January 1981

Labor Law: The Duty of Fair Representation, Applicability of the NLRA and Other Seventh Circuit Cases

Marvin Gittler
LABOR LAW: THE DUTY OF FAIR REPRESENTATION, APPLICABILITY OF THE NLRA, AND OTHER SEVENTH CIRCUIT CASES

MARVIN GITTLER*

Among the significant recent developments in the United States Court of Appeals for the Seventh Circuit in the area of labor relations during the 1979-80 term is the enumeration of a noninclusive list of factors to be considered in determining whether a union has breached its duty of fair representation.1 The Seventh Circuit also rendered decisions which delineated the scope of the coverage of the National Labor Relations Act,2 examined the practices, procedures, and standards employed by the National Labor Relations Board,3 and reviewed Board decisions in the areas of the duty to bargain, sympathy strikes, and employee protected activity.4

* Partner, Asher, Goodstein, Pavalon, Gittler, Greenfield & Segall Ltd., Chicago, Ill. Former chairman, Chicago Bar Association Labor Law Committee. The author gratefully acknowledges the able and diligent assistance of John Fisk, candidate for J.D., Illinois Institute of Technology/Chicago Kent College of Law.

1. See text accompanying notes 11-45 infra.

2. 29 U.S.C. §§ 151-169 (1978) [hereinafter referred to as the Act or the NLRA]. See text accompanying notes 52-87 infra.

3. See text accompanying notes 140-202 infra. The National Labor Relations Board [hereinafter referred to as the Board or the NLRB] was created in 1935 to administer the NLRA. It was assigned the task of supervising representation elections and adjudicating unfair labor practice cases. 29 U.S.C. §§ 153, 159(c)(1), 160(a) (1978).

4. See text accompanying notes 203-230 infra. This article focuses on cases decided under the National Labor 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) [hereinafter collectively referred to as the Labor Act]. However, during the 1979-80 judicial term there were important decisions concerning the employment relationship. Although beyond the scope of this article, these cases deserve mention: Burkhart Randall Div. of Textron, Inc. v. Marshall, 625 F.2d 1313 (7th Cir. 1980) (the flexible, administrative probable cause standard is appropriate for the issuance of a warrant for an OSHA inspection whether the warrant is sought on the basis of an administrative plan or employee complaints; once probable cause is established on the basis of an employee complaint, OSHA may inspect the entire premises of the subject employer); Marshall v. N.L. Industries, Inc., 618 F.2d 1220 (7th Cir. 1980) (an arbitrator’s award does not preclude additional relief under OSHA; acceptance of an arbitration award does not establish a waiver of an employee’s rights under OSHA); Holder v. Old Ben Coal Co., 618 F.2d 1198 (7th Cir. 1980) (Title VII plaintiff applying for a job labeled “unskilled” must foreclose the possibility that his/her application was rejected in order to hire a more experienced or better qualified applicant before a prima facie unlawful discrimination case is established); Cedillo v. International Ass’n of Bridge and Structural Iron Workers Local I, 603 F.2d 7 (7th Cir. 1979) (a local union’s determination to deny all memberships via a transfer program is not incapable, as a matter of law, of an offensive disparate impact which violates Title VII); EEOC v. Kenosha Unified School Dist. No. 1, 620 F.2d 1220 (7th Cir. 1980) (the “substantially equal” standard, as applied under the Fair Labor Standards Act, requires more than that the jobs be comparable, and an important differentiating
Duty Of Fair Representation: Bliznik v. International Harvester Co.

Background Considerations

The United States Supreme Court first recognized the statutory duty of fair representation in *Steele v. Louisville & Nashville R.R.* 5 a case arising under the Railway Labor Act. 6 In that case, the Supreme Court held that when Congress empowered unions to bargain exclusively for all employees in a particular bargaining unit, thereby subordinating individual interests to the interests of the unit as a whole, it imposed on unions a correlative duty "inseparable from the power of representation" to exercise that authority fairly. 7

The Supreme Court soon extended the fair representation analysis, developed initially under the RLA, to a case arising under the NLRA. 8 The Court reasoned that the duty of fair representation is implicit in the NLRA because that statute, like the RLA, affords to unions the exclusive power to represent all the employees of a bargaining unit. 9

While the existence of the duty of fair representation is now well established, the requirements imposed by the duty have remained unclear. The Supreme Court has stated that a union is in breach of its duty of fair representation when its conduct in processing employee grievances is "arbitrary, capricious, or in bad faith." 10 Until the Sev...
enth Circuit's decision in *Bliznik v. International Harvester Co.*, labor unions had been left largely in the dark as to what conduct was required of them once a decision to process an employee's grievance had been made.

