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LABOR LAW: UNDOCUMENTED ALIEN EMPLOYEES, BARGAINING ORDERS, EXHAUSTION, AND OTHER SEVENTH CIRCUIT CASES

CHRISTINE GOdsl COOPER*

The most significant recent development in the Seventh Circuit in the area of labor relations is the holding that undocumented alien workers, as employees under the National Labor Relations Act, are entitled to the protections and benefits of that statute. The bulk of the remaining cases decided by the Seventh Circuit in the past year were resolved on the basis of established precedent. This circuit has continued the nationwide trend of denying the National Labor Relations

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1. The undocumented alien worker is one who is present in the United States without valid documentation as required by section 212(a)(14) of the Immigration and Nationality Act of 1952: Except as otherwise provided in this act, the following classes of aliens shall be ineligible to receive visas and shall be excluded from admission into the United States:


The undocumented alien worker is variously referred to also as "undocumented worker" or "illegal alien." It has been suggested that the choice of expression indicates, respectively, whether the user is sympathetic or hostile to these aliens. There are those who consider the term "illegal alien" to be perjorative. I do not. But see, Salinas & Torres, The Undocumented Mexican Alien: A Legal, Social, and Economic Analysis, 13 Hous. L. Rev. 863 (1976), where it is noted that "the United States and Mexico joined in a United Nations resolution which directed the Secretary General to employ the term nondocumented migratory workers to define those workers who illegally or surreptitiously enter another country to obtain work." Id. at 863 n.1, quoting telegram from the Secretary of State of the United States Ambassador to the United Nations, Nov. 1975 (on file with Houston Law Review).

When the term "illegal alien" is used in this article, it is merely for variety of speech; it is in no way to be interpreted as exhibiting disrespect to any foreigner. This term was used by the Seventh Circuit, presumably for the same reasons. See NLRB v. Sure-Tan, Inc., 583 F.2d 355, 358 (7th Cir. 1978). The term was also used by the United States Supreme Court in DeCanas v. Bica, 424 U.S. 351, 356 (1976).


4. See text accompanying notes 132-253 infra.
Board's *Gissel* bargaining orders\(^5\) and also has chastised the Board for inadequate or improper decisions.\(^6\) The doctrines of exhaustion of internal union remedies and exhaustion of grievance procedures\(^7\) were recurring issues in the Seventh Circuit in the past year, as was the duty of fair representation.\(^8\)

This article will analyze the landmark decision of *NLRB v. Sure-Tan, Inc.*\(^9\), where the Seventh Circuit held that undocumented alien workers are entitled to protection under the National Labor Relations Act. In addition, the article will discuss the Seventh Circuit decisions concerning *Gissel* bargaining orders and the exhaustion of internal union remedies and grievance procedures. Finally, this article will note briefly the remaining labor law cases decided by the Seventh Circuit from June 1, 1978 to May 31, 1979.\(^10\)

\(^5\) See text accompanying notes 132-54, *infra*.
\(^6\) See text accompanying notes 167-77, *infra*.
\(^7\) See text accompanying notes 178-99, *infra*.
\(^8\) See text accompanying notes 200-10, *infra*.
\(^9\) 583 F.2d 355 (7th Cir. 1978).
\(^10\) This article focuses on cases decided under the National Labor Relations Act, 29 U.S.C. §§ 151-169 (1976); the Labor-Management Relations Act of 1947, 29 U.S.C. §§ 141-197 (1976); and the Labor-Management Reporting and Disclosure Act of 1959, 29 U.S.C. §§ 401-531 (1976) (collectively referred to as the Labor Act). However, during the preceding year there were important decisions concerning the employment relationship. These are beyond the scope of this article, but deserve a footnote mention: Bucyrus-Erie Co. v. Dept. of Industry, 599 F.2d 205 (7th Cir. 1979) (ERISA does not pre-empt application of state fair employment laws to employee benefit plans); Tri-State Terminals, Inc. v. Jesse, 596 F.2d 752 (7th Cir. 1979) (disability benefits under Longshoremen's and Harbor Workers' Compensation Act); Clemens v. Mitsui O.S.K. Lines, Ltd., 596 F.2d 746 (7th Cir. 1979) (employer liability under Longshoremen's and Harbor Workers' Compensation Act); Coutu v. Universities Research Ass'n., Inc., 595 F.2d 396 (7th Cir. 1979) (Davis-Bacon Act does not require employee suing for back wages to exhaust administrative remedies); Nachman Corp. v. Pension Ben. Guar. Corp., 592 F.2d 947 (7th Cir. 1979), *cert. granted*, 99 S. Ct. 2881 (1979) (ERISA provision which subjects employers to liability for payment of unconditionally vested benefits does not contravene the due process clause); Marshall v. Chromalloy Am. Corp., 589 F.2d 1335 (7th Cir. 1979), *cert. denied*, 100 S. Ct. 174 (1979) (anonymous employee complaint was held sufficient to support OSHA warrant); Pelton Casteel, Inc. v. Marshall, 588 F.2d 1182 (7th Cir. 1978) (OSHA warrant was upheld even though it misstated a fact); Blocksom & Co. v. Marshall, 582 F.2d 1122 (7th Cir. 1978) (OSHA is not an impermissible delegation of legislative authority); Reiferzer v. Shannon, 581 F.2d 1266 (7th Cir. 1978) (ERISA extends federal jurisdiction to claims that pension trustees have improperly denied pension benefits in violation of the terms of the pension plan); Barrett v. Grand Trunk W.R.R. Co., 581 F.2d 132 (7th Cir. 1978) *cert. denied*, 404 U.S. 946 (1979) (Military Selective Service Act requires that a returning veteran be given the same employment opportunities he would have enjoyed had he not entered the service).
LABOR LAW

SURE-TAN: UNDOCUMENTED ALIEN WORKERS ARE ENTITLED TO THE PROTECTIONS OF THE NATIONAL LABOR RELATIONS ACT

Background Considerations

When the National Labor Relations Board\textsuperscript{11} was created in 1935 to administer the National Labor Relations Act,\textsuperscript{12} it was assigned the task of supervising representation elections\textsuperscript{13} and adjudicating unfair labor practice cases.\textsuperscript{14} Since its inception, the role of the Board has been to insure the rights of the workers in America\textsuperscript{15} to organize, bargain collectively, and engage in peaceful concerted activity toward those ends or to refrain from those activities.\textsuperscript{16} In exercising its powers, the Board's ultimate purpose is to foster collective bargaining.\textsuperscript{17} Thus, the Board's bias—if it be that—in favor of unionization is statutorily mandated.\textsuperscript{18} However, the actual implementation of this bias may not be in conformity with national labor policy or with important national objectives. The Board, through its responsibility in representation cases and unfair labor practice cases,\textsuperscript{19} has enormous power either to foster or to frustrate national policy on labor relations or other pertinent national objectives.\textsuperscript{20} It remains for the courts\textsuperscript{21} to harmonize the

\begin{itemize}
\item \textsuperscript{11} Hereinafter sometimes referred to as “the Board” or as “the NLRB.”
\item \textsuperscript{12} National Labor Relations Act § 3, 29 U.S.C. § 153 (1976).
\item \textsuperscript{13} Id. § 159(c)(1).
\item \textsuperscript{14} Id. § 160(a).
\item \textsuperscript{15} The S\textit{ure-Tan} case, NLRB v. Sure-Tan, Inc., 583 F.2d 355 (7th Cir. 1978), makes it inappropriate to speak of the rights of American workers as eligible voters under the National Labor Relations Act. See text accompanying note 39 \textit{infra}.
\item \textsuperscript{16} The rights of employees under the Act are stated in section 7 of the National Labor Relations Act:
\begin{quote}
Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection, and shall also have the right to refrain from any or all of such activities except to the extent that such right may be affected by an agreement requiring membership in a labor organization as a condition of employment as authorized in section 8(a)(3).
\end{quote}
\item \textsuperscript{17} The Board's mandate to ensure the section 7 rights can be found at National Labor Relations Act §§ 1, 3, 8-11, 29 U.S.C. §§ 151, 153, 158-161 (1976). Section 1 states the legislative policy:
\begin{quote}
It is declared to be the policy of the United States to eliminate the causes of certain substantial obstructions to the free flow of commerce and to mitigate and eliminate these obstructions when they have occurred by encouraging the practice and procedure of collective bargaining and by protecting the exercise by workers of full freedom of association, self-organization and designation of representatives of their own choosing, for the purpose of negotiating the terms and conditions of their employment or other mutual aid or protection.
\end{quote}
\item \textsuperscript{18} Id.
\item \textsuperscript{19} See text accompanying notes 74-90 \textit{infra}.
\item \textsuperscript{20} The decision by the General Counsel of whether to investigate a charge or issue a complaint in an unfair labor practice case is not subject to judicial review. National Labor Relations
aggressive stance of the National Labor Relations Board with the legislative intent of the National Labor Relations Act or with other federal laws.

The threshold inquiry for Board intervention in any labor dispute is, of course, jurisdiction. Very recent times have seen expansion of Board jurisdiction: the Board now asserts authority over condominiums and cooperative associations, day care centers, private companies rendering services to public employers, law firms, and university faculties.

The statutory range of Board jurisdiction extends to the breadth of the commerce clause of the United States Constitution. Act § 3(d), 29 U.S.C. § 153(d) (1976). This decision affects the development of the law under the Act. See, e.g., Report on Case Handling Developments at NLRB, 1977 Labor Relations Yearbook 250 (1978). While an unsuccessful company can challenge a representation election by a refusal to bargain, an unsuccessful union has no such recourse. See note 46 infra. Thus, some decisions of the Board in representation cases can be reviewed by the courts.


The Board will assert jurisdiction over housing cooperatives and condominiums having gross annual revenues of at least $500,000. Salt & Pepper Nursery School, 222 N.L.R.B. 1295, 91 L.R.R.M. 1338 (1976). However, the gross annual revenues must total at least $250,000.


Cornell University, 183 N.L.R.B. 329, 74 L.R.R.M. 1269 (1970). Gross annual revenues must exceed $1,000,000.

See note 25 supra.

NLRB v. Jones & Laughlin Steel Corp., 301 U.S. 1 (1937). However, the Board need not exercise jurisdiction this broad. In the interests of manageability, the Board has promulgated rules for the discretionary exercise of its jurisdiction, pursuant to 29 U.S.C. § 164(c)(1) (1976). These standards usually involve dollar amount minima. R. Gorman, Basic Text on Labor Law 22-23 (1976) [hereinafter cited as Gorman]. See also notes 26-30 supra and note 34 infra.
when a dispute constitutionally can be the subject of Board jurisdiction, the Act\textsuperscript{33} may impose restrictions on the Board’s power.\textsuperscript{34} Although the Act grants to workers the basic section 7 rights,\textsuperscript{35} these rights are granted only to “employees” as defined therein.\textsuperscript{36} Only “employees” can vote in Board-supervised representation elections and persons not deemed “employees” are not entitled to the protections of the Act. One of these important protections is the prohibition of employer unfair labor practices that discriminate on the basis of union activities.\textsuperscript{37}

Just as the expansion of jurisdiction increases the impact of Board policy, so too does the expansion of the definition of “employee.”\textsuperscript{38} The importance of section 7 rights argues for the broadest interpretation of “employee,” for only “employees” can address the National Labor Relations Board for protection under the Act. Thus, both jurisdiction and employee status are fundamental questions in labor relations law and national policy.

