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LABOR LAW

RICHARD W. LANER AND ANTHONY E. DOMBROW*

The Seventh Circuit decided a myriad of cases which could be classified as labor law decisions in its preceding term. Most were routine and solidified precedent or a pre-existing dichotomy in the law. Some, however, will have an impact to one degree or another on the labor law bar. By and large the court's decisions in this term were well reasoned and judicially sound. The following review is an attempt to highlight those decisions which in any way signify new developments in the law, extensions or retractions of the law, or enable some speculation concerning future direction. In addition, because of a lack of startling developments in the last term, we have also reviewed those cases which accentuate typical problems to the practitioner, with a few further inclusions simply because we found them to be of interest.

Peerless of America, Inc. v. NLRB,1 represents another attempt by the reviewing appellate courts to audit the National Labor Relations Board's implementation of the often difficult teachings of NLRB v. Gissel Packing Co.,2 in an area of critical importance to unorganized employers and the unions who seek to represent their employees. In the landmark decision of NLRB v. Gissel Packing Co.,3 the Supreme Court held that a Union, which had obtained valid authorization cards from a majority of employees in an appropriate unit, must be recognized as the exclusive bargaining representative, though the Union either lost a secret ballot election or a secret ballot election did not proceed after a petition, if the Employer (1) engaged in "outrageous" and "pervasive" unfair labor practices during an election campaign; or (2) committed "less pervasive practices which nonetheless still have the tendency to undermine the majority strength and impede the election processes." Under Gissel, the critical issues in justifying a bargaining

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1. — F.2d —, 83 LRRM 3000 (7th Cir. 1973).
3. Id. at 614.
order are: what are the coercive effects of the Employer's past unfair labor practices upon the election conditions, is there the possibility of erasing the effects of the past misconduct to insure a fair and uncoerced future election and what is the likelihood of recurrence in the future. The Supreme Court held this assessment:

is for the Board and not the Courts, however, to make . . . , based on its expert estimate as to the effects on the election process of unfair labor practices of varying intensity. In fashioning its remedies under the broad provisions of Section 10(c) of the Act . . . , the Board draws on a fund of knowledge and expertise all its own, and its choice of remedy must therefore be given special respect by reviewing courts.4

Despite this admonition, in Peerless of America, Inc.,5 the Seventh Circuit chastised the Board for its perfunctory assessment of the impact of the Employer's unfair labor practices and its direction of a bargaining order. The court made its own independent review of the effect of the Employer's unfair labor practices upon the election conditions and refused to enforce the bargaining order.6 But, the court properly justified this seeming intrusion upon the Board's authority:

However, by this [admonition], the [Supreme] Court hardly meant totally to overrule in this area the famous statement in Universal Camera Corp v. NLRB, . . . that "Reviewing courts must be influenced by a feeling that they are not to abdicate the conventional judicial function," including the responsibility placed on them by the Administrative Procedure Act . . . to prevent capricious determinations by administrative agencies. NLRB v. General Stencils, Inc., 438 F.2d 894 at 904.7

In Peerless, the Board found the Employer violated Section 8(a)(1) of the National Labor Relations Act (Act) by interrogating employees about their union sentiments; by creating the impression of surveillance of employees' union activities; by promising improved benefits if the Union were defeated; by threatening a plant closure and loss of jobs if the Union won the election and by attempting to enlist employees to persuade their fellow employees to desert the Union. In determining

4. Id. at 612 n.32.
5. — F.2d —, 83 LRRM 3000 (7th Cir. 1973).
6. The Seventh Circuit has similarly chastised the Board in the past. The court has either made an independent review of the effect of employer unfair labor practices upon election conditions without remand to the Board, NLRB v. Kostel Corp., 440 F.2d 347, 76 LRRM 2643 (1971); Self-Reliance Ukrainian American Coop. Ass'n v. NLRB, 461 F.2d 33, 80 LRRM 2278 (1972), or has remanded to the Board for detailed analysis and specific findings. New Alaska Dev. Corp. v. NLRB, 441 F.2d 491, 76 LRRM 2689 (1971).
7. Peerless of America, Inc. v. NLRB, — F.2d —, 83 LRRM 3000, 3009 (7th Cir. 1973).
that this Employer misconduct was sufficient to warrant a refusal to
bargain in violation of Section 8(a)(5) and the remedy of a bargaining
order, the Board merely had stated:

These unfair labor practices were directed at undermining union
strength and impeding the election process. Applying the standards of NLRB v. Gissel Packing Co., 395 U.S. 575, we consider
whether there is still a possibility of ensuring a fair election. We
believe that possibility is slight because of the lingering coercive
effect of the unfair labor practices . . . . We therefore hold that
the employees' majority designation of the Union as expressed in
their authorization cards provides in this case a more reliable
measure of the employees' true desires than would be provided by
an election.8

On review, the court predictably reacted as it had in prior reviews of
similarly defective Board rationale in support of bargaining orders:

We have consistently held that Gissel contemplates that the Board
must make "specific findings" as to the immediate and residual
impact of the unfair labor practices on the election process and
that the Board must make "a detailed analysis" assessing the possi-
bility of holding a fair election in terms of any continuing effect
of misconduct, the likelihood of recurring misconduct, and the poten-
tial effectiveness of ordinary remedies . . . . But once again the
Board has failed to give a satisfactory explanation of its decision
(citation omitted). Instead it has proffered a list summarizing in
general terms the employer's Section 8(a)(1) violations, as if any
interrogations, threats, promise of benefit and solicitations of what-
ever intensity, whenever, however, and in whatever context made
were the equivalent of all others imaginable.9

The court stated it would not enforce a bargaining order because of the
marginal nature and extent of the Section 8(a)(1) violations; neither
did it remand to the Board for "specific findings" and "a detailed an-
alysis." Rather, the court independently assessed the propriety of a
bargaining order and, after elaborate discussion, found it inappropri-
ate.10

In expressing dissatisfaction with the Board's boilerplate ap-
proach, the Seventh Circuit has given expression to a growing view of
other Courts of Appeals. This view was expressed by Judge Friendly
in NLRB v. General Stencils, Inc.,11 where the Board was criticized for
not utilizing its rule making powers to bring some uniformity and cer-

8. Id. at —, 83 LRRM at 3002.
9. Id. at —, 83 LRRM at 3007-08.
10. Id. at —, 83 LRRM at 3010. The court, in Peerless, also stated that em-
ployee turnover since the election is a relevant consideration and militates against
issuance of the drastic remedy of a bargaining order where the employer's misconduct
is of questionable sufficiency.
11. 438 F.2d 894, 76 LRRM 2288 (2d Cir. 1971).
ertainty to the evaluation of conduct for bargaining order and, failing
that, for not giving an illuminating justification for a bargaining order
in its decisions. Until the Board reacts to this growing dissatisfaction
of the court, enlightened employers will contest the Board's defective
boilerplate rationale for bargaining orders; they will prepare their
defenses and arguments in accordance with the reviewing court analy-
ses that such findings of violative conduct are insufficient to warrant
a bargaining order.