**Bliznik v. International Harvester Co.**

International Harvester discovered one of its foremen in the act of stealing industrial brass from its plant. When confronted, the foreman admitted the theft and added that he had acted in concert with Bliznik. Bliznik denied any involvement, but the company nevertheless discharged him.12

After exhausting the initial steps of the contractually-mandated grievance procedure, Bliznik's union, the Progressive Steelworkers, agreed to pursue his claim to arbitration.13 Shortly before the arbitration hearing, Bliznik met with the union's attorney, who did not investigate Bliznik's version of the events surrounding his discharge and did not interview any of the witnesses named on the list that he provided.14

arbitration of his grievance regardless of its merit, the settlement machinery provided by the contract would be substantially undermined. *Id.*

The Supreme Court again considered the union's duty of fair representation in *Hines v. Anchor Motor Freight, Inc.*, 424 U.S. 554 (1976). In that case, the Court held that where an employee could establish the breach of the duty of fair representation by his union in the processing of his grievance, the finality provisions of the collective bargaining agreement would not operate as a bar to suit against the union and employer. *Id.* at 571-72.

In a recent decision, the Court held that the RLA does not permit the recovery of punitive damages in an action brought against a union for breach of its duty of fair representation in processing an employee's grievance against his employer. *International Bhd. of Electrical Workers v. Foust*, 442 U.S. 42 (1979).

11. No. 79-2013 (7th Cir. Mar. 4, 1980). The case is cited at 618 F.2d 113. The order of the court is unreported pursuant to Circuit Rule 35 which, before its amendment on July 1, 1980, provided in pertinent part:

(a) Policy. It is the policy of the circuit to reduce the proliferation of published opinions.

(b) Publication. The court may dispose of an appeal by an order or by an opinion, which may be signed or *per curiam*. Orders shall not be published and opinions shall be published.

(i) Unpublished orders:

(ii) Shall be distributed only to the circuit judges, counsel for the parties in the case, the lower court judge or agency in the case, and the news media, and shall be available to the public on the same basis as any other pleading in the case;

(iv) Except to support a claim of *res judicata*, collateral estoppel or law of the case, shall not be cited or used as precedent (a) in any federal court within the circuit in any written document or in oral argument or (b) by any such court for any purpose.


13. *Id.* at 2.

14. *Id.* The attorney advised Bliznik that testimony was unnecessary because in a recent case involving the same union and company, the arbitrator had ordered reinstatement of an employee who had admitted stealing company property. *Id.*
At the arbitration hearing, the foreman testified, consistent with his statement to the company, that he stole the industrial brass pursuant to a conspiracy with Bliznik. Bliznik denied any involvement and the case became a contest between his word and that of the foreman. The attorney representing Bliznik did not cross-examine any of the witnesses, object in any way to the admission of evidence offered by the company, or call any witnesses other than Bliznik. The arbitrator upheld the company’s dismissal of Bliznik, relying primarily on his assessment of the witnesses’ credibility. After the union declined to pursue the matter further, Bliznik brought suit against his former employer for wrongful discharge and against his former union for breach of its duty to fairly represent him in the ensuing grievance arbitration.

The district court granted the company and union’s motion for summary judgment. The district court agreed with the defendant’s argument that the plaintiff, Bliznik, had presented no evidence to demonstrate arbitrary, discriminatory, or bad faith action. The district court went on to note that negligence alone is insufficient to state a cause of action for breach of the duty of fair representation. The district court reluctantly concluded as a matter of law that the union attorney’s inaction was, at worst, simple negligence and, as such, insufficient to serve as the basis of a claim for breach of the duty of fair representation.

In an unpublished opinion, the Seventh Circuit reversed the district court’s grant of summary judgment and remanded the case to al-

15. Id.
16. Id.
17. Id.
18. The suit was brought pursuant to section 301 of the Labor Management Relations Act, 29 U.S.C. § 185(a) (1976), which provides in pertinent part:
   (a) Suits for violation of contracts between an employer and a labor organization representing employees in an industry affecting commerce as defined in this chapter, or between any such labor organizations, may be brought in any district court of the United States having jurisdiction of the parties, without respect to the amount in controversy or without regard to the citizenship of the parties.
19. No. 79-2013, slip op. at 1.
20. Summary judgment is properly granted only when (1) no genuine issue of material fact exists, and (2) the moving party is entitled to judgment in his favor as a matter of law. Fed. R. Civ. P. 56(c).
23. Id.
24. See note 11 supra.
low Bliznik an opportunity to show whether the union attorney represented him in a perfunctory manner.\textsuperscript{25} The Seventh Circuit directed the district court not to place undue reliance on labels such as negligence or perfunctoriness, but rather to adopt a pragmatic approach.\textsuperscript{26} The court then proceeded to enumerate a non-inclusive list of factors to be considered in determining whether the union breached its duty of fair representation. The district court was instructed to determine whether, under the circumstances, the union:

