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## Afterword - Labor Law Reform: Waiting for Congress

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## AFTERWORD

### LABOR LAW REFORM: WAITING FOR CONGRESS?

MARTIN H. MALIN\*

#### INTRODUCTION

The topic of labor law reform usually focuses attention on Congressional action to amend the National Labor Relations Act or enact other legislation. Most of the articles in this symposium are similarly focused. Presumably, so too is the work of the Dunlop Commission. The last time there was a Democrat in the White House, substantial energy went into the effort to reform the NLRA, but the effort failed. Perhaps this time will be different. There seems to be a different tenor to the debate over labor law reform. Although many acknowledge the continuing need to strengthen the NLRA's protection of collective employee action, there also is a focus on alternatives to traditional collective bargaining. This reflects another way in which this time is different. Organized labor is much weaker than it was when Jimmy Carter was president. As the editors of the recent Industrial Relations Research Association research volume on workplace representation observed,

The long term decline in union density to 10 percent of the private-sector work force, the growth and development of new forms of worker representation in both the United States and other countries, and the interest of the Clinton administration in labor law reform, all suggest that the time may be ripe for a fundamental, broad-ranging reconsideration of the role of employee representation in the workplace and the economy.<sup>1</sup>

When an informed and well-respected commentator such as Professor Rogers declares that there is consensus that our traditional system of collective bargaining "no longer works," and "serves neither unions nor workers nor management effectively,"<sup>2</sup> and when an indi-

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1. BRUCE E. KAUFMAN & MORRIS M. KLEINER, *EMPLOYEE REPRESENTATION: ALTERNATIVES AND FUTURE DIRECTIONS* 11 (1993).

2. Joel Rogers, *Reforming U.S. Labor Relations*, 69 CHI-KENT L. REV. 97, 97 (1993). See also Richard B. Freeman & Joel Rogers, *Who Speaks for Us? Employee Representation in a Nonunion Labor Market*, in *EMPLOYEE REPRESENTATION: ALTERNATIVES AND FUTURE DIRECTIONS* 13, 16 (Bruce E. Kaufman & Morris M. Kleiner eds., 1993).

vidual such as Professor Gottesman, who has devoted most of his professional career to representing organized labor, laments that legislatively strengthening traditional collective bargaining will add at most a few percentage points to the rate of union density,<sup>3</sup> it is time to focus on alternative strategies for providing collective employee voice in the workplace. The thoughtful contributions to this symposium should prove to be a major contribution to this necessary expansion of our horizons. In closing this symposium, however, I feel compelled to plead that we not lose sight of the need to maintain traditional unionization and collective bargaining as a real option for those employees who may freely choose it. I do not intend to suggest that the contributors to this symposium are hammering nails into the casket of traditional labor unions. On the contrary, all recognize the importance of strengthening the NLRA.<sup>4</sup> With the focus on alternatives to traditional union exclusive representation, however, it is important that the need to maintain the availability of the traditional option not get lost in the shuffle.

Several contributors to this symposium call for modifying section 8(a)(2) to enable employers to develop employee representation plans as an alternative to traditional labor unions to provide a mechanism for employee collective voice.<sup>5</sup> All recognize the danger that such plans could become sham methods of employer control which stifle, rather than facilitate, employee voice. What will keep such plans honest? Although many employers will recognize that it is in their best interests to provide true mechanisms for employee voice, they are not the ones who we need fear will use the plans to subvert employee voice. It is the unenlightened employers who must be kept honest. The ability of the employees faced with a sham employer-promulgated representation plan to organize a traditional union will be very important in checking abuses of any section 8(a)(2) exception that might be developed.<sup>6</sup>

3. Michael H. Gottesman, *In Despair, Starting Over: Imagining a Labor Law for Unorganized Workers*, 69 CHI.-KENT L. REV. 59, 61 (1993).

4. Samuel Estreicher, *Labor Law Reform in a World of Competitive Product Markets*, 69 CHI.-KENT L. REV. 3 (1993); Gottesman, *supra* note 3; Rogers, *supra* note 2; Clyde W. Summers, *Employee Voice and Employer Choice: A Structured Exception to Section 8(a)(2)*, 69 CHI.-KENT L. REV. 129 (1993).

