referred to work through an illegal hiring hall were likely to be the beneficiaries, rather than the victims, of the discrimination. Indeed, the Board had to protect the premise for its *Brown-Olds* orders by establishing a per se doctrine of coercion, refusing to admit proffered evidence that employees on the job had in fact paid their dues and fees voluntarily.

The Supreme Court reacted predictably. In *Carpenters Local 60 v. NLRB*, the Court struck down the *Brown-Olds* remedy on the ground that the Board’s power “to command affirmative action is remedial, not punitive . . . .” Scant heed was given to the frustrating predicament of the Board in having to battle strongly entrenched discrimination with ineffectual weapons. The Court’s adherence to the orthodox rule in such circumstances bodes ill for any order that cannot readily be fitted within the rubric of “remedy.”

The remedy-penalty dichotomy is again involved in what is probably the most hotly debated current issue of the NLRB remedial power. In *Ex-Cell-O Corp.* and three companion cases, the Board has under consideration at the time of this writing a proposal for a revolutionary new order in refusal-to-bargain cases. The proposed remedy would require an employer to reimburse his employees for the loss of wages and fringe benefits that they would have obtained through collective bargaining if the employer had not violated section 8(a)(5) of the NLRA by refusing to bargain in good faith. Such an order is subject to a number of possible objections, several of which

12. Section 10(b) of the NLRA provides for a six-month statute of limitations on unfair labor practice charges. 29 U.S.C. § 160(b) (1964).
15. Id. at 655.
I shall deal with throughout this paper. For now I shall limit myself to the order's alleged punitive aspects.

The remedy in Ex-Cell-O would be unprecedented. It would also be strong medicine; a marginal employer might be hard hit financially by having to pay all his employees an amount equivalent to the increased benefits he supposedly denied them over a two or three-year period. And there is no doubt the remedy would be in large part a product of the Board's frustration over the delay in bargaining which a determined employer can now win with impunity, since the conventional remedy for an 8(a)(5) violation is merely an order to bargain in the future. The requested Ex-Cell-O remedy would thus invite the charge that its primary purpose was deterrence, not compensation, infecting it with the Local 60 vice. Unlike the disgorgement order in the discriminatory hiring hall cases, however, an Ex-Cell-O reimbursement order can be shown to have a rational relation to the particular violation found. If a reasonably accurate standard of measurement can be formulated, a problem I shall touch upon shortly, any amount awarded an individual employee in the bargaining unit will reflect the loss he has suffered by being deprived of the opportunity for union representation during the period of the employer's unfair labor practice. The rule against punishment would not seem an insuperable barrier.

An employer's case is especially appealing when he can show his refusal to bargain was just a "technical violation," designed to test the validity of the Board's certification of the union as bargaining agent. It might seem more equitable to reserve an Ex-Cell-O remedy

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18. If an employer chooses to fight an 8(a)(5) charge through the Board and the courts, the time from violation to ultimate judicial enforcement of the NLRB's order is likely to run upwards of two years. See, e.g., P. Ross, The Government as a Source of Union Power 171-72 (1965); McCulloch, supra note 2, at 133; Brief for Charging Party at 56, Ex-Cell-O Corp., No. 25-CA-2377 (N.L.R.B., Sept. 27, 1966) (estimating an average elapsed time of 30.3 months). This figure is something of a two-edged sword. It dramatizes the injury done employees through an employer's obdurate delay in complying with his bargaining duty. But it also emphasizes the risk which might have to be taken by an employer who declines to bargain, not out of any subjective desire to deprive his workers of their statutory rights, but merely as a means of testing the validity of the Board's certification. See note 20, infra.

19. To avoid windfalls to some employees, the Board in its compliance proceeding would presumably have to be careful to take account of the dates of employment of individual workers.

20. NLRB rulings in representation cases are not ordinarily subject to direct judicial review. An employer challenges a certification by refusing to bargain, thereby initiating an 8(a)(5) unfair labor practice proceeding. See, e.g., Boire v. Greyhound Corp., 376 U.S. 473 (1964); Pittsburgh Plate Glass Co. v. NLRB, 313 U.S. 146 (1941); AFL v. NLRB, 308 U.S. 401 (1940). This seemingly roundabout procedure was deliberately chosen by Congress to avoid delays in the election process. S. Rep. No. 573, 74th Cong.,
for flagrant or repeated offenses, and not apply it to the employer who acts in good faith. One immediate difficulty with such a distinction is that it tends to substantiate the charge that reimbursement is essentially punishment for the wrongdoer rather than compensation for the victim. But this may not be a fatal defect. In several cases of "massive" or "aggravated" unfair labor practices, the Board, with at least qualified judicial approval, has gone beyond the standard cease-and-desist order to provide a remedy with considerably more bite.