(1) conducted a fair investigation,
(2) provided Bliznik with a fair opportunity to participate in the presentation of his case,
(3) presented arguments favorable to his case,
(4) refuted the employer's insubstantial claims, and
(5) presented Bliznik's claim in a favorable light.\textsuperscript{27}

The Seventh Circuit's enumeration of the factors to be considered in determining whether a union has breached its duty of fair representation appears to be consistent with its analysis in earlier cases, particularly \textit{Cannon v. Consolidated Freightways Corp.}\textsuperscript{28} In that case, the court reversed the trial court and dismissed a claim that the defendant company had improperly discharged the plaintiff Cannon.

Cannon had refused to take a sobriety test at the request of his employer after his involvement in an accident. Industry practice at that time established a presumption of drunkenness as against employees who refused to submit to a sobriety test. Drunkenness, under the terms of the collective bargaining agreement, was sufficient cause for job termination.

Evidence adduced by the employer at the hearing before the joint grievance committee revealed that the plaintiff had, in fact, refused to take the test after the company explained the consequences of such refusal and extended a second offer to take the test.\textsuperscript{29} In rebuttal, the union representative argued on behalf of the employee, \textit{inter alia}, that it was unlikely plaintiff was drinking at eleven a.m., when the accident occurred, and also pointed out that the employee had not been arrested for being under the influence of alcohol.\textsuperscript{30} The representative sug-

\textsuperscript{25} Bliznik v. International Harvester Co., No. 79-2013, slip op. at 3 (7th Cir. Mar. 4, 1980). The court relied on \textit{Vaca v. Sipes}, 386 U.S. 171, 191 (1967), where the Supreme Court stated that a union "may not arbitrarily ignore a meritorious grievance or process it in a perfunctory manner." \textit{See} note 10 \textit{supra}.

\textsuperscript{26} No. 79-2013, slip op. at 3.

\textsuperscript{27} \textit{Id.} at 4.

\textsuperscript{28} 524 F.2d 290 (7th Cir. 1975).

\textsuperscript{29} \textit{Id.} at 293.

\textsuperscript{30} \textit{Id.} at 293-94.
gested that the accident may have resulted from equipment defects for which the employer was responsible, and concluded that the employee had a good safety record during his eighteen years of employment, had never had charges of intoxication placed against him, and "in my opinion this fellow ought to be put back to work and compensated for all time he lost."31 Plaintiff employee testified that he had not been drinking and that he did not know of his obligation to take the test. After hearing the evidence and arguments, the joint grievance committee denied the grievance.32

The Seventh Circuit found, as a matter of law, that the business agent had made a good-faith effort to plead the plaintiff's case at the hearing.33 The court noted that the union acted without malice or prejudice and that under established procedure, absent proof that the duty of fair representation was breached, federal labor policy encouraging settlement of labor disputes through means chosen by the parties34 required that the determination of the committee not be reviewed.35

The Cannon rationale can be contrasted with the record in the recently decided case of Miller v. Gateway Transportation Co.36 In Miller, the union's representation of an employee at a grievance proceeding consisted solely of a reading of the employee's written grievances.37 The Seventh Circuit noted that the union had failed to urge an available defense, had conducted no investigation, and had made no attempt to locate witnesses or obtain relevant records. The court concluded that a genuine issue existed as to the question of fair representation and remanded the case to the district court for further proceedings.38