5. Estreicher, *supra* note 4; Summers, *supra* note 4.

6. The advocates of § 8(a)(2) exceptions appear to recognize this. It is the fear of employer abuse that leads Professor Summers to confine his proposed § 8(a)(2) exception quite narrowly. Summers, *supra* note 4. Professor Estreicher recognizes, "To prevent employer-based schemes from becoming mere tools to manipulate workers, the option to choose an independent union must be a realistic one." Estreicher, *supra* note 4, at 35.

Other contributors have called for protections for employees who wish to bargain with their employers in the absence of a traditional exclusive representative.<sup>7</sup> When such bargaining exists, however, employers may feel free to play divide and rule. What will stop an employer from rewarding a minority faction within the workforce to gain their alliance against the interests of the majority? I suggest that one deterrent is the ability of the majority to organize and gain the status of exclusive representative.

Thus, regardless of what we do to provide alternative mechanisms of collective voice in the workplace, we must strengthen the option of traditional exclusive representation by a labor union. Many look to Congress to strengthen the NLRA. Although remedies for discriminatory discharges and prohibitions on striker replacements would undoubtedly improve the legal climate for collective bargaining, there is much that can be done without changing a single word in the statute.

During the 1980s, the legal environment for collective bargaining became extremely hostile without any relevant changes in statutory language.<sup>8</sup> The change in the legal environment resulted from an NLRB and judiciary populated by individuals who were themselves hostile to collective bargaining. The Clinton administration promises to appoint judges and NLRB members who are more receptive to collective bargaining. This presents an opportunity to achieve a modest level of labor law reform regardless of whether Congress enacts any statutory changes. In the remainder of this afterword I address two ways in which the Board and the courts may take a fresh look at interpreting the existing statute which, in a small way, would address two underlying problems: the law's inability to provide employees with a meaningful opportunity to choose to be represented by a union and the law's inability to thwart employers who are determined whenever employees successfully organize to ensure that no collective bargaining agreement ever takes effect.

## I. EQUALIZING ACCESS DURING REPRESENTATION CAMPAIGNS

In their empirical study of union representation elections, Professors Getman, Goldberg, and Herman found a significant imbalance

7. Matthew W. Finkin, *The Road Not Taken: Some Thoughts on Nonmajority Employee Representation*, 69 CHI.-KENT L. REV. 195 (1993); Gottesman, *supra* note 3; Alan Hyde, *Employee Caucus: A Key Institution in the Emerging System of Employment Law*, 69 CHI.-KENT L. REV. 149 (1993).

8. See Julius G. Getman, *The Courts and Collective Bargaining*, 59 CHI.-KENT L. REV. 969 (1983).

between company and union opportunities for organizational communication. They recommended that the law require that an employer who campaigns against the union on company time afford the union a similar opportunity to campaign on company time.<sup>9</sup> Although much of the Getman study and recommendations have been controversial,<sup>10</sup> its treatment of the imbalance in company and union access to employees has not been. Indeed, one is tempted to say that the conclusion is intuitively obvious.

Employer anti-union campaigns often stress that unions do not have the power to compel employers to raise wages or improve working conditions. They drive home to employees the employer's power. Employer campaigning on company time further drives home the employer's control over the employees' working time. When the union is left to respond in a less effective manner, the employer's message of union impotence is further reinforced.