In Peerless-type cases where the Union needs a majority of valid
cards from employees in an appropriate bargaining unit as well as in
any representation election where only those employees in the appro-
priate unit can vote, the Board's inclusion or exclusion of employees in
an appropriate unit can have a significant impact on the results. In
NLRB v. Caravelle Wood Products, Inc., the court reviewed the
Board's unit placement of employee-relatives of shareholders of a
closely held corporation. The Board's decision effectively pierced the
corporate veil to hold that eight workers, the wives, sons and daughters
of ten shareholders of a small family corporation, were not "em-
ployees" within the definition of Section 2(3) of the Act even though
that Section ignores corporate relations and only excludes an "individual
employed by his parent or spouse."

Two years earlier by way of dicta the court warned the Board that
it lacked the authority to amend the statutory definition of "em-
ployees." In Caravelle, now faced squarely with the issue, the court
rejected the Board's attempt, albeit equitable, to equate the son of a part-
tner or sole proprietor with the son of a closely held corporate share-
holder. In critically pointing up the Board's inconsistent treatment
of spouses and children of substantial shareholders of closely held cor-
porations in the past, the court correctly noted that these previous de-
cisions created an elastic formula which virtually repealed the statute.

The court stated the Board's broad discretion to include or exclude
employees from an appropriate unit under Section 9 of the Act enables
it to reach the same conclusion it had reached in Caravelle without any
distortion of the Section 2(3) definition of "employee." The former
approach, however, requires detailed factual findings in justification
and support of a conclusion, while in the latter case the Board can act
arbitrarily on a per se basis.

Presumably, in recognition of the equitable and practical result,

12. 466 F.2d 675, 82 LRRM 1004 (7th Cir. 1970).
13. Lake City Foundry v. NLRB, 432 F.2d 1162 (7th Cir. 1970).
the court remanded to allow the Board to again analyze the special status of these employee-relatives under its discretionary Section 9 authority and to come to the same conclusion. Four months thereafter, the Board issued its supplemental decision reaffirming its prior conclusion to exclude these employee-relatives, this time supporting its decision with Section 9 factual determinations that showed the excluded employees had interests too closely allied to the company and did not, therefore, have a sufficient community of interest with the other employees.

The court’s rejection in Caravelle is more than a matter of form over substance. The Board’s decision to per se exclude these relatives under Section 2(3) allowed no deviation even where the facts would show that the relative was in no way allied with management. By contrast, the court’s holding, however, allows for a disposition based on varying and relevant factual considerations. The court’s decision recognizes that per se rules, neat as they may be, arbitrarily prevent the presentation of factual differences which may be significant to the need for an efficient and flexible operation. Further, the court properly reminds the Board not to erode the parties’ rights but to be mindful of its statutory obligations.

In its recent term, the court reviewed other organizational campaign disputes. In NLRB v Springfield Discount, Inc. the union won a representation election by a vote of 19 to 18. The employer filed objections claiming the union conducted a pre-election poll as to the sentiments of four eligible employees. The Board found no objectionable conduct and, therefore, certified the election results. In such cases, an employer is not statutorily able to seek immediate judicial review. Rather, an employer, who wishes to challenge an adverse Board ruling on its objections, must first refuse to bargain with the union, be subjected to an 8(a)(5) finding by the Board and then can contest the 8(a)(5) finding before the court by contending that there was an improper certification of the election results which negates a duty to bargain. Springfield Discount contended that, because it is objectionable conduct for employers to similarly poll its employees during a campaign, it is equally objectionable for a union to do so. Though a victorious union could later use the information derived from a poll to punish unsympathetic employees, the Seventh Circuit, in accord with Board and court precedent, held such a poll conducted by a union did not constitute objectionable conduct. More importantly,
the court recognized the principle that, because employees are economically dependent on their employer and because an employer is in an immediate position to punish employees discovered to be union sympathizers, there is justification that conduct by an employer may be coercive and forbidden while that same conduct by a union is permissible.15 Because of these considerations, different standards may be correctly applied to the evaluation of employer and union conduct during a campaign.16

In Scholle Chemical Corp. v. NLRB,17 the court resolved the rights of non-employee union organizers to distribute union literature and to solicit employees on company property. Scholle is located near Chicago in a suburban industrial tract housing along with another large company and is near a four-lane, highly traversed thoroughfare. An offshoot of this thoroughfare, which leads to the plant, is a privately-owned road. Scholle employed about 350 employees who resided throughout Cook and DuPage counties. The other company in the industrial tract, Automatic Electric, employed 11,000 employees. Both the Scholle and Automatic Electric employees arrive and leave work via private automobile; all Scholle employees and 40% of the Automatic Electric employees use the offshoot road. Because the shift changes at the two companies overlap, it was impossible to distinguish Scholle employees from Automatic Electric employees. When the non-employee union organizers attempted to solicit and distribute near the Scholle plant entrance and on the privately owned offshoot road, they were prohibited by Scholle. The organizers then attempted to solicit and distribute at the intersection of the offshoot road and the main thoroughfare. They found this method unproductive due to the heavy traffic and the inability to identify Scholle employees. The organizers then requested a current list of all unit employees' names and addresses but received none. The court properly relied upon the authority of NLRB v. Babcock and Wilcox,18 recently reaffirmed in Central Hardware Company v. NLRB.19 In Baocock, the Supreme

15. In this regard, see Louis-Allis Company v. NLRB, 463 F.2d 512, 81 LRRM 2864 (7th Cir. 1972); Plant City Welding & Tank Company, 119 NLRB 131, 41 LRRM 1018 (1957); NLRB v. West Const. Gasket Co., 205 F.2d 902, 32 LRRM 2353 (9th Cir. 1953).