31. Id. at 294.
32. Id.
33. Id. at 293.
35. 524 F.2d at 294-95. The employee argued that a breach of the duty was established by the union's failure to raise a defense at the hearing that the industry practice of requiring a sobriety test was improperly promulgated under the terms of the collective bargaining agreement. This argument was rejected by the court. Absent a showing of arbitrariness or bad faith, the union's failure to raise a relevant defense does not breach the duty of fair representation even if such failure "was an act of neglect or the product of a mistake in judgment." Id. at 294. This proposition appears to be an accurate statement of the case law. See, e.g., Baldini v. Local 1095 UAW, 581 F.2d 145, 151 (7th Cir. 1978); Bazarte v. United Transp. Union, 429 F.2d 868, 872 (3rd Cir. 1970).
36. 616 F.2d 272 (7th Cir. 1980). The case was decided about one month before Bliznik.
37. Id. at 277.
38. Id. The court stated: The relevant inquiry is not "whether the union in fact pursues an employee's grievance," but rather "whether the union has made a full investigation, has given the
It appears that courts indeed will be paying more attention to the quality of a union's actions in representing aggrieved workers. The issue of "negligence" in the processing of grievances, which is usually raised in the context of an employee arguing the *Vaca* and *Hines*\(^3\) expression of "perfunctory action," appears to be generating considerable litigation.\(^4\) While the Seventh Circuit's decision in *Bliznik* lacks precedential value,\(^4\) it nonetheless provides invaluable guidance as to the types of union conduct to which the court will ascribe the heretofore malleable concepts of "arbitrary" or "perfunctory." Such guidance is of obvious aid to unions in the determination of what steps they must take in the handling of employee grievances in order to avoid breaching their duty of fair representation. The factors enunciated by the court are, however, also useful to the individual employee and the employer. They, too, have a stake in defining the parameters of the duty of fair representation.

Whether the Seventh Circuit will enumerate the *Bliznik* factors in a published opinion of precedential value is an interesting matter on which to speculate. Regardless of publication, the *Bliznik* factors are indicative of the approach the Seventh Circuit will employ in analyzing fair representation cases. The factors enunciated in the *Bliznik* case could provide a positive standard for inquiry so long as they are not mechanically applied.\(^4\)

A court's analysis in a fair representation case should never lose sight of the totality of the union's conduct. The balance between the policy of promoting private dispute resolution on the one hand, and guaranteeing fairness to employees on the other, must recognize the myriad factors that influence union judgments and actions in representing their constituency.\(^4\) This balance can be maintained by recogniz-

grievant notice and an opportunity to participate, has mustered colorable arguments and has refuted insubstantial arguments by the employer." *Id.* at 277 n.12, citing R. Gorman, Labor Law ch. 30, § 6 at 718 (1976).

39. See note 10 supra.

40. Compare Cannon v. Consolidated Freightways Corp., 524 F.2d 290, 294 (7th Cir. 1975), with Griffin v. UAW, 469 F.2d 181 (4th Cir. 1972), and Ruzicka v. General Motors Corp., 523 F.2d 306 (6th Cir. 1975).

41. See note 11 supra.

42. Perhaps, by avoiding publication of its opinion, the Seventh Circuit is seeking to avoid just such a mechanical application of the *Bliznik* factors.

43. For example, the issue of "investigating" a grievance cannot be measured by analogies to discovery devices available in federal litigation. Such devices are generally not available to unions during arbitration or other dispute resolution procedures, although some compulsory process may be had. See Ill. Uniform Arbitration Act, Ill. Rev. Stat. ch. 10, § 107 (1975).

Questions relating to the relative sophistication of non-attorney representatives must arise in any analysis of a representative's obligation. It does appear that the duty is evolving into an
ing the distinction between honest mistaken conduct and intentional, severely hostile and irrational treatment. In such a context, the analysis in Bliznik does provide a positive means of effectuating the judicial and statutory policies enunciated since Steele v. Louisville & Nashville R.R.

The Scope Of The Coverage of the NLRA

The threshold inquiry for NLRB intervention in any labor dispute is jurisdiction. The statutory range of Board jurisdiction extends to the breadth of the commerce clause of the United States Constitution, and in recent times there has been an expansion of the exercise of this jurisdiction. The Seventh Circuit reached decisions in several cases during the 1979-80 term which further delineated the scope of the coverage of the NLRA. In a series of related cases, the court restricted the coverage of the Act and the jurisdiction of the "attorney-client" relationship, although this is not uniformly accepted. See e.g., Difini v. Spector Freight Systems, 101 L.R.R.M. 3055 (D.C.N.Y. 1979).

Beyond the scope of this paper, but of obvious relevance to future analyses, is precisely the issue loosely defined as the "quality" of representation once a decision to proceed to arbitration is made. For example, if an "attorney-client" standard is to be imposed on lay representatives, will the courts eventually require that attorneys be made available in dispute resolution proceedings? If attorneys are employed, should they be held to a higher standard than a lay representative? The court in Bliznik may have been influenced by the fact that the grievant's representative was an attorney and not a lay representative. Note, by way of comparison, the court's treatment of an attorney representative in an earlier case, Holodnak v. Avco Corp., 381 F. Supp. 191 (D.C. Conn. 1974), aff'd as modified, 514 F.2d 285 (2d Cir. 1975).