The Supreme Court's decision in the *Nutone* case<sup>11</sup> is often thought to impede a Board requirement of equal access. In *Nutone*, the employers had maintained valid no-solicitation rules but violated their own rules to campaign against the unions. The Court rejected arguments that the combination violated section 8(a)(1) of the NLRA. In so doing, it emphasized the limited nature of the record before it:

We do not at all imply that the enforcement of a valid no-solicitation rule by an employer who is at the same time engaging in anti-union solicitation may not constitute an unfair labor practice. All we hold is that there must be some basis, in the actualities of industrial relations, for such a finding. The records in both cases . . . are barren of the ingredients for such a finding.<sup>12</sup>

*Nutone*, thus, left open to the Board the possibility of developing an equal access rule, provided it does so on a record which discloses the need for such a rule based in the "actualities of industrial relations." Moreover, *Nutone* speaks only to the unfair labor practice implications of an employer's campaigning on company time while denying the union similar access to the employees. It does not speak to what regulations the Board may impose to ensure that a represen-

9. JULIUS G. GETMAN ET AL., *UNION REPRESENTATION ELECTIONS: LAW AND REALITY* 156-59 (1976).

10. See, e.g., Patricia Eames, *An Analysis of the Union Voting Study from a Trade Unionist Point of View*, 28 STAN. L. REV. 1181 (1976); Thomas A. Kochan, *Book Review*, 29 STAN. L. REV. 1115 (1976); Paul Weiler, *Promises to Keep: Securing Workers' Rights to Self-Organization Under the NLRA*, 96 HARV. L. REV. 1769, 1782-86 (1983).

11. *NLRB v. United Steelworkers of America*, 357 U.S. 357 (1958).

12. *Id.* at 364.

tation election be conducted under conditions designed to assure free, fair and informed employee choice.

Of course, for almost three decades, the Board has recognized that "an employee who has had an effective opportunity to hear the arguments concerning representation is in a better position to make a more fully informed and reasonable choice."<sup>13</sup> Consequently, the Board requires that the employer furnish a list of all eligible voters' names and addresses for use by all parties to the election.<sup>14</sup> The same day that the Board decided *Excelsior*, requiring employers to furnish the list of voters' names and addresses, the Board also refused to adopt an equal access for campaigning rule, "prefer[ring] to defer any reconsideration of current Board doctrine in the area of plant access until after the effects of *Excelsior* become known."<sup>15</sup> The Board has never revisited the issue. The time has come for the Board to evaluate whether imbalances in access to employees for campaigning impedes free, fair and informed representation elections. For two reasons, the Board should do so via a rulemaking proceeding.

First, the use of rulemaking will further the goal of having elections conform to the rule. Little is served by overturning an election that has already been conducted in order to announce a new rule governing pre-election conduct. It is far better to announce the rule in advance and then hold the parties to it.<sup>16</sup> Second, it is clear that any equal access for campaigning rule will require considerable factual support to withstand judicial scrutiny. The rulemaking process will enable the Board to gather extensive data concerning the adequacies and imbalances in access under current Board policy. As the Board's experience with hospital bargaining units demonstrates, development of an extensive factual record in support of a rule greatly enhances its credibility when subject to judicial review.<sup>17</sup>

13. *Excelsior Underwear, Inc.*, 156 N.L.R.B. 1236, 1240 (1966).

14. *Id.*

15. *General Electric Co.*, 156 N.L.R.B. 1247, 1251 (1966).

16. Indeed, in *Excelsior*, the Board announced that its rule requiring employers to furnish voter lists would be applied prospectively only. 156 N.L.R.B. at 1240 n.5. This led the Supreme Court to consider the Board's actions to be improper rulemaking. *NLRB v. Wyman-Gordon*, 394 U.S. 759 (1969).

17. *See American Hosps. Ass'n v. NLRB*, 499 U.S. 606 (1991).

## II. VIGOROUSLY ENFORCE THE DUTY TO BARGAIN FOR FIRST CONTRACTS

In *NLRB v. Crockett-Bradley, Inc.*,<sup>18</sup> the court held that the employer had engaged in unfair labor practices sufficiently egregious to justify enforcing the Board's *Gissell* bargaining order. Negotiations pursuant to that order occurred from January 30, 1976 until June 3, 1976, without agreement. The Board then brought contempt proceedings against the company, contending that it was not negotiating in good faith in violation of the court's order. A special master agreed, but the court rejected the master's recommendation because he relied too heavily on his view that the company's bargaining position was inherently unreasonable. Instead, the court emphasized that the employer had attended every bargaining session called by the union, and that the parties had made progress on such issues as bereavement pay, handling of holidays falling on weekends, and union access to company bulletin boards. The court concluded that the company was bargaining in good faith.<sup>19</sup>

The union in *Crockett-Bradley* faced a common problem of newly recognized unions—they frequently are unable to obtain collective bargaining agreements. The collective bargaining rights obtained through representation or unfair labor practice procedures are shallow if they do not mature into collective bargaining agreements.