16. This is not a unique doctrine. For example, a union can solicit employees through home visits. An employer may not. Peoria Plastics Co., 117 NLRB No. 74, 39 LRRM 1281 (1959).

17. — F.2d —, 82 LRRM 2410 (7th Cir. 1972).


Court accommodated the employees' rights to organize and employers' conflicting property rights:

Organization rights are guaranteed to workers by the same authority, the National Government, that preserves property rights. Accommodation between the two must be obtained with as little destruction of one as is consistent with the maintenance of the other. The employer may not affirmatively interfere with organization; the union may not always insist that the employer aid organization. *But when the inaccessibility of employees makes ineffective the reasonable attempts by non-employees to communicate with them through the usual channels, the right to exclude from property has been required to yield to the extent needed to permit communication of information on the right to organize.*

Given the diffusion of the Scholle work force throughout Cook and DuPage counties (which made any media communication impractical), the unavailability of a mailing list (which made any postal communication impractical), and the heavy traffic on the main thoroughfare (which made distribution to unidentified Scholle employees impossible), the court concluded that the reasonable attempts by non-employee union organizers to communicate with inaccessible Scholle employees through the usual channels was ineffective. Therefore, Scholle's property rights were made to yield to the Union's organization rights to the extent necessary to permit communication. Scholle's refusal to yield, therefore, violated Section 8(a)(1) of the Act.

Despite its victory in this battle, the Union has not won the war. The Union's organization efforts began in November, 1969; the Court of Appeals decision issued in December, 1972; and, certiorari has been sought. Thus, after approximately four years, the Union still has no organizational access to the Scholle employees. Through the delay of litigation, an employer can effectively stifle such organizational efforts indefinitely. Employee frustration and lost interest become additional weapons for the employer to use its anti-union campaign.

Unlike the *Peerless* decision which involved the propriety of a

21. In contrast, see General Dynamics, 137 NLRB 1725, 50 LRRM 1475 (1962); Monogram Models, 192 NLRB No. 99, 77 LRRM 1913 (1971); Falk Corp., 192 NLRB No. 100, 77 LRRM 1916 (1971) where no Section 8(a)(1) violation was found because, in each instance, feasible and effective methods of communication were available to non-employee organizers.
22. Compare the differing approach in Scholle and Babcock and Wilcox to Food Employees v. Logan Valley Plaza, 391 U.S. 308 (1968), where the Supreme Court applied first amendment free speech principles to communication by unions on private property which really is public or quasi-public in nature. This difference is discussed at length in the Central Hardware case.
bargaining order, the court's recent decision in *Playskool, Inc. v. NLRB*\(^{23}\) involved the propriety of an employer's voluntary recognition of a union under Section 8(a)(2) of the Act. In *Playskool*, the United Furniture Workers of America unsuccessfully had attempted to organize the Playskool employees since 1952. On several occasions, the Furniture Workers requested recognition through a card check which the Company rejected by insisting on an election. The last such election was conducted in November and December of 1968 when the Furniture Workers received 29.9% of the vote. Subsequent to this loss, the Furniture Workers engaged in continued organizational activities, although the extent of this activity and the employer's knowledge of it were in dispute. At the very least, however, the Furniture Workers' solicited employees at the plant gates, solicited authorization cards and held union meetings. In March, 1969, the Retail Wholesale and Department Store Union (RWDSU) began its own campaign. Playskool learned of RWDSU's organizational campaign a month later and decided not to oppose the RWDSU because of its reputation as a "good union" and because it did not process many grievances or instigate many strikes. Later that month, RWDSU claimed it represented a majority of unit employees and requested a card check to verify its claim. Without notifying the Furniture Workers, Playskool and RWDSU agreed to an informal card check by the Illinois Department of Labor's Conciliation Service. On the basis of this card check, the Conciliation Service found the RWDSU had obtained valid authorization cards from at least 300 of the 500 unit employees. Playskool and RWDSU then executed a recognition agreement and, shortly thereafter, a collective bargaining contract containing a union security clause.

The legal issue in the case involved the "Midwest Piping" doctrine and its extension herein by the Board. In *Midwest Piping & Supply, Inc.*,\(^{24}\) each of two competing unions claimed to represent a majority of the employees and each filed a petition for an election. Before the election could be held, one union presented the Employer with its signed authorization cards to prove its majority status and, on this basis, the Employer recognized this union. The Board found the rival unions' petitions and claims to majority status presented a "question concerning representation" which can only be resolved by the Board through its election procedures. Instead of remaining neutral

\(^{23}\) 477 F.2d 66, 82 LRRM 2916 (7th Cir. 1973).

\(^{24}\) 63 NLRB 1060, 17 LRRM 40 (1945).
when confronted with such conflicting claims and not signing a contract until the question concerning representation was resolved, the Employer unlawfully resolved the question concerning representation by recognizing one of the competing unions. The Board found this was unlawful assistance by the Employer to one of the rival unions in violation of Section 8(a)(2) of the Act. Since Midwest Piping, the Board has expanded the Midwest Piping doctrine and its evaluation of the existence of a question concerning representation to the situation where there are no petitions or actual demands of rival unions but simply to where the Employer merely knows of rival unions' organization efforts. An employer may not recognize any union upon the basis of a card showing when a rival union has raised a "question concerning representation." Where there is no rival union, the Board requires the union to present signed cards from 30% of the employees to support a representation petition. However, in these rival union cases, the Board has not specifically defined the minimum amount of support a union must show to raise such a question concerning representation necessitating an election. In its Playskool decision, the Board stated:

The sole requirement necessary to raise a question concerning representation within the meaning of the Midwest Piping Doctrine, as modified by the Board, is that the claim of the rival union must not be clearly unsupportable and lacking in substance.

In Playskool, the Board concluded the Furniture Workers met the test. It had obtained signed cards from 30% of the unit employees which was sufficient to support a petition for the last election; it had polled 29.9% in the last election; and, it had continued its organizational efforts since that last election.