For example, in *J. P. Stevens & Co.*\(^{21}\) where an employer had engaged in extensive coercion of, and discrimination against, employees in twenty of the employer's forty-three plants, the Board decreed relief which compelled employer action even at plants where no unfair labor practices were found. This included the posting, mailing and reading of notices concerning the violations so as to reach all the workers.\(^{22}\) In *H. W. Elson Bottling Co.*,\(^{23}\) an employer who had attempted numerous times to intimidate employees during an organizing campaign was directed to give the union access to plant bulletin boards for three months and the right to address employees for one hour on company time and premises. Novel Board remedies are not confined to employer violations. A union which persisted in running a discriminatory hiring hall was ordered in *J. J. Hagerty, Inc.*\(^{24}\) to operate its

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1st Sess. 14 (1935); H. R. Rep. No. 1147, 74th Cong., 1st Sess. 6 (1935). Even if court review were provided in representation cases, limited to the certification alone, there would probably be little saving of time. At present, an unfair labor practice case resulting from an employer's refusal to recognize a certification is regarded as a continuation of the representation case, and issues resolved in the earlier proceeding may not be relitigated in the later one. Pittsburgh Plate Glass Co. v. NLRB, 313 U.S. 146 (1941).


22. On review the court of appeals modified the Board's order so as to require the reading only at the twenty plants where violations were committed, and to give the employer the option of having a Board agent read the notice. *J. P. Stevens & Co. v. NLRB*, 380 F.2d 292, 305 (2d Cir.), cert. denied, 389 U.S. 1005 (1967). In addition the court eliminated a Board requirement that the employer give the union reasonable access to plant bulletin boards for a period of one year. In a subsequent case involving the same employer but different plants, the NLRB ordered the company to furnish the union with a list of the names and addresses of all its employees at the affected plants; the court, however, denied enforcement of this portion of the order. *J. P. Stevens & Co.*, 163 N.L.R.B. No. 24 (Mar. 6, 1967), enforced in part, 388 F.2d 896 (2d Cir. 1967).

23. 155 N.L.R.B. 714 (1965), enforced in part, 379 F.2d 223 (6th Cir. 1967). The court of appeals modified the Board's order by making the "captive audience" portion contingent on the employer's further resort to that means of communication. At the same time the court conceded that "an order such as that proposed here would be appropriate under more aggravated circumstances." 379 F.2d at 226. See also *Marlene Indus. Corp.*, 166 N.L.R.B. No. 58 (July 3, 1967) (access to plant parking lots and approaches).

hall under the supervision of the NLRB's Regional Director and to maintain permanent records subject to his inspection for one year. A court of appeals concluded that the requirement of supervised operation was too onerous, but enforced the record-keeping portion of the order.

All these "graduated" remedies, varying as they do in accord with the degree of guilt, can still be justified as genuinely compensatory rather than simply penal. In the language of the Supreme Court, an NLRB remedy may properly concern itself with the removal or "dissipation" of the "consequences of violation." Moreover, it is axiomatic that the Board is a public agency enforcing public, not private, rights. Employees' public rights to self-organization and collective bargaining are surely more grievously and lastingly wounded by an employer's or union's flagrant, repeated violations than by a "technical violation" intended to test the validity of a particular Board ruling. Only the former are likely to leave permanent scars in the employees' consciousness. The need to extirpate the lingering psychic effects of aggravated unfair labor practices, and the consequent injury to union organizational strength, might thus justify requiring affirmative action in certain cases while denying it in others that are superficially similar.

On balance, however, I am not persuaded that these considerations support different treatment of the "willful" and the "good faith" offender in the Ex-Cell-O situation. Even the employer who declines to bargain for the sole purpose of securing judicial review of a Board certification has deprived his employees of their statutory bargaining rights if he ultimately fails to prevail in the courts. (Whether this deprivation can be reduced to dollars-and-cents terms is of course another matter.) It seems entirely fair that the employer, rather than the employees, should bear the risk of his mistake. This is no different from any other litigation in which losses may occur or accumulate because one party insists upon standing on rights that turn out to be nonexistent. Furthermore, an Ex-Cell-O reimbursement order should not deter an employer from seeking court review in a meritorious case. If he wins, he has nothing to pay. If he loses, he should (by hypothesis) have to pay no more than what he would have paid anyway, had he begun bargaining immediately upon certification. The employer could protect himself against the possibility of crushing financial liability by establishing a contingency reserve.