The NLRA envisions a regime of private regulation of the workplace accomplished through collective bargaining. The statutory expectation is that, once charged with a duty to bargain in good faith, company and union will achieve an agreement which better fits the peculiarities of the workplace to which it applies than will direct government regulation of terms and conditions of employment. The statute is not concerned with the substance of the agreement. The NLRA merely requires the employer to open its door and, in good faith, let the union in. It says nothing about what should result from the meeting.<sup>20</sup>

The policy favoring free collective bargaining has greatly minimized legal scrutiny of the parties' positions at the bargaining table. Unions are not held accountable for the substantive positions that

18. 523 F.2d 449 (5th Cir. 1975).

19. *NLRB v. Crockett-Bradley, Inc.*, 598 F.2d 971 (5th Cir. 1979).

20. See Archibald Cox & John T. Dunlop, *Regulation of Collective Bargaining by the National Labor Relations Board*, 63 HARV. L. REV. 389, 395 (1950) (quoting relevant legislative history); Benjamin M. Shieber, *Surface Bargaining: The Problem and a Proposed Solution*, 5 U. TOL. L. REV. 656, 657-58 (1974) (same).

they take at the bargaining table as long as their motives are proper and their positions are not so beyond a broad range of reasonableness as to be irrational.<sup>21</sup> Similarly, employers are not held accountable for the substantive positions they take at the bargaining table. As the leading treatise on the NLRA summarizes the state of the case law, "The Board generally does not find bad-faith bargaining solely because of the content of very aggressive contract demands made by the employer."<sup>22</sup>

On the other hand, the duty to bargain in good faith requires that employers negotiate with an intent to reach agreement, even though no agreement need actually be reached. Surface bargaining, or merely going through the motions of negotiating without any expectation of reaching agreement, is illegal. It is rare, however, that there is direct evidence of illegal motive.<sup>23</sup> Therefore, subjective intent must be inferred from objective conduct.

The NLRB has been willing to infer subjective bad faith from the content of employer bargaining proposals in two circumstances. First, the Board will find bad faith where the proposals themselves are grossly outrageous.<sup>24</sup> Second, the Board will cite the substantive proposals and other objective conduct by the employer and base a finding of bad faith on the totality of the circumstances.<sup>25</sup>

Once the Board finds bad faith, the policy of free collective bargaining limits its choices of available remedies. The Board may not order an employer to agree to a specific contract provision, even though the employer's rejection of the proposed provision was properly considered to be evidence of bad faith.<sup>26</sup> Consequently, the Board's typical remedy is to order the employer to bargain in good faith. Similarly, where the content of employer contract proposals, coupled with other actions which by themselves would be legal, leads the Board to conclude that the employer engaged in surface bargaining, the Board also only orders the employer to bargain in good faith.

21. *Air Line Pilots Ass'n v. O'Neil*, 111 S. Ct. 1127, 1130 (1991).

22. *THE DEVELOPING LABOR LAW* 627 (Patrick Hardin ed., 3d ed. 1992).

23. Although rare, it does happen. See, e.g., *Virginia Holding Corp.*, 293 N.L.R.B. 182, 184 (1989); *Brownsboro Hills Nursing Home, Inc.*, 244 N.L.R.B. 269, 270-71 (1979).

24. See, e.g., *NLRB v. A-1 King Size Sandwiches, Inc.*, 732 F.2d 872 (11th Cir.), *cert. denied*, 469 U.S. 1035 (1984); *Prentice-Hall, Inc.*, 290 N.L.R.B. 646 (1988).

25. See, e.g., *Virginia Holding Corp.*, 293 N.L.R.B. 182, 184 (1989); *ACL Corp.*, 271 N.L.R.B. 1600, 1603 (1984) (listing conduct which may indicate bad faith but finding it not present in the instant case).