\textit{NLRB v. Sure-Tan, Inc.}

A novel and controversial question was presented to the Seventh Circuit in \textit{NLRB v. Sure-Tan, Inc.}\textsuperscript{39} Are undocumented workers entitled to the protections of the Act? In \textit{Sure-Tan}, pursuant to a Board-conducted representation election, the Board certified the union\textsuperscript{40} as

\textsuperscript{33}{29 U.S.C. §§ 151-169 (1976).}
\textsuperscript{34}{GORMAN, supra note 32, at 26-27. At some point, it should be noted that the Seventh Circuit relied heavily on this labor law hornbook. \textit{See}, e.g., Indiana & Michigan Electric Co. v. NLRB, 599 F.2d 227, 229 (7th Cir. 1979); Medline Indus., Inc. v. NLRB, 593 F.2d 788, 796 n.11 (7th Cir. 1979); Battle v. Clark Equipment Co., 579 F.2d 1338, 1349 (7th Cir. 1978). The other well-known labor law source, C. Mor\textit{ris}, \textit{The Developing Labor Law} (1971) [hereinafter cited as Mor\textit{ris}], was never cited.}
\textsuperscript{35}{See note 16 supra.}
\textsuperscript{36}{Section 2(3) defines “employee” as follows: \textit{The term “employee” shall include any employee, and shall not be limited to the employees of a particular employer, unless the Act explicitly states otherwise, and shall include any individual whose work has ceased as a consequence of, or in connection with, any current labor dispute or because of any unfair labor practice, and who has not obtained any other regular and substantially equivalent employment, but shall not include any individual employed as an agricultural laborer, or in the domestic service of any family or person at his home, or any individual employed by his parent or spouse, or any individual having the status of an independent contractor, or any individual employed as a supervisor, or any individual employed by an employer subject to the Railway Labor Act, as amended from time to time, or by any other person who is not an employer as herein defined.} 29 U.S.C. § 152(3) (1976).}
\textsuperscript{37}{National Labor Relations Act § 8(a), 29 U.S.C. § 158(a) (1976); GORMAN, supra note 32, at 27.}
\textsuperscript{38}{See note 36 supra.}
\textsuperscript{39}{583 F.2d 355 (7th Cir. 1978). This landmark decision has been followed by the Ninth Circuit in NLRB v. Apollo Tire Co., 604 F.2d 1180 (9th Cir. 1979). \textit{See also} Comment, 10 \textit{Rut.-Cam. L.J.} 747 (1979).}
\textsuperscript{40}{Section 9(c) of the National Labor Relations Act, 29 U.S.C. § 159(c) (1976), sets forth the
the bargaining representative of the company's production and maintenance employees. The result of the election had been six votes for the union and one against it. The company objected to the election on two grounds: 1) six of the seven eligible voters were illegal aliens; and 2) the union representative had told these undocumented workers that the union would secure proper INS clearance so that they and their families could work and reside in the United States. The regional director overruled the objections because the witnesses denied that the union representative made any such statements about INS documentation. In order to secure judicial review of the election certification, the company refused to bargain with the union. The Board then found that the company breached its duty to bargain in good faith with the representative of the employees. The Board asked the United States Court of Appeals for the Seventh Circuit to enforce its remedial bargaining order and the company defended on the grounds that the Board's certification of the union was invalid.

In this case of first impression, the company in *Sure-Tan* argued

procedure for Board certification of an election victor. The union in *Sure-Tan* was Chicago Leather Workers Union, Local 431, Amalgamated Meat Cutters & Butcher Workmen of North America, AFL-CIO. 583 F.2d at 355 n.1.

41. The "company" was both Sure-Tan, Inc. and Surak Leather Co., which the Board found to be a "single integrated enterprise." *Id.* at 357.

42. *Id.*

43. *Id.*

44. Immigration and Naturalization Service [hereinafter referred to as INS]. This agency is responsible for inspecting the documentation of persons entering or leaving the United States, and is charged derivatively with administering all laws relating to immigration and naturalization including deportation. 8 U.S.C. §§ 1103, 1357, 1551-1557 (1976).

45. The Regional Director of the NLRB reviews objections to elections. NLRB Case Handling Manual ¶ 13,940; see GORMAN, supra note 32, at 48.

46. Had there been such a misrepresentation, the question of whether the misrepresentation constituted unlawful campaign activity destroying the "laboratory conditions" of the election would have been presented. General Shoe Corp., 77 N.L.R.B. 124, 21 L.R.R.M. 1337 (1948). See also notes 113-124 infra. If the Company or the Union had alerted the immigration authorities in order to discourage or encourage union activities, that would have been an unfair labor practice. National Labor Relations Act §§ 8(a)(1), 8(a)(3), 8(b)(1), 29 U.S.C. §§ 158(a)(1), 158(a)(3), 158(b)(1) (1976). See also Mike Yurosek & Sons, 225 N.L.R.B. 148, 92 L.R.R.M. 1624 (1975). Query whether a *Gissel* bargaining order would ever be issued in such a situation. See text accompanying notes 132-35 infra.

47. Direct judicial review of representation decisions is not available under the Act, as such decisions are not "final orders" as required in sections 10(e) and 10(f). 29 U.S.C. §§ 160(e), 160(f) (1976). AFL v. NLRB, 308 U.S. 401 (1940). A company which wishes to give a court test to an election outcome must refuse to bargain with the victorious union. The union will then charge the company with a refusal to bargain in violation of section 8(a)(5), 29 U.S.C. § 158(a)(5) (1976), to which the company will raise the defense of an invalid election. GORMAN, supra note 32, at 59-60.


50. See note 47 supra.

51. 583 F.2d at 358.
that Board certification of the union would run afoul of federal immigration laws which require that an alien who enters the United States to perform work must obtain an appropriate certificate from the United States Secretary of Labor.

In rejecting this argument, the Seventh Circuit in Sure-Tan relied on a strict reading of the Act, deference to the long-standing position of the Board, and federal immigration policy.\textsuperscript{52} The court noted that the section defining "employee" is written broadly, without expressly excluding aliens.\textsuperscript{53} Because of that far-reaching definition, the Seventh Circuit concluded that it was appropriate to defer to the body "charged with the administration of enforcement of the statute . . . unless there are compelling indications that it is wrong."\textsuperscript{54} The court did not make an extensive or incisive analysis of this deferral. However, the court in Sure-Tan did make some modest comments about the relationship between this ruling and the observance of immigration laws. Acknowledging that the undocumented workers are wrongdoers, the court noted that their inclusion in the statutory definition of "employee" would not benefit their own wrongdoing so much as it would benefit the union.\textsuperscript{55} The wrongdoers are subject to deportation—and were actually deported in this case—while the certification of the union remains. The court in Sure-Tan predicted that denying employee status to undocumented workers would actually encourage illegal immigration, since the denial would then act as an incentive to employers to hire undocumented workers in order to avoid unionization.\textsuperscript{56} The court also censured the company for its knowing employment of undocumented workers and found the company's argument that certification would conflict with immigration laws "unbecoming."\textsuperscript{57}

The bargaining order was enforced, notwithstanding the deportation of the aliens. The consistent position of the Board has been that employee turnover is normally irrelevant to the question of union majority status: absent objective evidence to the contrary, new employees are presumed to support the union in the same percentage as did the workers they replaced.\textsuperscript{58} This presumption is particularly apt during

\textsuperscript{52} Id. at 358-61.
\textsuperscript{53} Id. at 359.
\textsuperscript{54} Id., citing Old Ben Coal Corp. v. Interior Board of Mine Operations Appeals, 523 F.2d 25, 36 (7th Cir. 1975).
\textsuperscript{55} 583 F.2d at 360.
\textsuperscript{56} Id.
\textsuperscript{57} Id.
\textsuperscript{58} Id. at 361, citing Dynamic Machine Co., 221 N.L.R.B. 1140, 91 L.R.R.M. 1054 (1975), enforced, 552 F.2d 1195 (7th Cir.), cert. denied, 434 U.S. 827 (1977).
the insulated period of the certification year.\footnote{59}

In a vigorous dissent, Judge Wood disagreed with the decision reached by the majority in \textit{Sure-Tan}. Judge Wood concluded that, "[t]he six had no right to be here, no right to the jobs, and consequently no right to make determinations binding on the respondents' business long after their deserved departure."\footnote{60}

\textbf{Analysis of NLRB v. Sure-Tan, Inc.}

In \textit{Sure-Tan}, the Seventh Circuit did not adequately analyze the relevant statutory and case law in four major areas. First, the court found the aliens in \textit{Sure-Tan} to be "employees" under the National Labor Relations Act without making a distinction between undocumented and documented aliens. Next, the Seventh Circuit did not consider the impact of deportation on the purposes underlying the National Labor Relations Act. Moreover, the Seventh Circuit's opinion also did not adequately address the conflict between Board action and federal immigration laws. Finally, the court's extension of the unlawful aliens' constitutional rights to include statutory rights under the National Labor Relations Act is incorrect. A more thorough examination of these issues by the Seventh Circuit could have resulted in a new election or a limited bargaining order, either of which would have been a more appropriate result.

Undocumented Aliens as Employees: A Closer Look

A major factor in the \textit{Sure-Tan} decision was the Seventh Circuit's deference to "the longstanding and consistent interpretation by the Board . . . that aliens are employees under the Act. . . ."\footnote{61} Both the cases cited by the \textit{Sure-Tan} court\footnote{62} as well as other Board opinions,\footnote{63} show clearly that this statement is hyperbole.