A corollary to the principle that Board remedies must be compensatory and not punitive is that such remedies must not be unduly speculative. The most common monetary awards are back pay for employees discriminated against in violation of sections 8(a)(3) and 8(b)(2). Ordinary, the calculation of such amounts is relatively simple. Where uncertainty arises, however, the Board has been willing to make a "just and reasonable estimate," on the ground that the wrongdoer should bear the risk of the uncertainty which his own wrong has created.

The problem of speculativeness is presented in its starkest form in the Ex-Cell-O situation. It is a matter of speculation whether bargaining would have resulted in any contract at all. It is even more a matter of speculation what the terms of any such contract would have been. Since these rather technical and specialized issues will be discussed in detail elsewhere in this symposium, I shall make only a few general observations.

First, the question of whether a contract might have been reached must not be confused with the question of whether the employer has violated the Act. In the case we are considering there is no doubt about

27. It has been suggested that the Board could also order an employer guilty of unlawful interference to compensate the union for its organizational expenses. Bok, The Regulation of Campaign Tactics in Representation Elections Under the National Labor Relations Act, 78 Harv. L. Rev. 38, 127-28 (1964). However, so far the Board has been chary about extending the scope of money awards. See, e.g., Boyle's Famous Corner Beef Co., 168 N.L.R.B. No. 46 (Nov. 17, 1967) (denial of charging party's expenses incurred as a result of employer's unlawful conduct). In "runaway" shop cases, however, the Board customarily awards employees moving expenses to the new location. New Madrid Mfg. Co., 104 N.L.R.B. 117 (1953).


30. The union in Ex-Cell-O contended that prompt, good-faith negotiations produce contracts 80-90% of the time; the employer replied that contracts were not executed in about 28% of the cases studied in a recent survey. See Brief for Charging Party at 20, Brief for Respondent at 23 n.7, Ex-Cell-O Corp., No. 25-CA-2377 (N.L.R.B., Sept. 27, 1966). See also F. Ross, The Labor Law in Action: An Analysis of the Administrative Process of the Taft-Hartley Act 111-18 (1966).

the latter point; the only doubt is about our capacity to measure the damage. Second, the fact that a contract might not have emerged from the bargaining (even the unions admit this is the result in ten to twenty per cent of the cases) does not necessarily preclude a monetary award. Presumably, any compensation would be for the lost opportunity to bargain, not for lost wage increases in a contract never negotiated. The courts have gone far in protecting reasonable expectancies, and an award in the *Ex-Cell-O* context would not be a sport.

Finally, however, in order to avoid stigmatizing a reimbursement order as a penalty, it would be necessary to allow the employer the widest latitude to establish that there was little if any likelihood that he would have concluded a contract with the union; or, if he had, that it would have been profitable to the employees as a group. I suspect that the union's difficulty in proving a prima facie case of injury in an *Ex-Cell-O* situation has been exaggerated and the employer's difficulty in rebutting it underestimated. Actually, it should be fairly easy for a union to demonstrate, on the basis of Bureau of Labor Statistics figures, what were the average annual or quarterly gains in wages and fringe benefits in first-contract and subsequent negotiations across the country, or in particular industries, or in particular localities. But how is an employer to show that the particular union he faced was so lacking in economic muscle that its chances of securing a favorable contract were only one-in-five rather than four-in-five? Moreover, there is a subtle economic truth, now widely accepted among the labor economists, which is not going to be easy for an employer to get across to NLRB agents in a compliance hearing. Professor Albert Rees of Chicago puts it as well as anyone:

> It may seem very strange that statistical studies can find a considerable effect of unions on wages and none on labor's share. On further consideration, however, this result is quite reasonable. ... [A] successful union will not necessarily raise labor's share even in its own industry. The wage bill will rise following a wage increase if the demand for labor is inelastic ... and this will raise labor's share in the short run. But as time passes the employer will tend to substitute capital for labor. ... It is thus entirely possible for a union simultaneously to raise the relative wages of its members and to reduce their aggregate share of income arising in their industry.

32. P. Ross, supra note 30, at 111-18.
34. A. Rees, The Economics of Trade Unions 95-96 (1962). See also P. Douglas, Real Wages in the United States, 1890-1926 (1930); R. Lester, Economics of Labor 292-
Stated differently, a union's demonstration of average increases in wage rates in first-contract negotiations can be quite misleading if used to show the total loss to the work force as a whole over any substantial period of time. The dramatic raises in the early years of union contracts are deceptive; they do not reflect the adjustments the employer will usually make to spread the wage bill over a smaller number of employees. How is the Board to take account of this phenomenon?