26. *H. K. Porter Co. v. NLRB*, 397 U.S. 99 (1970).

The Board's orders fail to provide the parties with any guidance as to what objectively the employer must do to comply.<sup>27</sup>

This, however, is how it should be. If an employer is in good faith unyielding at the bargaining table, the union's remedy is not to seek NLRB assistance but to exert economic pressure. If the parties are acting out of a mutual good faith desire to reach agreement, the relative strength of the parties' economic weapons will determine the content of the agreement. The statute does not, and should not, compel an employer to make concessions that the union is too weak to force.<sup>28</sup>

The problem with illegal surface bargaining is that the employer who engages in it probably does not fear a strike, but rather welcomes one as an opportunity to rid itself of the union. Surface bargaining is a problem only where the union is weak. A union who can shut an employer down by striking because the employees cannot be easily replaced need not fear surface bargaining. When the union is weak, however, a strike enables the employer to permanently replace the strikers.<sup>29</sup> Because permanently replaced strikers lose their rights to vote in a decertification election after a year, surface bargaining may be calculated to force the union to strike as a necessary step toward ousting the union.<sup>30</sup>

Unfair labor practice strikers, however, may not be permanently replaced.<sup>31</sup> Consequently, a finding of bad faith premised on surface bargaining denies the employer the opportunity to exploit the union's vulnerability to permanent replacement beyond extracting a favorable contract. Indeed, because the Board may not order the employer to make any substantive concessions, the only real effect of a finding of surface bargaining is to strengthen the union's strike weapon by denying the employer the ability to permanently replace the strikers.

27. See James A. Gross et al., *Good Faith in Labor Negotiations: Tests and Remedies*, 53 CORNELL L. REV. 1009 (1968).

28. See *NLRB v. Tomco Communications, Inc.*, 567 F.2d 871, 883 (9th Cir. 1978).

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

30. In his classic article on the duty to bargain, Professor Archibald Cox characterized the problem of surface bargaining as follows:

The bargaining status of a union can be destroyed by going through the motions of negotiating almost as easily as by bluntly withholding recognition. The NLRB reports are filled with cases in which a union won an election but lacked the economic power to use the strike as a weapon for compelling the employer to grant it real participation in industrial government. As long as there are unions weak enough to be talked to death, there will be employers who are tempted to engage in the forms of collective bargaining without the substance.

Archibald Cox, *The Duty to Bargain in Good Faith*, 71 HARV. L. REV. 1401, 1413 (1958).

31. See *NLRB v. Thayer Co.*, 213 F.2d 748 (1st Cir.), cert. denied, 348 U.S. 883 (1954).

Recognizing that what is at stake is not what substantive bargain should the employer be compelled to yield to, but instead whether the employer should be able to permanently replace if the union should strike, places the surface bargaining case in its proper role. The evil behind surface bargaining is not that an economically advantaged employer will use its superior bargaining power to extract a favorable agreement from the union; it is that the economically advantaged employer will abuse its superior power to walk away from the bargaining process entirely. Stripping surface bargaining employers of the ability to permanently replace strikers denies them the fruits of their sham bargaining.

Thus, NLRB policing of good faith in the bargaining process amounts to NLRB policing of the use of the employer's most severe economic weapon. The suggestion that section 8(a)(5) may be used to limit the use of permanent replacements to safeguard the integrity of the bargaining process is not novel. It is at the heart of the Supreme Court's decision in *NLRB v. Curtin Matheson Scientific Corp.*<sup>32</sup>

In *Curtin Matheson*, the Court upheld the Board's refusal to presume that permanent replacements are opposed to continued representation by the union which called the strike. The Court held that the Board acted reasonably when it did not allow an employer to withdraw recognition where the sole basis of the employer's good faith doubt of the union's continued majority status arose from the fact that permanent replacements constituted a majority of the bargaining unit.