The earliest Board decision concerning the status of aliens was rendered in 1944 in \textit{Logan v. Paxton}.\footnote{64} There, the Board stated that non-citizenship should not disqualify a worker from voting in a repre-

\footnotesize{\begin{itemize}
\item \footnote{59} 583 F.2d at 361, \textit{citing} Brooks v. NLRB, 348 U.S. 96, 98 (1954).
\item \footnote{60} 583 F.2d at 362.
\item \footnote{61} \textit{Id} at 359.
\item \footnote{63} \textit{See, e.g.,} American Smelting & Refining Co., 102 N.L.R.B. 1489, 31 L.R.R.M. 1463 (1953); Azusa Citrus Assoc., 65 N.L.R.B. 1136 (1946); Allen & Sandilands Packing Co., 59 N.L.R.B. 724, 15 L.R.R.M. 170 (1944); Logan & Paxton, 55 N.L.R.B. 310, 14 L.R.R.M. 20 (1944).
\item \footnote{64} 55 N.L.R.B. 310 (1944).
\end{itemize}}
sentation election. It is not possible to discern from the reported decision, however, whether the Logan aliens were lawfully admitted to the United States or not. The Board's ruling in Logan, that there should be no distinctions based on citizenship, was predicated on an earlier case in which the Board refused to use race as a factor in unit determinations. The subsequent history of Board findings of the employee status of aliens is similarly uninstructive. It was not until 1973, in Lawrence Rigging, Inc., that the Board clearly decided that aliens without working papers are employees under the Act. However, the strength of that rule was undercut in the 1974 decision of Handling Equipment Corp. Citing Lawrence Rigging, Inc., the Board in Handling Equipment decided that workers without valid working papers are nonetheless employees under the Act. The evidence in Handling Equipment was insufficient, however, to establish that the employees in question were unlawfully employed. Of even greater significance was the Board's statement that, because there was no finding of discriminatory discharge, “[w]e do not reach the question whether the 12 [undocumented] employees are entitled to the protection of the Act.”

The quite apparent implication of these cases is that aliens who can be shown to have no right to be working in the United States may not be regarded as statutory employees. Thus, although the Seventh Circuit in Sure-Tan was correct in stating that there is a long-standing Board rule that aliens are entitled to the protections of the Act, there is no such rule respecting undocumented workers that is likewise “consistent and long-standing.” Rather, the rule that undocumented workers are statutory employees was conceived in 1973: since that time, the rule has been inconsistently applied and poorly developed.

66. The only possible exception is Seidmon, Seidmon, Henkin & Seidmon, 102 N.L.R.B. 1492, 31 L.R.R.M. 1464 (1953), but the case involved Estonian citizens who were alleged to be disqualified from voting because they were “enemy aliens.” The Board allowed them to vote in the representation election.
68. However, the Board erred in citation. It claimed to rely on American Smelting & Refining Co., 102 N.L.R.B. 1489, 31 L.R.R.M. 1463 (1953), but the case should have been Seidmon, Seidmon, Henkin & Seidmon, 102 N.L.R.B. 1492, 31 L.R.R.M. 1464 (1953).
70. Id. at 65 n.5, 85 L.R.R.M. at 1604.
71. Id.
72. Id.
73. It is interesting to note that despite the vacillation from 1973 to 1974, the Board stated quite strongly in 1976 that unlawful aliens are employees under the Act. Amay's Bakery & Noodle Co., 227 N.L.R.B. 214, 94 L.R.R.M. 1165 (1976).
Deportation: Impact on the Underlying Purposes of the National Labor Relations Act

The purposes of the Act were not fully considered by the Sure-Tan court. In Sure-Tan, the court correctly noted that "employee" is broadly defined by the Act. However, for at least two reasons, the court should have examined this definition: 1) the definition is little more than a tautology, i.e., "employee" shall include any employee; and 2) the interpretation of difficult terms must be made in harmony with the underlying purposes of the Act, which support unionization and collective bargaining.

The Sure-Tan case saw a union victory brought about by the vote of undocumented workers. The company's workforce was composed almost exclusively of aliens who had no right to be in this country. Thus, Sure-Tan presents the extreme situation of a workforce majority consisting of undocumented workers electing union representation that cannot represent these same workers because of actual deportation. Nonetheless, as a result of the Seventh Circuit's enforcement of the Board's order, the union became statutorily entitled to represent, vis-à-vis an unwilling company, employees whose preference for such representation is unknown. Granted, such an outcome does support unionization, but does it effectuate the purposes of the National Labor Relations Act? And if not, what other result would?

At the outset, it should be recognized that the analysis of the undocumented worker situation is quite different from that of the lawfully admitted alien, primarily because of the former's precarious presence in this country. That precarious presence severely impacts upon the section 7 rights of both the undocumented workers and all other workers in the unit, as will be developed below.

What are the section 7 rights that can be exercised by aliens who are eventually deported because they lack valid work certificates? Such

74. See note 53 supra.

75. Of course, the Board should have examined the definition in the first instance. Ordinarily, the courts will defer to Board determinations of who are "employees," the reason being Board expertise in evaluating the constituent factors. The question will usually be one of fact. However, the interpretation of "employee" in this instance is rather one of law. See generally NLRB v. Hearst Publications, Inc., 332 U.S. 111 (1944).

76. See note 53 supra.


78. Of course, whether or not the company is willing or eager to bargain is irrelevant. The company has the duty to bargain with the representative chosen by the employees in the unit. National Labor Relations Act §§ 8(a)(5), 9(a), 29 U.S.C. §§ 158(a)(5), 159(a) (1976).

79. See text accompanying notes 17 and 18 supra.
persons can organize, as was done in and sanctioned by *Sure-Tan*. But these employees cannot bargain collectively. They will not be here to bargain. Without the ability to bargain collectively and to engage in concerted activity, the right to organize is feeble indeed. This was recognized by Congress in enacting the National Labor Relations Act.\(^80\)

The underlying purposes of the Act were not served by the Seventh Circuit in *Sure-Tan* when the court granted employee status to undocumented workers who were subject to deportation. The purpose of encouraging unionization must be seen in conjunction with the purpose of encouraging collective bargaining. Unionization without the possibility of collective bargaining by the very persons who brought in the union makes a mockery of the statute and of congressional intent. It is contrary to national objectives to promote unionization without the concomitant national objective of freedom of association and worker free choice.

Thus far, the analysis of the section 7 rights of the undocumented aliens, as in *Sure-Tan*, has been premised upon the eventual deportation of the aliens. How would this analysis differ if it were assumed, perhaps correctly, that not every company will, upon losing the representation election, see that its workers are deported?\(^81\) Given the duty to bargain asserted by *Sure-Tan*, there may be no practical incentive for the company to call the INS: it must bargain with the union anyway, whether it hires a new workforce or not. These undocumented workers might then stay in this country indefinitely. Therefore, why should they not be accorded the protections of the National Labor Relations Act? Again, it is because these rights can be but poorly exercised. The paramount motive impelling aliens to seek entry into the United States is to take advantage of the higher wages available.\(^82\) The perceived—even if not real—threat of deportation can be expected to cause the undocumented workers to keep quiet about what they would otherwise demand in the negotiation and administration of a collective bargaining agreement. Not only is the undocumented alien unable to

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81. The company here did hire a new workforce, which is rumored to be Spanish-speaking. Remarks, John Marshall Labor Law Symposium, March 31, 1979, Chicago, Illinois. See also note 45 supra. It is clear that any action by either the company or the union to interfere with employee free choice is an unfair labor practice. See note 46, supra. However, the Board is powerless to effectively remedy such injustice if the employees are subject to deportation.

bargain collectively with any real power, but he or she is similarly im-
potent to engage in concerted activity. The alien, as an employee, has
the right to strike, but this action would imperil the alien's presence in
the workforce. A vindictive employer would alert the immigration au-
thorities. The weakened workers are then a serious liability to the en-
tire bargaining unit. The strength of the lawfully present workers will
be sapped by the fears of the undocumented aliens.

The real distinction, therefore, between granting and denying em-
ployee status to the undocumented worker, in terms of the section 7
rights of these workers, is that employee status gives them the right to
organize, while the absence of such status precludes their organization.
Regardless of employee status, undocumented workers will not have
the effective right to bargain collectively and engage in protected con-
certed activity.

It would be tolerable to grant the section 7 rights to undocumented
aliens, even though the rights would be more apparent than real, were
it not for the fact that this benefit to the illegals has its price: 1) it is at
the expense of the representational choice of the workers who succeed
them (assuming eventual deportation of the aliens); or 2) it is at the
expense of the organizational strength of the lawfully present workers
in the unit (assuming merely a perceived threat of deportation).

Granted, denying employee status to undocumented workers does
have important disadvantages. The company may well try to avoid
unionization by hiring the undocumented. However, an aggressive
union can make the call to the INS. If the union persists, the company
will eventually have a lawfully-constituted workforce. If the undocu-
mented are denied employee status, they can be discharged or other-
wise discriminated against for union support. They will have no right
to organize. However, it is unlikely that this abuse will be any greater
than—and will not add to—the current exploitation of the employee's

83. Protected concerted activity for mutual aid, as envisioned by section 7 of the National
Labor Relations Act, supra note 15, includes solicitation, organization, bargaining, and protesting
employer practices, as by striking. See Gorman, supra note 32, at 296-325. A tremendous body
of law has developed delineating the line between protected and unprotected activity. Id. Unpro-
tected activity includes "a slow-down, sit-down strike, wildcat strike, damage to business or to
plant equipment, trespass, violence, refusal to accept work assignment, physical sabotage, refusal
to obey rules and other such activities." Boeing Airplane Co. v. NLRB, 238 F.3d 188, 193 (9th
Cir. 1956).

84. Again, only certain kinds of strikes are protected. See note 79, supra. The economic
strike to support bargaining demands and the strike to protest unfair labor practices are protected.
If undocumented workers could actually exercise the rights named in section 7, it would make sense for all concerned to accord them employee status. The benefits to the undocumented workers are obvious. There are also benefits to both the union and the other workers in the unit, both of whom have an interest in the working conditions of the undocumented. That interest is to prevent unjust competition from exploited workers. If the undocumented could flex their section 7 muscle, they would not present unfair competition, nor would they be exploited—nor would they be hired in the first place.

But what of the notion that jurisdiction of the NLRB is fundamental, without which a worker is powerless to assert the most basic rights in employer-employee relations? In the context of the undocumented worker, the powerlessness results from the immigration laws, not from any basic defect in the labor laws. To try to use the National Labor Relations Act to promote the working rights of the undocumented as in Sure-Tan is to disregard reality. Those rights cannot be fulfilled unless the worker is assured of a continuing right to be present in order to exercise those rights. Because of the Immigration Act, there is no such right of an illegal alien to remain in the United States. Consequently, there is then no power to exercise the rights granted by the National Labor Relations Act.

Conflict With Federal Immigration Laws

The Seventh Circuit in Sure-Tan speculated that denying employee status would actually encourage illegal immigration, since unscrupulous employers might increase alien employment opportunities in order to avoid dealing with a union. However, any union desirous of organizing a plant worked by aliens could force a restructuring of the workforce by a well-placed call to the INS.