However, the validity of the "Midwest Piping" doctrine as extended has met with great resistance and disapproval by the reviewing Courts of Appeals. The Board's initial approach is to look to the rival union's support and to find a question concerning representation if the rival union's claims are "not clearly unsupportable." However, the courts instead first look to the support held by the majority union which was recognized by the Employer and find no question concerning representation exists if that union validly obtained the employees' majority support. Thus, the courts have refused to find a

27. Id. at —, 79 LRRM at 1508 (1972).
Section 8(a)(2) violation where an Employer has recognized one of two competing unions on the basis of the union's clear demonstration of uncoerced and validly obtained majority support.\textsuperscript{28} The Seventh Circuit following the same analysis, found a valid and uncoerced majority by the RWDSU, no question concerning representation which would have necessitated an election and, therefore, no Section 8 (a)(2) violation. In finding a valid majority on the basis of the state-conducted card check, the court discounted the existence of forged cards, back-dated cards and cards signed for both unions because they were apparently insufficient to destroy the RWDSU majority. The court also discounted failure to notify the Furniture Workers of the card check. And, the court discounted Playskool's long standing opposition to the Furniture Workers, its acceptance of RWDSU as a "good union" and its inevitable knowledge of continued overt organizing activity by the Furniture Workers.

The result in \textit{Playskool} will not alter the dichotomy in the law. The Board will persist in its application of the Midwest Piping doctrine as will the courts. However, \textit{Playskool} certainly argues well for a middle ground between the Board's overly liberal assessment of a question concerning representation and the courts' mechanistic formula of finding no question concerning representation. To the practitioner, Playskool's recognition of RWDSU, an admittedly "good union," in light of the facts and surrounding circumstances, certainly is, at the least, suspicious. The courts' holdings are susceptible to the exploitation by employers and unions desirous of such relationships. Yet, the Board's holdings are susceptible to a minority union thwarting the will of a majority union. To insure the fullest expression of employee free choice, therefore, an accommodation of the conflicting doctrines is clearly warranted.

In its recent term, the Seventh Circuit decided several cases which involved the actual bargaining relationship of an employer with an established union already representing its employees.

The issue in \textit{Mobil Oil Corp. v. NLRB}\textsuperscript{29} was whether employees have the right to representation at fact finding interviews conducted by management during investigations of suspected theft on company property. In \textit{Mobil}, the company decided to interview nine em-

\textsuperscript{28} NLRB v. Peter Paul, Inc., 467 F.2d 700, 80 LRRM 3431 (9th Cir. 1972); Modine Mfg. Co. v. NLRB, 453 F.2d 292, 79 LRRM 2109 (8th Cir. 1971); American Bread Co. v. NLRB, 411 F.2d 147, 71 LRRM 1243 (6th Cir. 1969); Iowa Beef Packers v. NLRB, 331 F.2d 176, 56 LRRM 2071 (8th Cir. 1964).

\textsuperscript{29} 482 F.2d 842, 83 LRRM 2823 (7th Cir. 1973).
 Employees suspected of theft. No decisions to discipline any of the nine suspects was made before the interviews began. The employer resolved that, during the interviews, no union representatives would be permitted and that none would be allowed prior to any preliminary disciplinary decision and action. Two of the interviewed employees requested the presence of union representation. The employer refused. After the interviews, most of these employees, including the two who requested union representation, were suspended or discharged. The Union claimed the employer's denial of union representation violated Section 8(a)(5) by derogating the Union's status as the exclusive collective bargaining representative and independently violated Section 8(a)(1) by diluting the employees' rights to act collectively to protect job interests. As to the 8(a)(5) contention, the Board has ruled such a denial of union representation to be violative if the real purpose of the employee interview is to make a record to support and strengthen previously decided disciplinary action. However, if the employee interviews from which the Union representative is excluded are merely fact finding and purely investigatory in nature and thus precede any decision on discipline, such a denial of union representation is not violative of Section 8(a)(5). On this latter basis, the Board found no Section 8(a)(5) violation in the instant case. However, expanding on these precedents, the Board found an independent Section 8(a)(1) violation in the employer's rejection of union representation to those employees who requested representation, reasonably believing the matters discussed could result in their being disciplined. Under Section 7 of the Act, the Board held the employees have a right to act in concert through their collective bargaining representative by seeking assistance in an interview which they reasonably believe may put their job security in jeopardy. The Seventh Circuit, in denying enforcement of this 8(a)(1) violation, stated that Section 7 contemplated employees working in concert and with statutory protection through their collective bargaining representative in the collective bargaining process. However, these fact finding and investigatory interviews, unlike the handling of grievances, are not part of the continuing collective bar-

32. Cf. Quality Mfg. Co., 195 NLRB No. 42 (1972), enforcement pending, 83 LRRM 2817, where the Board held that the disciplining of an employee who refused to attend an investigatory interview without union representation and of an employee-union representative who requested to be present violated § 8(a)(1).
gaining process and are not the type of concerted activity under Section 7 for which employees may seek their collective bargaining representative’s assistance. Thus, the employer’s rejection of union representation in investigatory and fact finding interviews, while held violative of Section 8(a)(1) by the Board, is permitted by the Seventh Circuit.

However, the line between investigatory, fact finding employee interviews and employee interviews to support contemplated disciplinary action which warrant union representation is a thin one indeed. To refuse an employee his representative is to act at one’s peril. However, often, as a practical matter, contractual provisions make union representation mandatory at either type of interview. Further the court has very narrowly construed Section 7 which protects employees’ rights “to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection.” If assisting employees to preserve their job security and tenure is not part of the continuing collective bargaining process, such assistance by collective bargaining representatives, which are organized to protect such employee interests, likely is concerted activity for “other mutual aid and protection.”

In NLRB v. Roselyn Bakeries, Inc., the Seventh Circuit was confronted with an Employer’s implied threat of a lockout or plant shutdown if the Roselyn employees persisted in organizing an outside union to oust the established incumbent union. Predictably, when the court decided that the implied threat occurred in the context of the employees’ organizational efforts, the court enforced the Board’s order finding a Section 8(a)(1) violation. While an employer is free to communicate his views about unions to his employees in a campaign involving one or more competing unions, his communication may not contain an express or implied threat of coercion or reprisal.