The Court offered two bases for its holding. The first was the empirically dubious proposition that permanent replacements are just as likely as not to desire continued representation by the striking union.<sup>33</sup> The second was the sound policy objective of confining the ability to permanently replace strikers to an economic weapon and precluding it from undermining the bargaining process by becoming a means by which the employer walks away from the union.

The Court deferred to the Board's reasoning that a presumption that permanent replacements oppose continued union representation would discourage good faith bargaining by empowering employers to use a strike as a means of eliminating union representation by hiring enough replacements. The Court concluded, "Restricting an employer's ability to use a strike as a means of terminating the bargain-

32. 494 U.S. 775 (1990).

33. *Id.* at 780.

ing relationship serves the policies of promoting industrial stability and negotiated settlements."<sup>34</sup>

Recognizing that surface bargaining cases are concerned with denying employers the ability to use the permanent replacement weapon as a tool for ousting the union goes a long way to explaining why the Board's remedies for surface bargaining do not specify what the employer must do to comply with the statute. The purpose of a finding of surface bargaining is not to compel the employer to make specific changes in its contract proposals. Rather, it is to take away the employer's incentive to talk the union to death and to empower the union to move the employer into a realistic bargaining frame of mind by being able to strike without fear of permanent replacement.

Unfortunately, there are two problems with the current approach to surface bargaining. First, current law makes it relatively easy for an employer to surface bargain while creating a stream of objective evidence which will negate any finding of surface bargaining. Second, remedies for illegal surface bargaining, other than a general order to bargain in good faith, are retrospective only, thereby negating much of the economic incentive for an employer to bargain in good faith.

Current interpretations of section 8(a)(5) enable employers to bargain to avoid a contract without fear of violation. A well-advised employer will take an initial position that is extremely negative and may be calculated to ensure its unacceptability.<sup>35</sup> It will appear at every union-called negotiating session,<sup>36</sup> will listen to and discuss all union proposals,<sup>37</sup> and will make concessions here and there.<sup>38</sup> In general, the employer will avoid the outer limits of grossly outrageous proposals and will avoid conduct that would otherwise lead to an inference of surface bargaining.<sup>39</sup> In so doing, the employer will suc-

34. *Id.* at 794-95.

35. *See, e.g.,* NLRB v. Crockett-Bradley, Inc., 598 F.2d 971 (5th Cir. 1979).

36. *See id.* at 976; Reichhold Chemicals, Inc., 288 N.L.R.B. 69 (1988); ACL Corp., 271 N.L.R.B. 1600, 1603 (1984) (company participation in 13 negotiating sessions is evidence of its good faith).

37. *See, e.g.,* Reichhold Chemicals, Inc., 288 N.L.R.B. 69 (1988).

38. *See, e.g.,* NLRB v. General Tire & Rubber Co., 326 F.2d 832, 833 (5th Cir. 1964). In ACL Corp., 271 N.L.R.B. 1600 (1984), the company responded to union contract proposals by demanding a one year extension of the existing agreement. The company expressly disclaimed any suggestion that its position was economically necessary. It steadfastly maintained this position throughout the negotiations. Five months into the negotiations, the company coupled the one year contract extension demand with an offer of a twenty cent per hour pay increase to take effect following the one year extension. The Board found that the Company did not surface bargain, relying in part on the company's wage offer.

39. ACL Corp., 271 N.L.R.B. at 1603.

ceed in surface bargaining without incurring liability.<sup>40</sup> Newly recognized unions seeking contracts with the employer for the first time are particularly vulnerable to such tactics.<sup>41</sup>

The extreme reluctance to find surface bargaining stems from fears that such findings will effectively dictate the terms of the collective bargaining agreement.<sup>42</sup> If a union is dissatisfied with the employer's position at the bargaining table, its remedy is not to complain to the NLRB, but to exert economic pressure. If the union is unable to pressure the employer to move off its position, the law should not intervene.