85 See generally Salinas & Torres supra note 78.
86 See generally notes 16-17 supra.
88 See generally Salinas & Torres, supra note 78, at 876-78.
89 The Board has jurisdiction over "employees." National Labor Relations Act §§ 9, 10, 29 U.S.C §§ 159-160 (1976). See note 16 supra.
91 It has been suggested that whichever party—the union or the company—fears an election loss will call the Immigration and Naturalization Service. One labor law practitioner has stated that most of the calls are from unions. Remarks, John Marshall Labor Law Symposium, March 31, 1979, Chicago, Illinois.
ally opposed to liberalization of immigration laws, it is not unlikely that such action would be taken, both for political and practical reasons. Deportability remains a device to be exploited by whichever party finds it expedient.

The Seventh Circuit in Sure-Tan insisted that its holding was not inconsistent with federal immigration laws. But this insistence is belied by the Board's own argument in the case. The Board argued in Sure-Tan that it was not responsible for administering or enforcing the laws and regulations of other government agencies. The Seventh Circuit found this argument unnecessary since it found that there was no conflict between the labor laws and the immigration laws. Despite the court's speculation, it is difficult to imagine how giving to undocumented aliens the status of labor law employees discourages illegal immigration. And it is clear that Board certification of a union that does not actually enjoy majority status (as can easily happen after the aliens are deported) in no way comports with national labor law.

Although the court concluded otherwise, the Board in Sure-Tan was prepared to acknowledge that its position conflicted with federal immigration laws. The Board insisted, as it had in the case of Handy Andy, that it should not be charged with enforcing the laws and policies of other federal agencies. Assuming, arguendo, the premise of conflict between federal immigration and labor laws, what is the propriety of the Board's decision?

In the landmark Handy Andy decision, the Board reversed its prior Bekins rule and refused to consider in a representation proceeding a claim of union discrimination on the basis of race. In other words, the Board will now certify a union charged with invidious discrimination; it will not investigate such a charge in a representation proceeding.

93. 583 F.2d at 359-60.
94. Id.
95. Id.
97. Id.
98. The Eighth Circuit first promulgated the rule in NLRB v. Mansion House Center Mgt. Corp., 473 F.2d 471 (8th Cir. 1973). The Board adopted the rule in Bekins Moving & Storage Co., 211 N.L.R.B. 138, 86 L.R.R.M. 1323 (1974). Under these cases, the Board would make a pre-certification inquiry into whether the Union was responsible for invidious discrimination. If it was, certification would be denied.
99. Although Handy Andy involved only racial discrimination, its rationale would presumably apply to other types of invidious discrimination. See 228 N.L.R.B. at 451, 94 L.R.R.M. at 1358.
proceeding. Among the many reasons\textsuperscript{100} for this decision was that jurisdiction over claims of racial or other invidious discrimination have been vested exclusively in the Equal Employment Opportunity Commission.\textsuperscript{101} In \textit{Handy Andy}, the Board made it clear that it "neither approve[s] nor condone[s] discriminatory practices on the part of the unions..."\textsuperscript{102} It was also clear that the Board would consider such charges in their normal unfair labor practice proceedings,\textsuperscript{103} but that the Board considered the charges inappropriate in a representation case.\textsuperscript{104}

\textit{Handy Andy} is inapposite to the \textit{Sure-Tan} situation, both in policy and in law. The demise of \textit{Bekins} was foreshadowed by \textit{NLRB v. Sumter Plywood Corp.}\textsuperscript{105} in its understanding of the problems of considering racial discrimination charges in representation cases. In \textit{Sumter}, the Board stated that:

Because individual employees who believe that they have been victims of racial discrimination practiced by a union have remedies under Title VII..., or through unfair labor practice complaints..., the "drastic step" of refusing to certify a union should be taken only in response to a strong demonstration the union has in fact engaged in a pattern of racially discriminatory practices, and is likely to continue such practices.\textsuperscript{106}

In part, then, it is the "availability of alternative remedies to individual employees victimized by discrimination..."\textsuperscript{107} that made the Board reluctant to deny certification to an allegedly discriminatory union.

\textit{Handy Andy} did not see the Board eschewing altogether allegations of discrimination. The Board continues "to police the conduct of certified unions as it relates to their duty of fair representation"\textsuperscript{108} and is the proper forum for claims of invidious forms of discrimination in

\textsuperscript{100} The Board cited several other reasons for its decision: certification does not constitute state action; the issuance of certification to a victorious union is mandated by the National Labor Relations Act; prompt certification facilitates collective bargaining; the \textit{Bekins} doctrine was ineffective in implementing an antidiscrimination policy; the \textit{Bekins} doctrine can create problems of interpreting section 8(b)(7)(C) of the Act; \textit{Bekins} utilized proof of discrimination at other plants and in other bargaining units, whereas the Board's findings and remedies are to apply only to the particular parties before it; the union had actually represented the minority employees adequately; and representation cases must be resolved expeditiously. \textit{Bekins Moving & Storage Co.}, 211 N.L.R.B. 138, 86 L.R.R.M. 1323 (1974).

\textsuperscript{101} Commonly referred to as the EEOC.

\textsuperscript{102} 228 N.L.R.B. at 456, 94 L.R.R.M. at 1363.

\textsuperscript{103} \textit{Id.}

\textsuperscript{104} \textit{Id.}

\textsuperscript{105} 535 F.2d 917 (5th Cir. 1976), \textit{cert. denied}, 429 U.S. 1092 (1977). \textit{Sumter} applied the \textit{Bekins} rule.

\textsuperscript{106} 535 F.2d at 931, \textit{citing} 42 U.S.C. § 2000e-2(c) (1976) and United Rubber Workers v. NLRB, 368 F.2d 12 (5th Cir. 1966).

\textsuperscript{107} 535 F.2d at 931.

\textsuperscript{108} 228 N.L.R.B. at 448, 94 L.R.R.M. at 1356.
the context of unfair labor practice proceedings. More important, *Handy Andy* recognized that "in their respective areas of authority the Federal agencies have overlapping responsibility . . . ." 109

The purpose of *Handy Andy*, then, was to acknowledge the appropriate separation of powers of the federal agencies, but the particular federal agencies in that case were seen as having common goals. Thus, whereas both the National Labor Relations Board and the Equal Employment Opportunity Commission are concerned about eradicating invidious discrimination, the goals of the National Labor Relations Board and the Immigration and Naturalization Service, given the *Sure-Tan* outcome, are mutually inconsistent. The NLRB, by conferring benefits on the illegal aliens, frustrates the INS, which wants to return the aliens and halt illegal immigration. Because of these fundamental differences, the Board cannot use *Handy Andy* to bolster its wish to confer employee status on undocumented workers.

**Constitutional Considerations**

The Seventh Circuit in *Sure-Tan* correctly noted that aliens are entitled to certain constitutional rights. 110 As stated by the United States Supreme Court, all aliens present 111 within the jurisdiction of the United States can claim the protections of the fifth and fourteenth amendments:

> There are literally millions of aliens within the jurisdiction of the United States. The Fifth Amendment, as well as the Fourteenth Amendment, protects every one of these persons from deprivation of life, liberty, or property without due process of law . . . . Even one whose presence in this country is unlawful, involuntary, or transitory is entitled to that constitutional protection. 112

However, that constitutional protection does not accord *ipso facto* aliens unlawfully within the United States the right to be considered employees under the National Labor Relations Act. 113 According to the United States Supreme Court, the category of "aliens" "is itself a heterogeneous multitude of persons with a wide-ranging variety of ties

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109. *Id.* at 451, 94 L.R.R.M. at 1358. *See also* NAACP v. Federal Power Comm'n, 425 U.S. 662, 665 (1976) (while the FPC has no power to promulgate rules prohibiting its regulators from practicing employment discrimination, it may consider the economic consequences of such discrimination in performing its regulatory functions).


111. Obviously, aliens in other countries are beyond the territorial jurisdiction of the National Labor Relations Act, as well as any other American law.


to this country." Congress cannot only establish categories of alienage, but may extend different privileges to them. The Congress or a state may, for example, accord disparate benefits to different classes of resident aliens and deny them altogether to unlawful aliens:

Neither the overnight visitor, the unfriendly agent of a hostile foreign power, the resident diplomat, nor the illegal entrant, can advance even a colorable constitutional claim to a share in the bounty that a conscientious sovereign makes available to its own citizens and some of its guests.

Since the illegal entrant cannot make claims, short of the denial of due process, against the state or Congress, it is difficult to argue that the illegal entrant can claim the protections of the National Labor Relations Act. Employee benefits under the Act are purely statutory; there is no constitutional impediment to depriving illegal aliens of NLRA employee status.

Remedial Possibility: A New Election

If the court in Sure-Tan had held that undocumented workers are not employees under the National Labor Relations Act, the year of certification would have presented no bar to holding a new election, and the Board’s rule that normal employee turnover does not affect the presumption of continued majority status would have been likewise inappropriate. A new election then would have been ordered and the outcome would clearly reflect the employees’ free choice.

However, even with the court’s finding that the undocumented are statutory employees, it would have been possible—and desirable—for the court to find that a new election should be held. This could have been done in one of two ways, both of which would require the Board (or the court) to break new ground.

The Board in Sure-Tan could have found that the election was invalid. Finding the original election to be invalid obviates the need to circumvent the irrebuttable presumption of majority status, as well as the one-election-per-year rule, since the invocation of either presupposes a valid prior election.

The recent General Knit, Inc. decision of the Board might have provided a tool for finding the Sure-Tan election invalid. General Knit

115. Id. at 78-80.
116. Id. at 80 (with the exception of “some,” emphasis supplied).
117. See generally GORMAN, supra note 32, at 52-59.
resurrected the *Hollywood Ceramics Co.* standards for campaign propaganda, according to which an election will be set aside by the Board if there existed substantial campaign misrepresentations likely to have had a significant impact on the outcome of the election.\(^{119}\)

The Board in *General Knit* believed that the *Hollywood Ceramics* standards were necessary to ensure fair elections.\(^{120}\) Since the Board has found it imperative to take a more active role in assessing campaign propaganda and its impact on an election, it could go one step further and fashion a rule that voting by undocumented workers requires heightened scrutiny of the campaign. By this rule, the Board could administratively notice that an alien electorate is likely to taint the election. This tainting results from both the threats of deportation, by whomever made, and whether express or not,\(^{122}\) as well as from the fact that counting such votes will not ensure a free and fair election to more permanent employees whose working conditions otherwise could be bound by the choice of deported or threatened aliens.\(^{123}\)

Perhaps the better way to have ordered a new election in *Sure-Tan*, given the holding that the illegal aliens are employees, would have been for the Board to carve an exception to its presumptions of continued majority status. The Board should be able to order a new election where the original election is immediately followed by a turnover of the majority of the voting workforce, particularly where the turnover is occasioned by the deportation of the voters. This kind of turnover should constitute "unusual circumstances"\(^{124}\) making the year of certification irrebuttable presumption nugatory. Moreover, this pe-

\(^{119}\) 140 N.L.R.B. 221, 51 L.R.R.M. 1600 (1962). More specifically, the Board in *Hollywood Ceramics* stated that:

> [A]n election should be set aside only where there has been a misrepresentation or other similar campaign trickery, which involves a substantial departure from the truth, at a time which prevents the other party or parties from making an effective reply, so that the misrepresentation, whether deliberate or not, may reasonably be expected to have a significant impact on the election.