One last point to be emphasized about the compensatory nature of remedial orders is the Board's constant effort to make its relief fully compensatory. Thus, in recent years, it has provided for the payment of six per cent interest on back pay due to discriminatorily discharged employees. The Board has also discontinued its former practice of "tolling" back pay awards from the date of a trial examiner's decision finding no discrimination to the date of a Board order reversing the trial examiner and holding that a discriminatory discharge had occurred. The discriminating union or employer, not the victimized employee, now bears the risk of error by the trial examiner.

B. No Enforcement or Imposition of Contract Terms

In enacting section 301 of the Taft-Hartley Act, Congress chose not to make a breach of a collective agreement an unfair labor practice subject to the remedial power of the NLRB. Instead, the enforcement of the labor contract was left to "the usual processes of the law." In addition, section 8(d) of the NLRA explicitly declares that the duty to bargain "does not compel either party to agree to a proposal or require the making of a concession ...." But at the same time,
an employer's unilateral change in working conditions without prior bargaining with the union representing his employees constitutes an unlawful refusal to bargain in violation of section 8(a)(5) of the Act. And an inference of bad faith in negotiations has usually been drawn from a pattern of conduct evidencing a lack of genuine effort to come to an agreement; in practice, that conduct has included an obdurate refusal by one party to make counterproposals to the other. The thrust of all those doctrines is obviously not in the same direction. Harmonizing them has caused the NLRB and the courts both substantive and remedial problems.

The leading Supreme Court decision on the overlap and potential conflict between the Board's power to remedy unilateral changes in working conditions and the courts' power to enforce labor agreements is NLRB v. C & C Plywood Corp. The contract in that case reserved to the employer the right to pay a premium rate above the contractual classified wage rate to reward "any particular employee" having special qualifications. Shortly after the agreement was signed, the employer announced that all members of the "glue spreader" crews would receive premium pay if they met specified production standards. The Supreme Court held, reversing a court of appeals, that the mere existence of an arguable contractual defense for the employer's action did not divest the Labor Board of jurisdiction to determine whether the awarding of premium pay constituted a unilateral change of working conditions in violation of section 8(a)(5). (The Board had ordered bargaining and a rescission of any unilateral change). The Court further held that the Board was not wrong in deciding that the union had not waived its right to bargain about the pay plan inaugurated by the employer. The disputed contract provision referred to increases for "particular employees," not groups of workers.

There were at least four factors in C & C Plywood which may have contributed to the conclusion reached, and in the absence of which the result might have been different. First, unlike the typical labor contract, the agreement contained no provision for final and binding arbitration. The Court made much of this point, and seemed to approve a lower court decision which reached a contrary result in a case where there was a provision for arbitration. Why should the presence or absence of an arbitration clause be crucial? I am not sure why it should. Apparently the ultimate question is whether the union has "clearly

41. E.g., NLRB v. Montgomery Ward & Co., 133 F.2d 676, 687 (9th Cir. 1943).
42. 385 U.S. 421 (1967).
43. Square D Co. v. NLRB, 332 F.2d 360 (9th Cir. 1964).
and unmistakably" waived its right to object to, or demand bargaining over, a change in working conditions by the employer. It is certainly arguable that such a waiver could be found just as well in a contract providing for resort to traditional judicial processes as in a contract providing for resort to an arbitrator to settle disputes.

On the other hand, there are both logical and practical reasons why the existence of an arbitration clause might more easily support the inference of waiver. First, arbitration is regarded as "part and parcel of the collective bargaining process itself." Viewed this way, the parties' provision for arbitration could be deemed a deliberate decision to channel their bargaining over all disputed matters during the life of the contract through the grievance and arbitration procedure, and as a waiver of their right to bargain through traditional negotiating sessions. It would of course take a considerable stretch of the imagination to regard resort to court litigation as a continuation of "collective bargaining" in any sense of the word. In addition, arbitration is usually both faster and cheaper than litigation, and it has come to occupy a preferred place in the Supreme Court's eyes as an instrument for settling industrial disputes. Despite these considerations, however, the NLRB would not reach a different result in the C & C Plywood situation merely because of the presence of an arbitration clause. A court of appeals is in accord.