The fear that Board regulation will replace free collective bargaining in settling contract terms ignores the limitations on Board remedies. The Board lacks the power to order an employer to agree to anything, even where it infers bad faith from the employer's intransigence.<sup>43</sup> The effect of a finding of surface bargaining is to enable the union to strike without fear of permanent replacement.<sup>44</sup> Thus, regulation of surface bargaining in appropriate circumstances actually enhances the process of free collective bargaining. By denying the employer the opportunity to rid itself of the union by provoking a strike and replacing the strikers, closer scrutiny of employer conduct for surface bargaining will provide incentives for negotiated settlements and further the national policy of promoting labor peace.

Nevertheless, it may be argued that the employees' vulnerability to permanent replacement is a factor which plays a pivotal role in free collective bargaining. When vulnerability to permanent replacement impairs the union's strike weapon, the law should not be concerned if the employer takes advantage of its superior bargaining power to extract a favorable deal.

Permanent replacement, however, has two sides to it. Although the ability to replace strikers permanently strengthens the employer's position at the bargaining table and contributes to the interplay of

40. As one NLRB attorney has summarized the situation, "An employer which meets regularly with the union and agrees to minimal concessions on some key issues will likely prevail in an unfair labor practice hearing." Bruce H. Meizlish, *Surface Bargaining: A Problem in Need of a Remedy*, 1985 DET. C.L. REV. 721, 724.

41. See Paul Weiler, *Striking a New Balance: Freedom of Contract and the Prospects for Union Representation*, 98 HARV. L. REV. 351, 357-63 (1984).

42. See, e.g., *ACL Corp.*, 271 N.L.R.B. at 1603 ("The Company's firmness in insisting on a 1-year extension of the current contract does not of itself constitute bad faith. . . . To hold otherwise . . . would be tantamount to requiring an employer to offer improved benefits . . . or be guilty of bad-faith bargaining.").

43. See *supra* note 26 and accompanying text.

44. See *supra* notes 31-32 and accompanying text.

economic forces that the statute envisions will result in agreement, it also may enable an employer to set the stage for withdrawing recognition from the union. In the latter situation, the employer will negotiate with no intention of reaching agreement, hoping to provoke a strike that will lead to replacement of the workforce and the demise of the union.

Where the employer and union have shared an ongoing relationship, there is good reason to presume that an employer's aggressive position in negotiations reflects its assessment of the parties' relative bargaining power. There is no reason to presume that an employer who has successfully bargained agreements in the past is not in good faith seeking a new deal, albeit one very favorable to it.

Newly recognized unions, however, particularly those recognized following vigorous employer opposition, are particularly vulnerable to employer tactics designed not to assert bargaining power to produce a contract, but rather to avoid a contract and thereby avoid the union. Moreover, there is reason for concern with employer tendencies to bring their opposition to collective bargaining to the bargaining table. In recognition of their vulnerability the law irrebuttably presumes that a newly certified union maintains majority status for a year.<sup>45</sup> Recognition of such vulnerability, coupled with the realization that surface bargaining charges concern regulation of economic weapons rather than substantive bargaining positions, justifies closer NLRB scrutiny of employer conduct for surface bargaining in negotiating first contracts.

Closer scrutiny of employer conduct for surface bargaining during first contract negotiations alone may not deprive employers of the incentive to try to talk the union to death. Under the NLRB's current approach, the employer's ability to replace strikers permanently becomes an issue only if the union strikes and the employer purports to permanently replace. In essence, the Board's processes mop up after a failed bargaining process by reinstating the replaced strikers to their jobs. If the goal is to further the statutory process of free collective bargaining by depriving employers of the incentive to avoid agreement, this mop-up approach to remedies leaves much to be desired.

An employer who surface bargains to avoid a first contract in effect dares the union to strike, wielding permanent replacement as an explicit or implicit threat to the union's very existence. Employees deterred from striking by the specter of permanent replacements tak-

45. *Brooks v. NLRB*, 348 U.S. 96, 104 (1954).

ing their jobs are not likely to be reassured by the potential for getting their jobs back after a prolonged legal fight.