*Id.* at 224.


\(^{121}\) *Id.* at 1688.


\(^{123}\) *See note 87 supra.*

\(^{124}\) *Brooks v. NLRB*, 348 U.S. 96, 98-102 (1954). The unusual circumstances noted by the Court were (1) defunctness or dissolution of the union; (2) substantial schism within the union; and (3) rapid fluctuation in the size of the bargaining unit within a short time. I am suggesting
culiar employees' departure should easily rebut the presumption that normal turnover is irrelevant to the union's majority status: there is nothing normal about this employee turnover. 125

Since the only routes to holding a new election while at the same time according employee status to the aliens involve significant departures from established rules, the departures may well open a Pandora's box. 126 In Sure-Tan, it would have been more direct and efficacious to simply hold that undocumented alien workers are not employees under the National Labor Relations Act.

Remedial Possibility: A Limited Bargaining Order

An alternative solution to the anomaly of granting section 7 rights to the deported aliens in Sure-Tan would have been for the Board (or court) 127 to tailor its bargaining order to the facts of the case. The Board has broad discretion in fashioning bargaining orders, 128 subject to limited judicial review. 129

125. One of the reasons that the Sure-Tan court would not rebut the presumption of the union's continued majority status was the Board's rule that normal employee turnover does not affect majority status: absent unusual circumstances, the new employees are presumed to support the union in the same ratio as those employees they have replaced. This presumption promotes industrial stability. After all, if the presumption is false, it is incumbent upon the employees to file a decertification petition or present objective evidence to the company of the union's new status. However, this presumption loses its sensibility when unusual circumstances are present, as where the employee turnover follows on the heels of the deportation of the employees who voted in the union.

In a somewhat analogous case in the Eighth Circuit, the court spurned the Board's self-created presumption, which, according to that court, was no where mandated by statute. The presumption that employees support the union in the same proportion as the employees they have replaced belongs only to the "normal turnover" situations. National Car Rental System v. NLRB, 594 F.2d 1203 (8th Cir. 1979) (turnover occasioned by the hiring of all new permanent replacements for all striking employees). However, such a presumption can be "so far from reality," as to produce "ridiculous" results. Id. at 1206. That is exactly what happened in Sure-Tan. The limits of this presumption should be recognized in the Seventh Circuit.

126. It would certainly invite litigation of "unusual circumstances" and could well deter the prompt performance of bargaining obligations.

127. This would have been done pursuant to judicial review in unfair labor practice cases. See note 47 supra.

128. Phelps Dodge Corp. v. NLRB, 313 U.S. 177, 193 (1941).

129. Id. at 197. The Board could have, as part of its remedial authority, ordered a new election. This may not be a useful or economic remedy if the company has hired a new workforce again consisting of undocumented workers. However, the possibility that the new aliens will not be deported offers some justification for such a remedy. Perhaps the Board could condition voter eligibility on lawful presence in the United States, but this seems a circuitous method of saying that the illegals are not employees. It would be an obvious conflict with federal immigration policy for the Board to order the rehire of those deported, or to find it an unfair labor practice to alert the INS of the aliens' presence. Likewise would be any Board action forbidding a party to call the INS as part of the bargaining order. One administrative law judge issued a bargaining order and a requirement that the illegal aliens be preferentially reinstated if and when their pres-
In *Sure-Tan*, a recalcitrant company and an unknown workforce were required to bargain. It would be possible to interpret "employee" to include the undocumented, as was done in *Sure-Tan*, but to deny a bargaining order if the undocumented (which had been a majority of the election-time workforce) have ceased working at the establishment within a determined time frame. The one-election-per-year rule could then simply be waited out, with a new election to come upon the proper indications of the employees. If, however, the undocumented remain in the workforce, a bargaining order would be appropriate. Again, the solution is far inferior to a simple recognition that undocumented workers are not statutory employees.

**Conclusion**

Whether as a reinterpretation of "employee" or a creative remedial order, in dealing with the rights of undocumented workers under the National Labor Relations Acts, attention must be paid to the underlying purpose of the Act. This purpose is to accord workers the basic section 7 rights, including full freedom of association and choice of a bargaining representative. Legislative history and the Act itself make it clear that the Act is "a bill of rights both for *American* workingmen and for their employers." It is by no means a bill of rights for unions not selected by the majority of employees in the bargaining unit. The statutory bias in favor of collective bargaining and unionization is the servant of the policy of worker free choice. Thus, when the rights of the union conflict with the basic rights of the workers, the former must give way. Where granting employee status to undocumented workers results in augmentation of union power at the obvious expense of the individuals' free choice of a bargaining representative, then something has gone wrong in implementing national policy.
DENIAL OF GISSEL BARGAINING ORDERS AND OTHER BOARD SET-BACKS

Gissel Bargaining Order Cases

A union may attain representative status either by informal recognition,132 by winning a representation election,133 or by securing bargaining rights through unfair labor practice proceedings.134 The latter involves the issuance of what is known as a Gissel bargaining order: Where the employer has been guilty of unfair labor practices during an election campaign, and the effect of those practices has been to dissipate the union’s prior majority status and to make a fair election impossible, the Board will require the company to bargain with the union as a remedy for the company’s unfair labor practices.135

The Board is somewhat aggressive in issuing Gissel bargaining orders.136 It is, however, often unsuccessful in getting judicial enforcement of these orders.137 Such enforcement was denied by the Seventh Circuit this past year in First Lakewood Associates v. NLRB.138

In First Lakewood Associates, the company’s alleged section 8(a)(1) violations139 were coercive interrogations of employees, surveillance of union activities and the promise of benefits to those employees who would vote against the union.140 The election was held and the union lost.141 The Board then issued a Gissel bargaining order pursu-

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132. National Labor Relations Act § 9(a), 29 U.S.C. § 159(a) (1976) gives exclusive bargaining power to “[r]epresentatives designated or selected for the purposes of collective bargaining by the majority of the employees in a unit appropriate for such purposes . . . .” Id. The Act does not require formal election of the bargaining representative. See GORMAN, supra note 32, at 40; MORRIS, supra note 34, at 246, citing H.R. CONF. REP. NO. 510, 80th Cong., 1st Sess. 41, June 3, 1947, 1 NLRB Legis. Hist. 545.

133. GORMAN supra note 32.


135. Id. Where the employer’s unfair labor practices have been so egregious and pervasive, a bargaining order may be issued without proof of an earlier majority status only if coercive effects of unfair labor practice could not be eliminated by traditional remedies. NLRB v. Gissel Packing Co., Id. at 613-14. See generally GORMAN, supra note 32, at 93-131.


137. See Hedstrom Co. v. NLRB, 558 F.2d 1137 (3d Cir. 1977); NLRB v. Armcor Industries, Inc., 535 F.2d 239 (3d Cir. 1976); Peerless of America, Inc. v. NLRB, 484 F.2d 1108 (7th Cir. 1973).

138. 582 F.2d 416 (7th Cir. 1978).

139. Section 8(a)(1) of the National Labor Relations Act provides:

It shall be an unfair labor practice for an employer . . . to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in section 7 . . . .


140. 582 F.2d at 417-18.

141. Id. at 421.
The Seventh Circuit denied the bargaining order, ruling that the Board’s determination that the unfair labor practices would make a fair election unlikely was unsupported by specific findings. The court would not accept what it characterized as the Board’s “substitution of conclusion for explanation.”

The Seventh Circuit itself then analyzed the propriety of the Gissel bargaining order in First Lakewood Associates; a not uncommon, but questionable, judicial exercise. The court concluded that the impact of the threats by the company had been diminished prior to the election. Thus, the Seventh Circuit determined that the better remedy would be a new election rather than enforcement of the bargaining order.

Likewise, the Seventh Circuit refused to enforce the Gissel bargaining order in Medline Industries, Inc. v. NLRB. In Medline, the court found that since the administrative law judge had improperly excluded two employees from the bargaining unit and included one invalid authorization card, the union did not have the majority support required for a Gissel bargaining order. Although the court usually

142. Id.
143. Id. at 424.
144. In the common Gissel situation, the Board is required to make specific findings concerning the impact of the unfair labor practices on the election process, as well as a detailed analysis of the possibility of holding a fair election. Id. at 423, citing Peerless of America, Inc. v. NLRB, 484 F.2d 1108, 1118 (7th Cir. 1973).
145. The Board did not detail the future impact of these violations, nor did it evaluate the effectiveness of less drastic, alternate remedies. 582 F.2d at 423.
146. Id., citing Peerless of America, Inc. v. NLRB, 484 F.2d 1108, 1119 (7th Cir. 1973).
147. Although the United States Supreme Court declared in NLRB v. Gissel Packing Co., 395 U.S. 575 (1969), that the Board is to determine whether a bargaining order should be issued, many courts make the determination de novo. See Gorman, supra note 32, at 96-104.
148. The Seventh Circuit noted that the threats, for the most part, ceased about six weeks prior to the election. Thus, the residual impact of such threats was diminished. Moreover, at least two employees did not hesitate to openly express their union support after these threats occurred. 582 F.2d at 424.
149. Id.
150. 593 F.2d 788 (7th Cir. 1979).
151. Id. at 796. The authorization card was secured by the union’s misrepresentation that everybody in the unit had already signed the card, which in itself is enough to invalidate a card. The union also misrepresented that the unambiguous card was to be used solely to obtain an election. Id. at 793-94. But see Cumberland Shoe Corp., 144 N.L.R.B. 1268, 54 L.R.R.M. 1233 (1963).
152. The real problem in Medline appeared to be the credibility of the administrative law judge. Ordinarily, the judge is entitled to deference. In Medline, however, the judge had discredited the testimony of the employee who had signed the card under pressure and because of the misrepresentations. The basis of the discredit, according to the judge, was the employee’s “‘embarrassed posterings and facial configurations,’ and the fact that he ‘is still in [the company’s] employ and testified under its watchful eye . . . ’” 593 F.2d at 795 n.8.
defers to Board expertise in unit determination, the Seventh Circuit in *Medline* concluded that the Board had acted arbitrarily by improperly classifying a warehouse worker (a category included in the unit) as a clerical employee (an excluded category) when she worked only peripherally as a clerical employee. The court also overruled the Board's exclusion of an employee who was on sick leave.\textsuperscript{153} Regarding the invalid authorization card, the Seventh Circuit refused to defer to the judgment of the administrative law judge, noting that the judge's actions were based on apparent hostility towards the company.\textsuperscript{154}

Considering both the *First Lakewood Associates* and *Medline* opinions, it is somewhat surprising that the Seventh Circuit approved the bargaining order in *C&W Super Markets, Inc. v. NLRB*.\textsuperscript{155} *C&W Super Markets* involved the question of whether certain persons who had solicited authorization cards were "supervisors."\textsuperscript{156} This is a crucial issue because supervisors are excluded from the definition of "employee" and thus are not entitled to the protections of the National Labor Relations Act.\textsuperscript{157} Supervisors can be discharged or otherwise discriminated against for their union activities.\textsuperscript{158} Furthermore, they are not entitled to vote in union representation elections.\textsuperscript{159} With regard to solicitation of authorization cards, such cards which are solicited by supervisors may be found to be invalid.\textsuperscript{160} Thus, where the vote is close, the status of supervisor *vel non* may well be outcome determinative.