It is not only the absence of an arbitration clause which makes C & C Plywood an atypical case. A second distinctive aspect is that the employer's unilateral change of working conditions did not cause the employees any measurable monetary loss. The employer was giving them more compensation than called for by the contract. The only real damage was to the union's status as collective bargaining representative. As the Supreme Court noted, it would be hard to tell exactly what sort of relief a court could provide. The injury was one for which a Labor Board order to bargain was a peculiarly apt remedy. Although the Supreme Court explicitly drew attention to this distinction, it is clear the NLRB does not regard it as decisive. Remedies in a number of Board cases have included orders for employers to reimburse employees for lost monetary benefits under contracts which the employer had breached or refused to "honor." I am inclined to think the Labor Board will prevail before the courts on this point.

45. NLRB v. Huttig Sash & Door Co., 377 F.2d 964 (8th Cir. 1967).
A third factor present in *C & C Plywood* may carry more weight with the Board. There was a clause which authorized the employer to award premium pay to "particular employees" having special qualifications. The dispute arose when the employer provided extra compensation for a whole *group* of employees meeting certain production standards. Did the contract provision regarding "particular" employees even apply to this situation? Arguably it did not. A determination that the clause was not applicable would thus leave the question of premium pay for *groups* of employees subject to the usual rule that an employer may not institute unilateral changes in working conditions without first bargaining over the matter with the representative of his employees. I find some indication that the NLRB may be receptive to this notion. Thus, it has justified the assertion of jurisdiction by saying the unfair labor practice issue did not primarily turn on an interpretation of a "specific contractual provision of ambiguous meaning, within the special competence of an arbitrator to determine." At the same time, the Board concedes its function is not to construe the "full meaning or effect" of a contractual provision.

I analyze the Board's theory, with some oversimplification, as follows. If it can be concluded that a specific contractual provision covers a particular dispute between the parties—for example, if it must reasonably be conceded that a given piecework formula contains the "answer" to a dispute regarding the proper amount to be paid certain employees, even though there may be considerable conflict as to how that formula should be applied—the Labor Board would apparently defer to arbitration to construe the clause, at least where it is ambiguous and thus in need of interpretation. On the other hand, when the basic question is not how the contract resolves a particular dispute, but whether it covers the matter at all—for example, whether a clause prescribing the treatment of "particular" employees is applicable to the treatment of *groups* of employees—the Labor Board will assume jurisdiction to resolve the question of coverage. For in the

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49. There may be some illogic here. If a clause clearly governs the dispute, I would say the Board should ordinarily defer to the arbitrator, regardless of whether the provision is "ambiguous." To the extent the NLRB makes ambiguity in the applicable clause a prerequisite for deferring to arbitration, the Board would seem to be concerned not so much with avoiding the function of contract enforcement as with avoiding contract interpretation. That of course would cut against my emphasis on the lack of contract "coverage" as the key to Board jurisdiction. For different views see Note, The NLRB and Deference to Arbitration, 77 Yale L.J. 1191 (1968).
absence of coverage of the dispute by the contract, the parties are relegated to their statutory rights and remedies, and those are peculiarly the province of the NLRB.

A fourth point should be noted about the Board’s assumption of jurisdiction in C & C Plywood. The dispute did not involve a single isolated employee, or even several individual instances of disagreement between the union and the employer regarding the way the contract should apply to a number of employees. Rather, the employer was asserting the right unilaterally to change working conditions in a way which would have a continuing impact on the work force. The Labor Board seems to regard this distinction as significant. In one case, for instance, the Board sharply distinguished between a unilateral change which has a “continuing impact on a basic term or condition of employment” and a “simple default in a contractual obligation.” In the latter situation, I gather, the Board would decline jurisdiction. Some statutory support for this analysis can be found in section 8(d) of the NLRA, which makes it an unfair labor practice for a party to a labor contract to “terminate or modify” the contract without following certain prescribed procedures. A simple breach, especially when isolated, would hardly be regarded as an attempted “modification.”

Insofar as the NLRB focuses on the element of contract coverage as the critical determinant of its jurisdiction, its approach seems generally sound, although I might add, or at least emphasize, a couple of qualifications. Fastening upon the issue of contract coverage absolves the Board of the charge that it is usurping the function of another tribunal to enforce the labor agreement. For the very question to be decided is whether the contract applies to a particular matter in dispute. If it does not, then only the statute is left as a source of rights and remedies. I see no reason why the Board should be foreclosed from its traditional jurisdiction to remedy unilateral changes in working conditions merely because a party can construct a plausible contractual defense to the alleged violation.