When an employer predicts or expresses his views on the effect of unionization on the future of his business, his prediction must be “carefully phrased on the basis of objective fact to convey an employer’s belief as to demonstrably probable consequences beyond his control.” Further, “if there is any implication that an employer may or may not take action solely on his own initiative for reasons unrelated to eco-

33. Such a contention has even more relevance when, as in this case where theft was being investigated, evidence elicited through these interviews could lead to criminal prosecution.
34. 471 F.2d 165, 81 LRRM 2375 (7th Cir. 1972).
35. NLRB v. Gissel Packing Co., 395 U.S. 575, 618 (1969); See also Section 8(c) of the Act.
nomic necessities and known only to him, the statement is no longer a reasonable prediction based on available facts but a threat of retaliation based on misrepresentation and coercion, and as such without the protection of the First Amendment." To distinguish between a lawful prediction and a coercive threat is often a challenge for the most experienced practitioners. Though the violative statement in Roselyn was found to be an implied and not a flagrant threat, it did raise the spectre of a plant closing and a resultant loss of jobs. Recognizing that employees are particularly sensitive to rumors of plant closings and often treat such hints as coercive threats rather than honest forecasts, the court typically resolved any doubt against the employer and found the implied threat to be coercive and violative. Roselyn embodies the principle of an increasing body of law that expressed or even implied threats of plant closings or of a loss of jobs are the most serious unlawful 8(a)(1) conduct during an organizational campaign. Indeed, in evaluating employer misconduct sufficient to warrant a bargaining order, the Board has recently held that such threats are most likely to give rise to such a remedy.

_NLRB v. Summit Tooling Co._ involved an employer's termination of unit work. In most respects, it is not a significant case. The court reinforced many long standing principles—to wit, a discharge of employees for their union activities violates Section 8(a)(3) of the Act; a refusal to execute a previously negotiated collective bargaining agreement violates Section 8(a)(5); a refusal to furnish information as required by the contract to aid a union's administration of the contract violates Section 8(a)(5); a refusal to bargain with the union about the effects or impact of a loss of jobs upon unit employees violates Section 8(a)(5). Curiously, what the Seventh Circuit did not need to decide was probably the most interesting issue in the case.

The Board had decided the employer was under no obligation to bargain about its decision to close its manufacturing operations because this constituted a complete going out of business. Since 1966,

37. _Id._
39. 474 F.2d 1352, 83 LRRM 2045 (7th Cir. 1973).
43. Summit Tooling Co., 195 NLRB No. 91, 79 LRRM 1396 (1972).
in *Ozark Trailors, Inc.*, the Board has held that an Employer who closes one part of a single, integrated, multiplex operation must bargain with the collective bargaining representative about the decision to close. However, that Board doctrine has met consistent resistance by the reviewing courts.

Whereas the *Summit* decision involved the termination of an employer's production operations and its legal consequences, the court also rendered decisions in its recently completed term involving the continuation or resumption of employer operations in a different form and its legal consequences. *NLRB v. Bachrodt Chevrolet* is one of those purchase-sale-merger cases where the implementation of minimal labor-relations counsel likely could have avoided costly litigation and potential financial liability. The desired operational results probably could have been accomplished as a practical matter with union representation as well as without, although clearly the employer, like most, would have liked to operate without a union.

Bachrodt had purchased some of the assets and liabilities of a nearby competitor, some of whose employees were represented by a union. Thereafter, Bachrodt refused to honor the old contract or recognize or bargain with the union; instead it implemented operational changes in its new employees' wages, hours and working conditions. The Board, however, found that Bachrodt was a legal "successor" and ordered it to bargain with the union and honor the existing union contract.

The court had no trouble routinely affirming the finding of successorship status inasmuch as there was merely a change in ownership without a material change in operations and Bachrodt hired 22 of its employees.

44. 161 NLRB 561 (1966).
45. See generally NLRB v. Thompson Transp. Co., 406 F.2d 698, 70 LRRM 2418 (10th Cir. 1969); NLRB v. Drapery Mfg. Co., 425 F.2d 1026, 74 LRRM 2055 (4th Cir. 1970). Recently, it appeared that the Board was reassessing and vitalizing its *Ozark Trailers* doctrine. Thus, in *Summit* and in Triplex Oil Refining Division of Pentalic Corp., 194 NLRB No. 86, 78 LRRM 1711 (1971), the Board avoided the issue by categorizing an arguably partial closing as a complete going out of business for which there is no duty to bargain under *Ozark Trailers*. See also NLRB v. Darlington Mfg. Co., 380 U.S. 263 (1965). And, in General Motors Corp., 191 NLRB No. 149 (1971), the Board held a decision to sell part of a single, integrated, multiplex enterprise was not a bargainable subject. However, the Board has recently drawn a line in its retreat from and narrowing of the *Ozark Trailers* doctrine in American Needle & Novelty Company, 206 NLRB No. 61, — LRRM — (1973) by holding a decision to relocate part of a single, integrated, multiplex enterprise is a mandatory subject of bargaining.

46. 468 F.2d 963, 83 LRRM 2528 (7th Cir. 1972).
47. See, Laner, *A Buyer Views the Purchase of a Unionized Business*, 47 Chi. Bar Record 93, 100 n.17 (1965), where one practical approach is suggested.
predecessor's 24 employees. Moreover, the court held Bachrodt itself could have had no doubt as to the union's representative status as there was not "even a hint" of any evidence to the contrary.

However, since the Board's decision was pre-NLRB v. Burns International Security Services Inc., its remedial order that Bachrodt assume and honor its predecessor's contract was not enforced. Bachrodt was merely ordered to meet and bargain with the union to "impasse" before making the changes it desired and, further, to make whole the employees for any losses suffered because of its failure to implement its bargaining duty.

The entire litigation could have been avoided had the buyer briefly notified the union in advance of its intended changes, sat down upon request and bargained about those changes in good faith and, if it could not obtain agreement after reasonable discussions, implemented those changes in the same manner Bachrodt prematurely had done in violation of its statutory duty to bargain.

Judge Stevens, in dissent, however, questioned the majority's finding of illegality in Bachrodt's changes, arguing:

(1) it was not in violation of any contract obligation;

(2) the company did not change terms after its duty to bargain arose (it did not have any such duty until it hired its predecessor's employees and the changed terms were told to such employees before they were hired); and

(3) there should be no duty to bargain before Bachrodt hired the employees (it was not clear that Bachrodt was going to hire the employees until they indicated their acceptance of the new working conditions).