In *C&W Super Markets*, the Board found that certain employees were not supervisors and thus those authorization cards solicited by the employees could be included in the majority. The Board also concluded that the company had engaged in coercive conduct which had

\textsuperscript{153} That an employee on sick leave is entitled to unit inclusion is well-established. *Id.* at 791. The only reason there was any question here was that the company had instituted a new policy by which employees who are ill for more than twenty-one days are terminated. However, this policy did not apply to employees hired before the policy's inception. *Id.* at 792.

\textsuperscript{154} *Id.* at 795.

\textsuperscript{155} 581 F.2d 618 (7th Cir. 1978).

\textsuperscript{156} Section 2(11) of the National Labor Relations Act defines supervisor as follows: The term "supervisor" means any individual having authority, in the interest of the employer, to hire, transfer, suspend, lay off, recall, promote, discharge, assign, reward, or discipline other employees, or responsibly to direct them, or to adjust their grievances, or effectively to recommend such action, if in connection with the foregoing the exercise of such authority is not of a merely routine or clerical nature, but requires the use of independent judgment.


\textsuperscript{157} See GORMAN, supra note 32, at 34.

\textsuperscript{158} *Id.* at 35.

\textsuperscript{159} *Id.*

\textsuperscript{160} The rationale for this rule is that employees solicited by supervisors are deprived of their freedom of choice. 581 F.2d at 620.
dissipated the union's majority and made a fair election impossible.\textsuperscript{161} The Board saw a bargaining order as the major requirement to both cure past and deter future violations of the Act.\textsuperscript{162} However, the Board in \textit{C&W Super Markets} failed to make the required "detailed analysis" of the issues in the case.\textsuperscript{163} In particular, the Board did not make specific findings concerning the adequacy of less drastic remedies.

The Seventh Circuit in \textit{C&W Super Markets v. NLRB}\textsuperscript{164} upheld the issuance of the bargaining order.\textsuperscript{165} Unlike \textit{First Lakewood Associates} and \textit{Medline}, the court deferred to the "informed discretion" of the Board.\textsuperscript{166} Thus, since the employees in question were found not to be supervisors, the effect of their solicitation of authorization cards was resolved against the company, \textit{i.e.}, cards solicited by them were considered valid and were counted in determining whether the union enjoyed majority support. The court in \textit{C&W Super Markets}, however, did not address the Board's failure to make a detailed analysis of the issues in the case, apparently because the Board's conclusion was considered reasonable by the court. In sum, while the Seventh Circuit correctly deferred to the Board's conclusion that the employees were not supervisors, the court in \textit{C&W Super Markets} upheld the validity of the bargaining order without requiring the Board to present an analysis of other, less drastic remedies, one of which might have been more appropriate than the bargaining order.

\textbf{Other Board Set-backs}

Regarding Board set-backs by the Seventh Circuit during 1978-79, two other cases must be noted. In \textit{Cerlo Manufacturing Corp. v. NLRB},\textsuperscript{167} the court set aside a rerun election which had been ordered by the Board because of a technical deviation from procedure. This deviation had been caused by the Board's failure to mail a copy of the official notice of election to the company. Despite the technical deviation, all of the eligible employees voted in the first election which the

\textsuperscript{161} \textit{Id.} at 623. The coercion included coercive interrogation, threats, discharges and other discrimination, blatant attempts to find "legitimate" reasons for discharging union adherents, and unlawful promises of benefits for opposing the union. \textit{Id.} at 623-24.

\textsuperscript{162} \textit{Id.} at 625, \textit{citing} Walgreen Co. \textit{v. NLRB}, 509 F.2d 1014, 1017 (7th Cir. 1975) as the Seventh Circuit's interpretation of \textit{NLRB v. Gissel Packing Co.}, 395 U.S. 575 (1968).

\textsuperscript{163} 581 F.2d at 625. Under \textit{Universal Camera Corp. v. NLRB}, 340 U.S. 474 (1951), the Court's review was limited to whether the Board's determination was supported by "substantial evidence on the record considered as a whole."

\textsuperscript{164} 581 F.2d 618 (7th Cir. 1978).

\textsuperscript{165} \textit{Id.} at 625-26.

\textsuperscript{166} \textit{Id.} at 622-23.

\textsuperscript{167} 585 F.2d 847 (7th Cir. 1978).
union lost. In addition, all employees signed statements\textsuperscript{168} that they had learned of their rights in the election either from the company’s unofficial notice of the election\textsuperscript{169} or elsewhere. Nonetheless, the Board ordered a rerun election which was won by the union.

The Seventh Circuit in Cerlo set aside the rerun election and upheld the original election which was lost by the union.\textsuperscript{170} In so holding, the court concluded that the union had been unable to show any bad faith on the part of the company or any harm to employee rights by the failure of the Board to send, and the company to post, the official notice.\textsuperscript{171} Thus, the Board’s rerun election and subsequent union victory were nullified by the Seventh Circuit.

In \textit{NLRB v. Mosey Manufacturing Co.,}\textsuperscript{172} the Seventh Circuit was presented with the issue of Board policing of campaign propaganda. In 1978, the Board, in the case of \textit{General Knit, Inc.},\textsuperscript{173} had reasserted its active role in the policing of such propaganda\textsuperscript{174} by reviving the standards set forth in \textit{Hollywood Ceramics Co.}\textsuperscript{175} Mosey involved a remand to the Board for consideration of the union’s alleged campaign misrepresentations in light of \textit{General Knit}. The Seventh Circuit refused to apply the \textit{Hollywood Ceramics} standards in Mosey. In so doing, the court remarked that the Board has an “on-again, off-again” policy\textsuperscript{176} of policing campaign propaganda and that the court would not enter this “foray.”\textsuperscript{177}

**EXHAUSTION OF INTERNAL UNION REMEDIES AND THE GRIEVANCE PROCEDURE: NEW EXCEPTIONS AND A FUNDAMENTAL DIFFERENCE**

\textit{Exhaustion of Internal Union Remedies}

The Seventh Circuit in 1978-79 continued to follow the well-established rule that exhaustion of internal union remedies is a prerequisite to a suit by the union member against the union, at least where the

\textsuperscript{168} The statements signed by the employees were solicited by the company, but with no evidence of abuse on the part of the company. \textit{Id.} at 848.
\textsuperscript{169} The company’s own posted notice contained substantially all of the information of the official notice, at least all the information relevant to the context of the election. \textit{Id.} at 848-49.
\textsuperscript{170} \textit{Id.} at 850.
\textsuperscript{171} \textit{Id.} at 849-50.
\textsuperscript{172} 595 F.2d 375 (7th Cir. 1979).
\textsuperscript{174} In reasserting its prior active role in the policing of campaign propaganda, the Board overruled Shopping Kart Food Market, Inc., 228 N.L.R.B. 1311, 94 L.R.R.M. 1705 (1977).
\textsuperscript{175} 140 N.L.R.B. 221, 51 L.R.R.M. 1600 (1962).
\textsuperscript{176} 595 F.2d at 375.
\textsuperscript{177} \textit{Id.} at 377-78.
A more difficult question is whether a company can raise as a defense the individual's failure to exhaust intra-union remedies. The Seventh Circuit in *Baldini v. Local Union No. 1095*\(^{179}\) appears to permit the company to raise such a defense in certain instances.

In *Baldini*, the union officials told the aggrieved employee, Baldini, that the proper steps had been taken to obtain arbitration of his discharge for theft. This was incorrect, however, and Baldini missed the time period in which to request arbitration. Baldini then sued the union for breaching its duty of fair representation and the company for wrongful discharge. The district court dismissed the suit against the union and granted summary judgment to the company.\(^{180}\)

The Seventh Circuit upheld the dismissal of the union suit because of Baldini's failure to exhaust the "fair and adequate" internal union procedures.\(^{181}\) The district court's grant of summary judgment to the company, however, presented a more complex issue since the company had raised Baldini's failure to exhaust internal union remedies as a defense.

The United States Courts of Appeals for the Eighth and Ninth Circuits have ruled that nonexhaustion of remedies is never a defense for a company defendant.\(^{182}\) The rationale for this rule is that exhaustion of the union procedure is purely a concern of the union. The Seventh Circuit itself, in *Harrison v. Chrysler Corp.*,\(^{183}\) held that the defense is unavailable to the company. In *Harrison*, the Seventh Circuit stated that:

> [A]n employer cannot, strictly speaking, raise the contractual defense available to the union, because it is not a party to the union's contract with the member . . . . It is also clear that the employer cannot assert the policy of avoiding judicial interference with internal union affairs to the extent that the policy serves only the interest of the union. Under the traditional rule, a litigant lacks standing to assert interests which are exclusively those of a third party.\(^{184}\)

The Seventh Circuit in *Baldini* found that the company does have

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\(^{178}\) Baldini v. Local 1095, UAW, 581 F.2d 145 (7th Cir. 1978); Battle v. Clark Equipment Co., 579 F.2d 1338 (7th Cir. 1978). There is an exception where the public policy issues outweigh private contract rights. NLRB v. Marine Workers, 391 U.S. 418 (1968).

\(^{179}\) 581 F.2d 145 (7th Cir. 1978).

\(^{180}\) 435 F. Supp. 264 (N.D. Ind. 1977).

\(^{181}\) 581 F.2d at 149.

\(^{182}\) Petersen v. Rath Packing Co., 461 F.2d 312 (8th Cir. 1972); Retana v. Local No. 14, Apartment, Motel, Hotel & Elevator Operators Union, 453 F.2d 1018 (9th Cir. 1972); Brady v. Trans World Airlines, Inc., 401 F.2d 87 (3d Cir. 1968), *cert. denied*, 393 U.S. 1048 (1969).

\(^{183}\) 558 F.2d 1273 (7th Cir. 1977). The *Harrison* case was limited to its facts.