Moreover, after some initial doubts, I have come to sympathize with the Board’s notion that a party’s “repudiation” of a labor agreement in whole or substantial part is to be equated with a refusal to

51. I do not mean to suggest the Board itself necessarily takes this limited view of its jurisdiction. See, e.g., Unit Drop Forge Div., Eaton Yale & Towne, Inc., 171 N.L.R.B. No. 73 (May 21, 1968) (availability of grievance-arbitration procedures do not preclude Board action); Scam Instrument Corp., 163 N.L.R.B. No. 39 (Mar. 8, 1967) (employer unilaterally imposed insurance rider “in violation of its subsisting collective-bargaining agreement”).

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bargain, and the party may be ordered to "honor" the contract.\textsuperscript{52} Although the repudiation problem hardly fits under the "contract coverage" concept previously discussed, it is probably reasonable for the Board to conclude that a union or employer which executives and then flagrantly disregards a contract has in effect made a sham of the collective bargaining process itself. A finding of an unfair labor practice and an appropriate remedy, including damages, are then in order, even though the aggrieved party might, as an alternative, have sought relief from an arbitrator or a court. In any event, the Supreme Court should soon enlighten us further on some of these issues.\textsuperscript{53}

Besides the stricture against the Board's enforcing labor contracts as such, the NLRB is also subject to an often-iterated admonition that it may not, "either directly or indirectly, compel concessions or otherwise sit in judgment upon the substantive terms of collective bargaining agreements.\textsuperscript{54} This has meant that only in rare instances will the Board find bad faith bargaining on the basis of one party's rejection of the other's proposals.\textsuperscript{55} Even more consistently, it has meant that the Board, in fashioning a remedy for an unlawful refusal to bargain, will not order the offender to grant the other party's demand, but will simply order him to negotiate in good faith about it.

A major break in the latter pattern came in \textit{United Steelworkers v. NLRB (H. K. Porter Co.)}.\textsuperscript{56} An employer had twice been found guilty of bad faith in refusing to accede to a checkoff in order to frustrate agreement, and not for a valid business reason. The Board entered the customary bargaining order. The court of appeals, however, remanded the case for reconsideration of the propriety of ordering the employer to grant the checkoff, perhaps in return for a reasonable concession by the union on some other issue. The court was not troubled by section 8(d)'s express prohibition of compelled concessions. It ex-

\begin{itemize}
\item \textsuperscript{52} Gene Hyde, 145 N.L.R.B. 1252, enforced, 339 F.2d 568 (9th Cir. 1964).
\item \textsuperscript{53} See NLRB v. Strong, 386 F.2d 929 (9th Cir. 1967), cert. granted, 88 S.Ct. 1849 (1968) (May NLRB order retroactive payment of fringe benefits due under contract which employer unlawfully refused to sign?).
\item \textsuperscript{55} For examples of such findings see Roanoke Iron & Bridge Works, Inc., 160 N.L.R.B. 175 (1966), enforced, 390 F.2d 846 (D.C. Cir. 1967) (checkoff provision opposed by employer for purpose of undermining union, not for "legitimate" business reasons); Reed & Prince Mfg. Co., 96 N.L.R.B. 850 (1951), enforced, 203 F.2d 131 (1st Cir.), cert. denied, 346 U.S. 887 (1953) (permission for union to use company bulletin board, an accepted practice in the industry); Montgomery Ward & Co., 37 N.L.R.B. 100 (1941), enforced, 133 F.2d 676 (9th Cir. 1943) (proposal for clause embodying a right guaranteed employees by the labor relations statute). See also Marcus, \textit{The Employer's Duty to Bargain: Counterproposal v. Concession}, 17 Lab. L.J. 541 (1966).
\item \textsuperscript{56} 389 F.2d 295 (D.C. Cir. 1967).
\end{itemize}
plained that the 8(d) language was a definition of the duty to bargain, and thus related "to the determination of whether a Section 8(a)(5) violation has occurred and not to the scope of the remedy which may be necessary to cure violations which have already occurred."[57]

The 8(d) policy against Board imposition of substantive contract terms is very much to the fore in the current *Ex-Cell-O* debate. I see no strictly technical bar to a reimbursement order based on an evaluation of the opportunity for wage gains and other benefits which was denied to employees by the employer's refusal to bargain. As the court observed in *H. K. Porter*, section 8(d) in terms is concerned with defining violations under section 8(a)(5), not remedies under section 10(c). Furthermore, the remedy suggested in *H. K. Porter* flies much more in the face of 8(d) policy than the remedy sought in *Ex-Cell-O*. The compelled checkoff would become a part of the labor agreement governing the party's future relations. The "make-whole" reimbursement order would apply only until the employer resumed good-faith bargaining; it would not add a term to any subsequent contract.[58]