Judge Stevens pointedly emphasized the practicality of Burns: The transfer of capital is encouraged by "freeing the purchaser of any obligation to the union, either contractually or in the form of a duty to bargain, until after a new complement of employees has been hired." He felt Bachrodt's holding destroyed this concept.

However, there is a significant practical distinction between the

48. In NLRB v. Burns Int'l Security Servs., Inc., 406 U.S. 272 (1972), the Supreme Court held that, normally, a successor business would not be required to honor an existing collective bargaining agreement.

49. In this regard, see the Board's recent decision in Central American Airways, 204 NLRB No. 25, 83 LRRM 1314 (1973).

duty to bargain and the continuing enforcement of a collective bargain-
gaining agreement. The duty to bargain is an obligation which is af-
fected by the relative bargaining power of the parties. The practical
questions are: Does the Union have the power, ability, finances, sup-
port and desire to strike? Can the Company withstand the financial
loss, or will they be able to operate in the face of a strike? By contrast,
a contract can more easily be enforced without change by an arbitrator
and a court by even the weakest union.

Therefore, Burns' elimination of the contract obligation is a major
inducement for the transfer of capitol. The bargaining power of the
union in implementation of its bargaining rights may achieve the same
contract. And, even if there was no union in the predecessor's oper-
ation, a week after the transfer the union could organize the em-
ployees and bargain the same contract. Therefore, these questions
are more effectively resolved by practical not Labor Board decisions.

Union Tank Car Company is yet another in the growing list of
merger, sale, consolidation and/or relocation "successor"-like cases
where multi-union representation rights are caused to come in conflict
due to significant operational changes implemented by employers. In
this case the court had an opportunity to review many aspects of the
emerging law in this area of critical and practical importance to busi-
nessmen who in the highly competitive '70's will be continually
forced to make substantial operating judgments for efficiency and
economy which by necessity often affect the representation rights of
their employees. Union Tank Car is further illustrative of the often
difficult accomodations required to be made between the three possi-
ble labor law adjudicators: arbitrators, the Labor Board and the
courts.

The employer had two plants, one primarily for manufacturing
and the second for finishing. The manufacturing plant was represented
by the Boilermakers. The finishing plant was represented by OCAW.
The employer acquired a third plant designed to efficiently integrate
the whole operation.

The Boilermakers represented the employees in the newly ac-
quired plant from its inception. The original two plants were thereaf-
ner phased out and their work was transferred to the new plant.
OCAW claimed it should represent the finishing employees, as it had in

51. Local 7-210, OCAW v. Union Tank Car Company, 475 F.2d 194, 82 LRRM
2823 (7th Cir. 1973).
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the transferor plant, pursuant to its collective bargaining agreement which provided that, if the employer's operations were moved, the OCAW agreement would apply to the location to which the work was moved.

When the company refused, contending that it would be illegal to recognize OCAW at the new plant, OCAW sought arbitration of its claim. The arbitrator held for OCAW ordering that the agreement with OCAW applied to the new facility, contingent upon a Labor Board ruling that this was not violative of the Act. Further, the arbitrator held the employer should make whole OCAW employees for all wages and benefits lost by the employer's failure to honor the contract.

Thereafter, in a subsequently filed representation case, the Board held that the new facility's employees were properly represented by the Boilermakers and OCAW had no representation rights. Based on this holding, naturally, the employer refused to comply with the arbitrator's award. OCAW then sought in a Section 301 action to compel compliance with the arbitral award, but it advised the court, consistent with the Board's prior decision, that it no longer had any interest in representing the employees at the new facility. It sought only to enforce the second part of the arbitrator's award, the "make whole remedy."

Therefore, the basic issue before the court was whether the arbitrator's remedies were separable or, instead, whether the Board's destruction of the first remedy pre-empted all issues flowing from the Union's representation of the employees. A majority of the Seventh Circuit, in agreement with the District Court below, refused to separate the award and held that, since the Board had held OCAW had no representation rights at the new facility, the OCAW contract legally could not follow the work; the Boilermakers properly represented all employees at the new facility and the employer could not be liable for any breach of contract damages to OCAW.

The dissent rejected this practical conclusion and distinguished between the strict legal issue of whether the contract was breached (finding clearly that it was) and which union legally could represent the employees (accepting the Board's conclusion that it was the Boilermakers). Simply stated, the dissent argued that the employer voluntarily and knowingly violated the contract by transferring the work to a facility where it could not recognize OCAW; therefore, citing Williston and Corbin, it should be liable for damages for that voluntary breach:
Plant removal was banned except upon the condition that the contract be applied at any new site of operation. The provision was not complied with.52

Yet, the Supreme Court in 1964 confirmed what most labor law practitioners knew to be true: a collective bargaining agreement is not normally simply to be interpreted and applied as a commercial contract according to the wisdom of Williston and Corbin. In John Wiley & Sons, Inc. v. Livingston,53 the Court cautioned as to the uniqueness of a union contract:

[A] collective bargaining agreement is not an ordinary contract. . . . It is generalized code to govern a myriad of cases which the draftsmen cannot wholly anticipate . . . . The collective agreement covers the whole employment relationship. It calls into being a new common law—the common law of a particular plant.54

OCAW was attempting to enforce an illegal clause and the employer had every right and an obligation to not comply with the clause. Therefore, its voluntary breach should not subject it to criticism or damages because public policy or compelling reasons cannot support the enforceability of such a clause. The dissent would have the employer choose between maintaining the status quo of production inefficiency or moving the OCAW facility to some other facility which was not represented by a union, notwithstanding the cost or further inefficiency that this might entail.

As the majority correctly observed, “This action was the culmination of the tortuous course of a labor dispute between the parties.”55 An arbitrator, in accordance with his limited jurisdiction, properly limited himself to the resolution of a contract interpretation question without regard to the Act. The Labor Board effectively overruled that decision because it was violative of the Act. The court’s majority, in balancing the delicate interplay, affirmed the Board’s total pre-emption of all the issues involved. Although hindered by a relatively complicated fact situation, the result, fully supported by precedent, also pragmatically recognizes the realities of labor relations in the private industrial sector. The legalistic but impractical view of the dissent would force operating managers to shy away from such operational changes so vitally needed in a period of inflationary economic growth.