\(^{184}\) *Id.* at 1278 (citations omitted).
a legitimate interest in the exhaustion of internal remedies in certain, limited cases, as where the use of the internal procedures could revive the grievance. The court in Baldini held, however, that because it was too late for Baldini to request arbitration, and thus revive the grievance, nonexhaustion of internal remedies could not be used as a defense by the company. Thus, the Seventh Circuit in Baldini parted with the Eighth and Ninth Circuits by holding that a company's nonexhaustion defense is limited to those instances in which the internal procedures could revive the grievance. According to the Seventh Circuit, the nonexhaustion defense is completely inapplicable where the union can no longer revive the grievance procedure as was the situation in Baldini.

Exhaustion of Grievance Procedures

If a collective bargaining agreement between the company and the union provides that a dispute be subject to a grievance and arbitration procedure, the company can require that that procedure be utilized. If the grievance procedure has not been utilized, the individual cannot directly sue the company for breach of contract concerning the dispute. Where, however, the union fails to fairly represent the aggrieved employee, the employee is then allowed to sue the company directly, without completing the grievance and arbitration process.

The Seventh Circuit fashioned a second exception to the rule against a direct suit against the company in Battle v. Clark Equipment Co. In Battle, the employees sued both the union and the company; the former for breach of the duty to fairly represent and the latter for breach of contract. The basis of the claim was the mutual modification by the company and the union of unemployment benefits to be distrib-

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185. The Seventh Circuit added that such an interest had been noted in the Harrison decision as well. 581 F.2d at 150.
186. The Seventh Circuit stated that where the use of the internal procedures could revive the grievance, "an employer's right to expect primary use of such procedures is quite directly implicated, and it may insist that union remedies be attempted for this purpose." Id.
187. Id.
188. See note 177 supra and accompanying text.
190. See id.
uted pursuant to a plant closing. The district court granted summary judgment to the union. The Seventh Circuit in *Battle* affirmed the summary judgment to the union because the employees had failed to exhaust the adequate and available intra-union remedies.

On the issue of summary judgment for the company, however, the Seventh Circuit excused the employees' failure to use the grievance procedure under the collective bargaining agreement. The court determined that if the employees had used the grievance procedure it would have necessarily involved proof of wrongdoing on the part of the union. The Seventh Circuit concluded that:

This leads to the anomalous result that, because of the union's indispensable role in shepherding a grievance through the various levels of the grievance machinery a successful prosecution of the appellants' grievances would depend on the union aggressively proving its own misconduct. . . . We do not believe that the law of the exhaustion of contract remedies requires the appellants to place themselves in such a position.

That the claim against the union was dismissed because of failure to exhaust internal union remedies while the employees were excused from pursuing the contractual grievance procedure was noted by the court as "a possible inconsistency," since the union's proof of its own wrongdoing would be necessary in either situation. The Seventh Circuit in *Battle*, however, justified this inconsistency by distinguishing between internal union remedies and grievance procedures:

There are important differences between the two situations. The intra-union remedies are set up on the assumption that there is a disagreement between the local union leadership and the employee. The contract grievance procedures assume an absence of such a conflict. The intra-union exhaustion requirement is based in part on the policy of permitting the union to attempt to resolve internal problems in house before they are brought to the public courtroom. In contrast, pursuit of a grievance through the grievance machinery would require the union to publicly declare its own wrongdoing.

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193. 579 F.2d at 1341-42.
194. *Id.* at 1342.
195. *Id.* at 1344.
196. *Id.* at 1345. The Seventh Circuit's reasoning was an interpretation of the United States Supreme Court's suggestion in Vaca v. Sipes, 386 U.S. 171 (1967), that there may be circumstances under which "the individual employee may obtain judicial review of his breach-of-contract claim despite his failure to secure relief through the contractual remedial procedures." 579 F.2d at 1346, *citing* Vaca v. Sipes, 386 U.S. 171, 184-85 (1967).
197. 579 F.2d at 1345.
198. *Id.* at 1346 n.10.
199. *Id.* The Seventh Circuit added:

Lastly, since the union plays the role of sole advocate of the grievant's cause under the contract remedies, any functional conflict of interest would mean that the grievant's case
The new ground broken by the *Battle* result, along with the availability of a company's nonexhaustion defense in *Baldini*, illustrate that the Seventh Circuit intends to set its own precedents in these areas. It will be interesting to watch for future developments by the court in the doctrines of exhaustion of union remedies and the exhaustion of grievance procedures.

**OTHER SEVENTH CIRCUIT LABOR LAW CASES IN BRIEF**

The Seventh Circuit reached decisions in several other areas of labor law during 1978-79 which merit comment. Briefly, these cases involved the duty of fair representation, settlement agreements, "contracting out," accretions to the workforce, and discrimination for union activities.200

**Duty of Fair Representation**

Allegations that a union breached its duty of fair representation by attaching impossible conditions to a reinstatement agreement settling a might not be made with adequate forcefulness. In the intra-union remedies, the employee can present his own case. *Id.*

200. Additional labor law decisions by the Seventh Circuit in 1978-79 include: NLRB v. Indiana & Michigan Elec. Co., 599 F.2d 185 (7th Cir. 1979) (a company must bargain with the negotiators selected by the employees, even though the company fears that the selection of the negotiators is a strategy to force coordinated bargaining, which, of course, a union may not force in derogation of established bargaining units); Woodlawn Hospital v. NLRB, 596 F.2d 1330 (7th Cir. 1979) ( strikers in health care institutions who were properly discharged before the effective date of the Health Care Amendments to the National Labor Relations Act, 29 U.S.C. §§ 158(d) and (g) (1976), for unprotected activities were not statutory employees; therefore, the employer's nondiscriminatory refusal to reinstate such strikers after the effective date of the amendments did not violate the Act); Larkins v. NLRB, 596 F.2d 240 (7th Cir. 1979) (right of the union to enforce valid union security agreements upheld where the union demanded and received the discharge of an employee who failed to make a timely tender of union dues and fees); Milwaukee Newspaper & Graphic Communications Union Local 23 v. Newspapers, Inc., 586 F.2d 19 (7th Cir. 1979) (where a contract contains an interest arbitration clause, inclusion of such a clause in subsequent contracts is not arbitrable); NLRB v. Knuth Bros., Inc., 584 F.2d 813 (7th Cir. 1978) (court enforced Board's order that the company pay pro-rata vacation benefits to replaced strikers, up to the time of the strike); Barbour v. Central Cartage, Inc., 583 F.2d 335 (7th Cir. 1978) (while the standards governing a district court's grant of injunctive relief under section 10(j) is a source of controversy among the circuits, the question here is moot since the section 10(j) injunction lapses upon the Board's ruling on the underlying charge); S.J. Groves & Sons Co. v. Local 627, Int'l Bhd. of Teamsters, 581 F.2d 1241 (7th Cir. 1978) (prerequisites for section 301 jurisdiction met by a contractual provision whereby, following deadlock, either party may take "all lawful economic recourse;" that recourse can include filing suit); Eaton Corp. v. International Ass'n of Machinists & Aerospace Workers, 580 F.2d 254 (7th Cir. 1978) (*Boys Market* exception to section 4 of the Norris-LaGuardia Act, 29 U.S.C. § 104(a) (1976), requires, as a precondition to any strike injunction, that both parties be contractually bound to arbitrate, not that both parties be capable of initiating arbitration over the particular dispute; to hold otherwise subverts the policy that the arbitration clause is the quid pro quo for the no-strike clause), *citing* Avco Corp. v. Local 787, UAW, 459 F.2d 968 (3d Cir. 1972)).
grievance were made in *Archie v. Chicago Truck Drivers.* The agreement provided that the discharged employee, Archie, would get his job back only if he signed a statement that he would agree to be terminated in the event of any recurrence of improper tallying of freight for a period of one year. Archie erred during that one year period by sending a shipment intended for Hawaii to New York. Archie was then discharged and the union refused to process his grievance. The district court dismissed Archie's suit against the union for breach of the duty of fair representation. In so holding, the court stated that the plaintiff, in order to show the union's breach, had to show that the union's conduct was motivated by bad faith.

The Seventh Circuit in *Archie v. Chicago Truck Drivers* held that dismissal of the suit was improper. The court concluded that the district court had erred in requiring the plaintiff to show that the union's conduct was based on bad faith. Rather, the Seventh Circuit found that the charge of unfair representation requires a showing that the union's conduct is arbitrary, discriminatory or in bad faith.

In *NLRB v. PPG Industries, Inc.,* the Seventh Circuit emphasized the flexibility permitted the union in carrying out its duty to fairly represent all employees in the unit. The court in *PPG Industries* refused to require the union to adopt an "adversary stance" vis-à-vis the employer "from the moment a claim is made by an employee." Such a requirement, the court concluded, would lead to a breakdown in the informal resolutions of disputes.

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201. 585 F.2d 210 (7th Cir. 1978). The real significance of this case is in the law of employment discrimination. The court, speaking through Judge Reynolds, refused to read into title VII the doctrine of constructive receipt of notice from the EEOC of the individual's right to sue. This liberal construction of title VII means that the ninety-day limitations period begins to run on the date the claimant actually receives the letter from the EEOC. The notice in *Archie* had been mailed to the claimant's home, but received by his wife, who did not bring the letter to his attention for nine days.

202. *Id.* at 223.

203. *Id.* at 219.

204. 585 F.2d 210 (7th Cir. 1978).

205. *Id.* at 220. The Seventh Circuit determined that the complaint was sufficient to state a cause of action. *Id.*

206. *Id.* at 219, citing *Vaca v. Sipes,* 386 U.S. 171 (1967). See also *Floeter v. C.W. Transport, Inc.*, 597 F.2d 1100 (7th Cir. 1979) (per the United States Supreme Court decision in *Hines v. Anchor Motor Freight,* 424 U.S. 554 (1976), an employee cannot proceed directly against his or her employer without first establishing that the union's representation in the arbitration procedure was "arbitrary, discriminatory, or in bad faith") 597 F.2d at 1102. Accord, *Barton Brands, Ltd. v. NLRB,* 529 F.2d 793 (7th Cir. 1976); *Orphan v. Furnco Construction Corp.*, 466 F.2d 795 (7th Cir. 1972); *Moore v. Sunbeam Corp.*, 459 F.2d 811 (7th Cir. 1972).

207. 579 F.2d 1057 (7th Cir. 1978).

208. *Id.* at 1059.

209. *Id.*

210. *Id.* at 1059-60. The court in *PPG Industries* also noted that where the Board and the
In an era of rising numbers of claims of unfair representation, these cases illustrate that the Seventh Circuit has properly focused on the fairness of the union representation rather than on the outcome of the representation. Thus, the emphasis of the court is on whether the union fairly represents its members and not on whether the union wins every grievance.