Finally, the Board proceeding leading to the reimbursement order would not in any legal sense be a "contract" action, any more than a statutory treble-damage action under the antitrust laws becomes a "contract" action when damages are measured in part by the estimated more favorable contract terms the plaintiff would have secured but for the unlawful conspiracy.[59]

Nonetheless, these technical arguments cannot hide the substantial merit of the employer's position in an *Ex-Cell-O* situation. The Wagner Act Congress, and even more the Taft-Hartley Act Congress, were adamant that there was to be no "governmental supervision" of contract terms.[60] While it is true that the statutory expression of this policy in section 8(d) deals directly with the duty to bargain, not with the reach of remedial orders, it is hard to maintain that section 8(d) is irrelevant here. In *Cooper Thermometer Co. v. NLRB,*[61] a court of appeals specifically relied on section 8(d) in striking down the Board's standard for computing back pay in a plant relocation case. The court reasoned that a sanction which would "treat the guilty party as if he had agreed to what the other party demanded . . . would give insuffi-

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57. Id. at 299.
61. 376 F.2d 684 (2d Cir. 1967).
cient respect to Congress’ direction in § 8(d) ...." As a practical matter, an Ex-Cell-O reimbursement remedy would in all likelihood tend to have a significant impact on the terms of any contract subsequently negotiated by the parties. The union will inevitably want to regard the scale by which the “make-whole” award was calculated as its “floor” in bargaining. This would seem true even though reimbursement takes the form of a single lump-sum payment to each affected employee, and even though the weekly pay check and other benefits remain constant, pending a new agreement.

There should be room here for a sophisticated judgment. As the Supreme Court has frankly acknowledged, a “tension” exists between the principle of uncompelled contract and the statutory duty to bargain. Realistically, neither principle can be given unfettered play without damage to the other; the “ultimate problem is the balancing of conflicting legitimate interests ....” I hesitate to place too much reliance on the Board’s peculiar competence to strike the balance in these circumstances, since the Supreme Court seems inclined to recognize such administrative expertise only when it suits the Court’s fancy. Yet I should think this the sort of case that is preeminently suited for the exercise of informed discretion by a specialized agency. Over thirty years of experience with the usual bargaining order must be assessed to determine the need for a more drastic remedy. And then an educated hunch must be essayed regarding a crucial matter with which no one has any experience at all, namely, the possible effects of a reimbursement order on the parties’ future bargaining and contractual relationships. My own feeling is that if the Board becomes convinced on the question of need, it should be granted the indulgence of a bit of experimentation on the question of effect.

C. Effectuating the Policies of the Act

Section 10(c) of the NLRA contains a general mandate for the Board to issue orders that will “effectuate the policies of this [Act].” Some of the more specific policies affecting the NLRB remedies have already been discussed. There are a number of other important policies that deserve at least a short word.

In framing a remedy, the Board must take into account not only the statutory right that has been violated, but also other statutory

62. Id. at 690.
64. Id. at 499, from NLRB v. Teamsters Local 449, 353 U.S. 87, 96 (1957).
rights that might be impaired unless the order is carefully drawn. Poignant examples are the occasions when an employer commits extensive unfair labor practices and chokes off an organizing drive just before the union secures a majority, or when he relocates his plant at a distant site, without prior notice or bargaining, and leaves his former employees stranded. What should the Board do in such situations if it concludes the traditional reinstatement and back pay order is inadequate? May the Board order the employer to bargain with a union, even though in one case the union never in fact commanded the allegiance of a majority of the employees in the bargaining unit, and in the other case the union does not represent a majority of the workers at the new location? Would not a bargaining order in such circumstances seriously infringe the rights of a majority of the employees to refrain from engaging in collective action?67

The NLRB has moved gingerly in this area. So far it will not order bargaining where the union has never achieved a majority,68 although it may where a union majority is destroyed by employer interference or coercion, despite the absence of any employer refusal to bargain in violation of section 8(a) (5).69 In Garwin Corp.,70 where an employer moved his plant from New York to Florida because of anti-union hostility, the Board ordered bargaining at the new site, regardless of whether the union represented a majority of the workers there. A court of appeals refused to enforce the bargaining order on the ground it might interfere with the rights of the Florida employees. These are not easy cases, but a hypersensitivity for the "right" of the employees to be free from union representation is probably misplaced. In Garwin, for example, the court seemed to ignore the fact that the Florida workers became part of a job community which, in a sense, was already established; that employees who join a going concern with a union shop have little choice about union affiliation; and that the Supreme Court has not hesitated in appropriate circumstances to uphold a union's bargaining rights despite the loss of its majority.71