52. Id. at 201, 82 LRRM at 2829.
54. Id. at 550.
55. 475 F.2d at 195, 82 LRRM at 2824.
The above cases presented the court with the review of employer conduct. During its recently completed term, the Seventh Circuit was additionally presented with cases that necessitated the review of the conduct of labor organizations.

*NLRB v. Laborers, Local 573 (Mengel Construction Co.)*,\(^{56}\) involved an application of Sections 8(b)(2) and 8(f) of the National Labor Relations Act. Section 8(f), unique to the construction industry, permits a contract to require employees to join a labor organization after their seventh day of employment as a condition of continued employment. (Non-construction employees have a 30 day grace period). As applied to this case, Section 8(b)(2) prohibits a labor organization from causing or attempting to cause an employer to discriminate against employees in violation of Section 8(f). In *Mengel*, the union insisted that the alleged discriminatees pay dues prior to the expiration of this seven day period and join the union prior to the expiration of this seven day period. The union also refused to grant membership to these alleged discriminatees after the seven day period and then insisted on their discharge for not complying with the seven day union security provision. The court properly found the union’s conduct contravened the clear language of Sections 8(f), 8(b)(2) and 8(b)(1)(A) by imposing unlawful conditions of continued employment in violation of Section 8(f) and by then causing these discharges after preventing satisfaction of lawful conditions of continued employment under Section 8(f).\(^{57}\)

In *Szczesny v. Montgomery Ward & Co.*\(^{58}\) the court evaluated a labor organization’s duty of fair representation to its members under Section 8(b)(1)(A). In *Szczensny*, an employee brought a suit under Section 301 of the Act claiming the company breached the collective bargaining agreement by discharging him without just cause, and that the union had breached its duty of fair representation which resulted in an adverse arbitral award. After the employee filed his grievance in the instant case, he was given veto power over the selection of the arbitrator; he did, in fact, veto one arbitrator and then acquiesced in the selection of the ultimate arbitrator. Prior to the arbitration hearing, the union gave the employee the opportunity to have his own attorney present and informed him of the necessity of his testi-

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56. 481 F.2d 1406, 83 LRRM 2988 (7th Cir. 1973).
57. While pre-hire contracts are uniquely allowed in the construction industry under Section 8(f), the Board has indicated an intent to dilute their application. R.J. Smith Constr. Co., 191 NLRB No. 135, 77 LRRM 1493 (1971).
58. 474 F.2d 1351, 83 LRRM 2041 (7th Cir. 1973).
mony. Disgruntled by the choice of the arbitrator, the employee refused to attend the arbitration hearing. When the company presented witnesses to uphold the just cause for the discharge, the union attorney engaged in vigorous cross-examination and pressed the employee's contentions of an improper discharge. The arbitrator upheld the discharge. The court, upon review of a directed verdict for the defendant's company and union affirmed the District Court decision. Using the standard set forth by the Supreme Court in *Vaca v. Snipes*, the Seventh Circuit found the union's conduct was not arbitrary, discriminatory or in bad faith and, therefore, constituted no breach of the duty of fair representation. Because there could be no remaining basis to contest the propriety of the arbitration proceeding and the validity of the award upholding the discharge, the company's discharge was not challenged by the court.

*Szczesny* is symptomatic of a growing trend of employee independence in attacking both employers and unions. However, the burden of proof upon an employee to show arbitrary, discriminatory or bad faith conduct by a union is a rigorous one. Under *Vaca*, a union need not take a case to arbitration. However, a union would be found to have breached the duty if it refuses to process a grievance because of the grievant's lack of union membership, or because of antagonism toward him from his intra-union activities, or because of racial considerations, or because the grievant has invoked Board procedures. Normally, if a Section 8(b)(1)(A) violation is found, the Board requires the union to insist on reconsideration by the Employer and to bring the matter to arbitration. However, where compliance with an original Board order is not effectively made, the Board has assessed a "make whole" back pay remedy against the offending union.

The court also decided two cases involving the interpretation of Section 8(b)(1)(B) which provides a labor organization must not "restrain or coerce an employer in the selection of his representatives for the purpose of collective bargaining or the adjustment of grievances."

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60. Allied Food Workers, 178 NLRB No 41 (1969); Port Drum, 170 NLRB No. 51 (1968).
61. Local 485, IUE, 170 NLRB No. 121 (1968).
62. Local 12, Rubber Workers, 150 NLRB 312 (1964).
63. Selwyn Shoe, 172 NLRB No. 81 (1968).
64. Port Drum, 180 NLRB No. 90 (1970); Local 485, IUE, 183 NLRB No. 131 (1970), enforcement denied on this point, — F.2d —, 79 LRRM 2278 (2d Cir. 1972).
In *Associated General Contractors v. NLRB*, the Employer Association had an established bargaining relationship with the union. The agreement, which expired on March 31, 1970, contained a provision requiring the submission of jurisdictional disputes between unions contesting the same work of an employer to a National Joint Board for the Settlement of Jurisdictional Disputes. The Joint Board, which resolved such disputes, was comprised of an equal number of employer and union designees under the chairmanship of an impartial member. The Employer Association and the union were represented on the Joint Board through their parent organizations. The Joint Board was dissolved in September of 1969 and was replaced by an Interim Joint Board with no Employer Association members or designees or representatives. Therefore, the Employer Association asserted it would not agree to any contractual provision providing for the resolution of jurisdictional disputes by the Interim Joint Board while the union insisted on the inclusion of such a provision. The Association proposed alternatives for resolving jurisdictional disputes, all of which were rejected by the Union as the parties reached an impasse. When the contract expired, the Union struck over this issue. While the Association offered further counter-proposals, the Union offered no meaningful counter-proposals. The Board found no Section 8(b)(1)(B) violation but found the Union's fixed and inflexible bargaining position on this mandatory subject of bargaining established sufficient bad faith in violation of Section 8(b)(3). The Seventh Circuit concluded that the Union's bargaining to impasse and striking to compel agreement on this issue constituted a violation of Section 8(b)(1)(B). The court concluded that the 8(b)(1)(B) statutory phrase of "adjustment of grievances" was sufficiently broad to encompass the adjustment of jurisdictional disputes which involve actual disputes or grievances in which employers who make contested assignments of work have a vital interest. By insisting on the Association's acceptance of the Interim Joint Board to resolve these disputes, the Union was insisting on the adjudication of vital Employer interests by a tribunal with no employer selected representatives and advocates. By bargaining to impasse and striking to compel the Association's acceptance of such a provision, the Union used the classic form of restraint and coercion. The court's conclusion, supported by precedent, is practical and sound. In *NLRB v. Plasterer's Union*, the Supreme