Settlement Agreements

In *NLRB v. Key Motors Corp.*, the Seventh Circuit held that where a Board-approved settlement agreement includes a bargaining provision of uncertain duration, but the agreement does not arise out of or concern a claim of refusal to bargain, the Board may not order the employer to bargain for a reasonable time after the settlement agreement where the union loses majority support about one month after the agreement. *Key Motors Corp.* involved the loss of majority support, evidenced by statements from a majority of the employees that they did not want the union to represent them. The Seventh Circuit concluded that where the bargaining provision in the agreement does not clearly define the duration of the provision or, at least, require a reasonable time even in the absence of union majority support, the employer must bargain in good faith until such time as the employer has a reasonably based, good faith doubt of the union's majority status. The Seventh Circuit's decision in *Key Motors Corp.* is particularly logical where the Board is in a position to require the durational language in any settlement agreement to be subject to its approval.

The distinction between Board-approved settlement agreements and out-of-Board settlement agreements was raised in *NLRB v. Van-*
According to the Vantran court, the Board-approved settlement agreement "manifests an administrative determination . . . that some remedial action is necessary to safeguard the public interests intended to be protected by the National Labor Relations Act." Obviously, there is no such Board determination in out-of-Board settlement agreements.

In Vantran, the Board ordered the employer to bargain with the union for an extended certification year as a remedy for the employer's withdrawal of recognition after the employer had entered into a settlement agreement with the union. The out-of-Board settlement provided for the dropping of the union's unfair labor practice charges and the employer's dismissal of its damage claim for strike misconduct in state court. It was undisputed that within four and one-half months after the execution of the agreement, the union lost its majority support.

The issue before the Seventh Circuit in NLRB v. Vantran Electric Corp. was whether the withdrawal of the recognition was lawful since it conflicted with the bargaining provisions of the settlement agreement. The Vantran court reached its decision by drawing a distinction between Board-approved agreements and out-of-Board agreements. The court determined that where the settlement agreement is out-of-Board, it must be carefully scrutinized "to determine the intended scope of the bargaining provision." The court contrasted such agreements to Board-approved settlements containing such provisions, for with such approval, the "parties are more likely to have intended the scope of that bargaining duty to satisfy Board standards."

The Seventh Circuit concluded that the employer's agreement to bargain was "incidental" to the union's dropping the unfair labor prac-
practices charges; what the union was really seeking in the agreement was the company's dismissal of the damages action.\textsuperscript{222} In other words, the \textit{quid pro quo} for the union's agreement to withdraw the unfair labor practices charge was the employer's agreement to have the damages action dismissed. Therefore, the non-Board settlement agreement did not actually settle the pending unfair labor practice charges.\textsuperscript{223} In effect, the Board exceeded its remedial authority by ordering bargaining for the extended certification year.\textsuperscript{224} The Seventh Circuit based its decision in \textit{Vantran} on the need to settle disputes without governmental intervention.\textsuperscript{225}

\textbf{"Contracting Out"}

In \textit{American Cyanamid Co. v. NLRB},\textsuperscript{226} the Seventh Circuit upheld the Board's finding that the company violated sections 8(a)(1)\textsuperscript{227} and 8(a)(5)\textsuperscript{228} of the National Labor Relations Act by contracting out maintenance and service work on a permanent basis during a strike without first notifying and bargaining with the union.\textsuperscript{229} This practice, in effect, converted the lawful economic strike into an unfair labor practice strike. The company in \textit{American Cyanamid} sought to confine the United States Supreme Court decision in \textit{Fibreboard Paper Products Corp. v. NLRB}\textsuperscript{230} to situations in which there had been no strike and to rely on the Ninth Circuit decision in \textit{Hawaii Meat Co. v. NLRB}\textsuperscript{231} which permits unilateral contracting out during a strike.\textsuperscript{232}

The Seventh Circuit in \textit{American Cyanamid} found this reliance

\begin{itemize}
\item \textsuperscript{222} Id. at 925.
\item \textsuperscript{223} Id.
\item \textsuperscript{224} Id.
\item \textsuperscript{225} The Seventh Circuit concluded:
\begin{quote}
If the Board perceived the need to intervene to protect the public interest, one of its important responsibilities, the appropriate time for such intervention was when the union requested it to withdraw charges and dismiss the complaint against the employer. At that time the Board could have refused . . . unless the settlement agreement was amended to include a bargaining obligation for an extended certification year.
\end{quote}
\item \textsuperscript{226} Id. at 356 (7th Cir. 1979).
\item \textsuperscript{227} See note 139 \textit{supra} for the text of section 8(a)(1) of the National Labor Relations Act, 29 U.S.C. \S\ 158(a)(1) (1976).
\item \textsuperscript{228} Section 8(a)(5) of the National Labor Relations Act provides:
\begin{quote}
It shall be an unfair labor practice for an employer . . . to refuse to bargain collectively with the representatives of his employees, subject to the provisions of section 9(a) . . . .
\end{quote}
\item \textsuperscript{229} 592 F.2d 360 (7th Cir. 1979).
\item \textsuperscript{230} 379 U.S. 203 (1964) (contracting out of work normally done by unit employees is a mandatory subject of bargaining).
\item \textsuperscript{231} 321 F.2d 397 (9th Cir. 1963).
\item \textsuperscript{232} 592 F.2d at 360.
\end{itemize}
The court determined that *Fibreboard* held only that such contracting out was authorized to enable the employer to continue operating in the emergency situation created by the strike. The *American Cyanamid* situation, on the other hand, was one where the company had made a unilateral decision to make the arrangement permanent in the absence of an emergency. Thus, the strike in *American Cyanamid* was characterized by the Seventh Circuit as an “unfair labor practice strike” and the employees were entitled to reinstatement upon their unconditional back-to-work offer.

**Accretions to the Workforce**

In *Lammert Industries v. NLRB*, the company closed down its Chicago and Westwood plants and opened in their place the Addison plant. On the date of the opening of the Addison plant, nineteen employees from the formerly union-represented Chicago plant and seven employees from the non-union Westwood plant constituted the workforce. The company refused to recognize and bargain with the union that had represented the employees at the Chicago plant. The Board held that the relocation was merely a continuation of the old Chicago plant so that the Westwood employees became an accretion to the Chicago workforce. Thus, the Board concluded that the company was obligated to bargain with the union.

The Seventh Circuit in *Lammert Industries v. NLRB* affirmed the Board’s decision, deferring to the Board’s expertise in the determination of accretions to the workforce. This affirmation rejected the company’s argument that a contrary result was mandated by the fact

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233. *Id.*
234. *Id.*
235. *Id.* The Seventh Circuit found that *Hawaii Meat* merely answered in the negative the question of “whether a decision to subcontract, taken at the time an economic strike occurs, and made for the purpose of keeping the plant operating, constitutes a failure to bargain . . . .” *Id.* at 361 n.7 (emphasis added), citing *Hawaii Meat Co. v. NLRB*, 321 F.2d 397, 399-400 (9th Cir. 1963).
236. 592 F.2d at 364. During settlement negotiations, the company attempted to condition allowing the employees back to work on their waiver for one year of the right to change any matter covered by the settlement agreement. The company was not permitted to do this in light of the unfair labor practice strikers’ unconditional offer to return to work. The company had argued that since it could have locked out the employees, it could impose reasonable conditions upon their return to work. The court acknowledged this novel argument but was not required to “decide under what circumstances an employer might be able to convert an economic strike to a permissible lockout or what conditions, if any, short of reaching agreement on the economic issues it might attach to ending such a lockout.” *Id.*
237. 578 F.2d 1223 (7th Cir. 1978).
238. See *id.* at 1224.
239. See *id.* at 1225.
240. 578 F.2d 1223 (7th Cir. 1978).
241. *Id.* at 1225-26. This is similar to the court’s deference to the Board regarding the deter-
that within five months of the opening of the new plant, the workforce consisted of sixteen former Chicago employees, seven non-represented employees from Westwood, and ten employees who had never voted in a union election. The crucial date, according to both the Board and the Seventh Circuit, was the date of the new plant opening.  

**Discrimination For Union Activities**

In *W.W. Grainger, Inc. v. NLRB*, the Board determined that where a supervisor fired a known union adherent for soliciting during work hours, the discharge was motivated by discrimination for union activities because the supervisor did not investigate the incidents that were used as grounds for the discharge. The Board also found that the company maintained an unlawfully broad no-solicitation rule extending to an employee's free time and that it discriminatorily applied a rule against solicitation during working hours. The Seventh Circuit in *Grainger* affirmed the Board's finding of violations of sections 8(a)(3) and 8(a)(5) of the National Labor Relations Act.  

*Indiana & Michigan Electric Co. v. NLRB* involved a Board decision which held that a short suspension period for union stewards and officers who participated in an unlawful strike was inherently destructive to employee rights under section 7 of the National Labor Relations Act since the union rank-and-file were not similarly suspended. The Seventh Circuit reversed the Board. In so doing, the court noted that "the higher responsibilities of union officials justify disciplining them..."

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242. 578 F.2d at 1226. The affirmation in *Lammert Industries* was also in spite of the fact that within the six months prior to the relocation, the union had lost a decertification election. However, this election had been set aside by the Board because of company coercion. *Id.* at 1224. The court noted that any other result would invite abuse.

243. 582 F.2d 1118 (7th Cir. 1978).

244. *Id.* at 1121.

245. *Id.* See, e.g., Republic Aviation Corp. v. NLRB, 324 U.S. 793 (1954).

246. The company allowed unrestricted discussion during work time as long as the employees continued their work uninterrupted, but prohibited the discussion when it involved the union. 582 F.2d at 1120, 1120 n. 3.

247. *Id.* at 1118.

248. Section 8(a)(3) of the National Labor Relations Act provides, in pertinent part:

> It shall be an unfair labor practice for an employer... by discrimination in regard to hire or tenure of employment or any term or condition of employment to encourage or discourage membership in any labor organization.


249. For the text of section 8(a)(5) of the National Labor Relations Act, 29 U.S.C. § 158(a)(5) (1976), see note 228 supra.

250. 599 F.2d 227 (7th Cir. 1979).

more severely than rank-and-file members for participating in unprotected activity." Under *Indiana Michigan & Electric*, the company is permitted to come forth with evidence that there is a legitimate and substantial business justification for the discrimination between union officers and the rank-and-file, as long as such discrimination is not inherently destructive of important employee rights.253

**Conclusion**

The majority of the 1978-79 labor law decisions by the Seventh Circuit were based on established precedent, illustrating that the court is in the mainstream of national labor relations law. The Seventh Circuit's decision in *NLRB v. Sure-Tan, Inc.*, however, which granted undocumented alien workers protection under the National Labor Relations Act, breaks new ground in labor relations. This significant decision invites serious reconsideration of the underlying purposes of the National Labor Relations Act.

252. 599 F.2d at 230.
253. *Id.* at 231-32.