Consequently, an employer who surface bargains during first contract negotiations is more likely to be met by an unfair labor practice charge than by a strike, even if the Board more closely scrutinizes bargaining conduct. If the charge is successful, the Board will order the employer to bargain in good faith. Such an order is akin to a parent yelling at two quarreling siblings to stop fighting and play nicely, except it may be less effective. The employer may return to the bargaining table and make a few cosmetic changes in its position, realizing that all it risks is another Board proceeding.<sup>46</sup>

The NLRB has been blind to the problem. At times it has ordered employers who surface bargained to reimburse the union's bargaining expenses<sup>47</sup> or to reimburse lost wages to employee members of the bargaining team who missed work to participate in fruitless bargaining sessions.<sup>48</sup> Such remedies, however, provide little incentive to the employer, upon returning to the bargaining table, to negotiate in an effort to reach rather than avoid agreement.

Although the Board has not confronted the problem, the Washington Supreme Court has. Under Washington state law, public employees do not have a right to strike and most public employee unions do not have a right to take bargaining impasses to interest arbitration. In *Municipality of Metropolitan Seattle v. Public Employment Relations Commission*,<sup>49</sup> the court upheld a Washington Public Employment Relations Commission order that an employer who had refused to bargain in good faith return to the table and negotiate, provided that if agreement was not reached, either party could demand mediation which, if unsuccessful would enable either party to demand interest arbitration. The court reasoned that the employer's conduct had exhibited flagrant and repeated efforts to avoid its bargaining obligations. Because the union lacked the right to strike and there was no other provision for resolving impasses with finality, the remedy was

46. See Meizlish, *supra* note 40, at 725-26 (detailing the example of the failure of NLRB remedies in a case involving Teamsters Local 696 and K-Mart Corp.'s Lawrence, Kansas, distribution center).

47. In *J.P. Stevens & Co. v. NLRB*, 623 F.2d 322 (4th Cir. 1980), the court held that the Board had authority to order the employer to reimburse the union's negotiating expenses for bargaining sessions rendered fruitless by the employer's bad faith, but denied enforcement to the order because the Board had failed to explain its apparent departure from its prior decisions denying such reimbursement. *Id.* at 329-30.

48. See, e.g., *Modern Mfg. Co.*, 292 N.L.R.B. 10, 10 n.4 (1988).

49. 826 P.2d 158 (Wash. 1992).

necessary to prevent the employer from continuing to breach its duty to bargain with impunity.

Ordering a private sector employer to bargain under threat of interest arbitration would be inconsistent with the NLRA's policy of free collective bargaining. It would be akin to ordering an employer to agree to a specific union contract proposal.<sup>50</sup>

The premise behind the court's decision in *Metro Seattle*, however, has much to offer for the NLRA. That premise is that where a labor relations act's ground rules for collective bargaining enable an employer repeatedly to avoid its duty to bargain in good faith, the labor board has the authority to remedy the violation by altering the ground rules in such a way as to make the bargaining process work as envisioned in the statute. Under the NLRA the appropriate remedy is not to order interest arbitration but to strip the employer of the temptation to dare the union to engage in a suicidal strike. Consequently, in cases of repeat or egregious surface bargaining, the Board should consider coupling its order to negotiate in good faith with an order prohibiting the employer from permanently replacing or threatening to permanently replace strikers during the negotiations. Such an order of affirmative relief would, in the language of section 10(c), "effectuate the policies" of the NLRA by depriving the employer of the incentive to bargain to avoid agreement and leaving the terms of the agreement themselves to be fixed through the collective bargaining process.

### CONCLUSION

The proposals I have offered in this afterword to equalize access during representation elections and to police surface bargaining more closely and effectively during negotiations for first contracts are not intended as a panacea for what ails our nation's labor laws. Rather, my point is that as we focus on reforming our system of collective representation for American workers by taking a fresh look at our labor statutes, we should not ignore the existing statute. As our eyes turn first to the Dunlop Commission and then to Congress to take a fresh look at our statutory scheme, they should not be blind to the Board and the courts who also should take a fresh look at interpretation of the existing statutory language.

50. See *J.P. Stevens & Co. v. NLRB*, 623 F.2d at 329-30; but see Meizlish, *supra* note 40, at 729-30 (arguing that an order of interest arbitration would be consistent with the NLRA).