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67. See id. § 157, which guarantees the right both to "engage in" and "refrain from" concerted activities.
69. Such orders to bargain have received a mixed response in the courts. See Piasecki Aircraft Corp. v. NLRB, 280 F.2d 575 (3d Cir. 1960), cert. denied, 364 U.S. 933 (1961) (violations of § 8(a) (3) as well as § 8(a) (1). Compare NLRB v. Flomatic Corp., 347 F.2d 74 (2d Cir. 1965), with United Steelworkers v. NLRB (Northwest Eng'r Co.), 376 F.2d 770 (D.C. Cir. 1967) (violations of § 8(a) (1) only).
The National Labor Relations Act does not establish a "general scheme" to provide "full compensatory damages for injuries caused by wrongful conduct."\(^{72}\) Employers and employees suffering physical injury or property damage in the course of a labor dispute are thus relegated to traditional tort actions in state court for redress.\(^{73}\) This principle has been carried to the point where the NLRB refused to award back pay to employees who were unable to work because of injuries resulting from a physical assault by union agents.\(^{74}\) It is arguable that the same principle should foreclose an *Ex-Cell-O* reimbursement order, on the theory such an award is more akin to general damages than to back pay.\(^{75}\) The answer would seem to be that the lost bargaining opportunity is a wrong only because of the NLRA, and so the violent tort analogy is not pertinent. Whatever relief is to be obtained in *Ex-Cell-O* must be obtained from the NLRB.

Another underlying policy of the Act is to coordinate its public rights and remedies, so far as practicable, with the common law or statutory rights of private parties. Thus, an employer asserting his property ownership can ordinarily close his premises to union agents who are not employees.\(^{76}\) The Board will require him to grant union representatives access only in unusual circumstances, for example, where his operation is in a remote region and the workers are isolated.\(^{77}\)

### III

**Practical Considerations in Framing Remedies**

The fashioning of effective NLRB remedies is at least as much an art as a science. Some brief mention is therefore in order regarding a few of the practical considerations that ought to go into the framing of Board orders.

Remedies should be equitable. They should take account of the economics and psychology of a situation, the reason for the statutory violation, the interests of innocent bystanders and other similar ele-

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ments. *Renton News Record*

illustrates an attempt by the Board to accommodate such factors. Two publishers violated section 8(a)(5) by failing to bargain over a decision to terminate certain printing operations and to join with three other publishers to purchase new equipment for their common use. The change was motivated by financial necessity, not antilabor animus. In its bargaining order, the NLRB did not require the two offenders to restore the status quo ante by reinstating the halted printing process. The Board reasoned that it was not economically feasible to operate as before, and that the three innocent publishers would be adversely affected by a restoration order. In less appealing circumstances, however, the Board has ordered resumption of the discontinued operation and bargaining about the decision to terminate, not merely bargaining about the effects of such a decision.

As far as possible, NLRB orders should be tailored to suit the facts of each particular case. Any busy administrative agency is naturally tempted to resort to the boilerplate of previous cases, especially if it has received judicial approval. But the losses are many. Boilerplate is likely to foster per se analysis, which the Supreme Court generally disapproves. It will complicate any future contempt proceeding. And it will almost inevitably blunt the drive for creative and flexible remedies.

Just as boilerplate should go, fuller and clearer rationalizations of the Board's decisions should be encouraged. On occasion in the past, the lack of sufficiently articulated reasons for a Board determination has kept an order from being enforced. But important as it is for the Board to safeguard its orders, persuasive explanations may serve an even more valuable function. The NLRB cannot police the whole of labor relations. Ultimately, compliance with the National Labor Relations Act depends on the vast majority of unions and employers according at least minimal respect to the Board and its directives. The Board must therefore not get too far ahead of the parties it regulates.

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83. It is my impression, for which I shall offer no substantiation, that the Board during the last two or three years has indeed taken greater pains to explain just why it is entering a particular order.
It has to keep them convinced that its decisions are, in the main, reasonable and fair. The ideal Board order, then, is an instrument of education as well as regulation.

IV

CONCLUSION

The NLRB’s current preoccupation with remedies is one of the healthiest signs on the labor scene. It is, I suppose, too much to hope that even respondents will applaud the individual attention they are now receiving. At any rate the rest of us should applaud. For the Board has learned the old common law lesson that remedies are the lifeblood of rights—and today the pulse grows stronger.