65. 465 F.2d 325, 80 LRRM 3157 (7th Cir. 1972).
Court recognized the vital interests of Employers, the performance of whose work is at issue, in the resolution of jurisdictional disputes; thus, there must be a broad construction of the statutory phrase of "adjustment of grievances" to encompass these disputes. In practice, employer designees on these adjustment boards operate as representatives and advocates of the employers interests; their uncoerced selection and presence on such boards is, therefore, critical. In Operative Plasterer's Local No. 2, Cascade Employers Association, and Local 964, Carpenters, the Board has held that strikes or picketing or related threats constitute restraint and coercion in 8(b)(1)(B) cases. As to the 8(b)(3) violation, the court properly enforced the Board order. The court concluded that the union's coercion of the Association to accept an illegal contract term as a condition of a final agreement was ipso facto a refusal to bargain in good faith. Further, even accepting the Board's rationale that this was a mandatory subject of bargaining which must be bargained in good faith to impasse, the court stated the union's flexible unwillingness to compromise and make meaningful counter-proposals constituted a close-minded refusal to bargain in good faith.

In the other Section 8(b)(1)(B) case, NLRB v. IBEW, Local 2150, the Seventh Circuit enforced a Board order finding the union violated Section 8(b)(1)(B) by disciplining company supervisors for crossing a picket line and for performing bargaining unit work during an economic strike. The disciplined supervisors were not part of the bargaining unit and were not represented by the union in bargaining with the company. They were members of the union but held "very qualified union membership." All the supervisors had the authority to adjust grievances and were, therefore, representatives of the employer under Section 8(b)(1)(B). During the strike, the supervisors crossed the union's picket line and performed bargaining unit for which they were thereafter fined and suspended by the union. The record contained no suggestion that the company gave the supervisors an option not to cross the picket line. Relying on the general principles enunciated in Lithographers Locals 15-P and 272 (The Toledo

67. 149 NLRB 1264 (1964).
68. 141 NLRB 469 (1963).
70. Under NLRB v. Wooster Div. of the Borg Warner Corp., 356 U.S. 342 (1958), wages, hours and terms or conditions of employment are mandatory subjects of bargaining. There is a duty to bargain in good faith over these matters to a point of impasse unlike permissive subjects of bargaining which a party can refuse to discuss.
71. — F.2d —, 83 LRRM 2827 (7th Cir. 1973).
the court stated the union's disciplinary action against the company's supervisors, who were management's representatives in the collective bargaining process, endangered the complete and undivided loyalty to which the company is entitled under Section 8(b)(1)(B). The court limited its rationale to union discipline when the underlying dispute was between an employer and a union rather than between the union and a supervisor. However, its rationale went beyond the instant strike context and was premised upon the residual effects that such union discipline would have on the ability of these supervisors to loyally adjust future grievances in the interests of an employer who gave them this authority. Section 8(b)(1)(B) sought to prevent, the court said, a supervisor being placed in a position where he must decide either to support his Employer and thereby risk union discipline or to support the union and thereby jeopardize his position with the employer. To permit such union discipline, the court held, would be the "functional equivalent" of the restraint and coercion of the employer's selected collective bargaining representatives that Section 8(b)(1)(B) prohibits.73

With this Seventh Circuit opinion, there now appears to be a dichotomy in the circuits. Recently, the District of Columbia Circuit, sitting en banc, decided IBEW, Local 134 v. NLRB (Illinois Bell Telephone Company) and IBEW, Locals 641, 622, 759, 820 and 1263 v. NLRB (Florida Power and Light Company).74 The facts in Florida Power and Light Company closely parallel the facts in the Seventh Circuit case. In Illinois Bell, however, the disciplined supervisors were, as required by the contract, full union members and included in the bargaining union. They were also given the option to respect or cross the union's picket line by the company. The District of Columbia found no violation of Section 8(b)(1)(B) in either case because the negative impact of the union's discipline on the supervisors' prospective loyalty is purely speculative, supervisors performing bargaining unit struck work are no longer management representatives entitled to immunity and NLRB v. Allis-Chalmers Mfg. Co.75 holds there is

72. 175 NLRB 1072, 71 LRRM 1467, enforced, 437 F.2d 55, 76 LRRM 2422 (6th Cir. 1971).
73. The court distinguished NLRB v. Allis-Chalmers Mfg. Co., 388 U.S. 175 (1967), where the Supreme Court upheld the validity of union fines of strikebreaking employees and found no Section 8(b)(1)(A) violation. Unlike employees under Section 8(b)(1)(A), Section 8(b)(1)(B) has given explicit protection to supervisors who act as the employer's selected collective bargaining representatives.
74. — F.2d —, 83 LRRM 2582 (1973).
75. 388 U.S. 175 (1967).
no statutory or policy prohibition against union fines of rank and file or supervisory union members who perform struck work. The Seventh Circuit did note that the Board's finding of an 8(b)(1)(B) violation would be vulnerable if, as in Illinois Bell, the supervisors were given an express option to respect or cross the union's picket line. Such an option might "arguably" make it difficult for the company to then legitimately complain about the union's compromising the loyalty of these representatives.76 However, the Seventh Circuit acknowledged the close parallel of its case and the Florida Power case, but disagreed with the District of Columbia Circuit's majority opinion and expressed accord with Judge MacKinnon's dissent.77

In conclusion, the recently completed term of the Seventh Circuit did not produce extraordinarily significant decisions in the labor relations area. However, it is likely that this court, which has previously taken an activist role in such cases, will do so once again in the very near future.

76. See NLRB v. IBEW, Local 2150, — F.2d —, — n.—, 83 LRRM 2827, 2823 n.3 (7th Cir. 1973).
77. Id. at — n.—, 83 LRRM at 2830 n.3.