45. 323 U.S. 192 (1944). See text accompanying notes 5-7 supra.
46. The NLRA § 2(9), 29 U.S.C. § 152(9) (1976), defines "labor dispute" as: "any controversy concerning terms, tenure or conditions of employment, or concerning the association or representation of persons in negotiating, fixing, maintaining, changing, or seeking to arrange terms or conditions of employment regardless of whether the disputants stand in the proximate relation of employer and employee."
48. See NLRB v. Jones & Laughlin Steel Corp., 301 U.S. 1 (1937). However, the Board need not exercise jurisdiction this broad, and in the interests of manageability it 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 of interstate commerce engaged in by the employer. R. Gorman, Basic Text on Labor Law 22-26 (1976).
50. See text accompanying notes 52-87 infra.
NLRB. 51

The court upheld the Board's assertion of jurisdiction in NLRB v. Austin Developmental Center, Inc. 52 The Austin Developmental Center, 53 a not-for-profit corporation, provided educational and counseling services to school-age children designated by the Chicago Board of Education as incapable of functioning within the public school system. The primary sources of ADC's funding are the Illinois Department of Mental Health and the Chicago Board of Education. 54 ADC asserted that section 2(2) of the Act, 55 which excludes "political subdivisions" from coverage, deprived the Board of jurisdiction over its operations, arguing that its "close and intimate relationship with the state" brought it within the scope of section 2(2). 56

The Board had found that the statutory limitation of section 2(2) 57 did not apply to exclude ADC from the coverage of the Act. 58 The Seventh Circuit indicated that Board rulings on its own statutory jurisdiction are entitled to great weight and upheld the Board's determination that statutory jurisdiction existed. 59 The court reasoned that ADC's lack of control over the wages and benefits of its employees, due to budgetary limitations imposed by its dependence on public funds, was not the type of control over ADC's labor relations required to invoke the section 2(2) exemption. 60 Noting that neither the Illinois Department of Mental Health nor the Chicago Board of Education specifically limited ADC's employee compensation expenditures, the court indicated that the Board may require collective bargaining even

51. See Lutheran Welfare Serv. v. NLRB, 607 F.2d 777 (7th Cir. 1979); NLRB v. Chicago Youth Centers, 616 F.2d 1028 (7th Cir. 1980).

52. 606 F.2d 785 (7th Cir. 1979).

53. Hereinafter referred to as ADC.

54. 606 F.2d at 788.

55. Section 2(2) of the NLRA, 29 U.S.C. § 152(2) (1976), provides, in relevant part: "The term 'employer' . . . shall not include the United States or any wholly owned Government corporation, . . . or any state or political subdivision thereof." Id.

56. 606 F.2d at 789.

57. The statutory limitation contained in section 2(2) has not been broadly construed. The Board defines "political subdivision" as (1) an entity created by the state so as to constitute an arm of government, or (2) an entity administered by persons who are responsible to the electorate or to public officials. NLRB v. Highview, Inc., 590 F.2d 174, 176 (5th Cir. 1979), modified on other grounds, 595 F.2d 339 (5th Cir. 1979); Compton v. National Maritime Union, 533 F.2d 1270, 1274 (1st Cir. 1976). The Supreme Court has acknowledged this two-part test, but has indicated that it does not necessarily define the boundaries of the political subdivision exclusion. The Supreme Court will look at an entity's other attributes as well, such as a broad power of subpoena or eminent domain, in determining whether it is a political subdivision. NLRB v. Natural Gas Utility Dist., 402 U.S. 600, 604-07 (1971).


59. 606 F.2d at 789.

60. Id. at 789 n.8.
where the employer's relationship to the exempt entity places it under substantial hardships in labor negotiations, so long as it retains some control over terms and conditions of employment.\textsuperscript{61}

The Seventh Circuit also rejected ADC's contention that the Board's exercise of its statutory jurisdiction constituted an abuse of discretion.\textsuperscript{62} The Board, the court stated, has broad discretion in choosing whether or not to exercise its statutory jurisdiction and will not be reversed absent a showing that it acted unfairly and caused substantial prejudice to the affected employers.\textsuperscript{63} Moreover, the court disagreed with ADC's assertion that the Board erroneously applied the "intimate connection" test,\textsuperscript{64} a discretionary rule formerly used to decline jurisdiction where the purposes of the Act would be furthered thereby.\textsuperscript{65} The court found that ADC had failed to establish that the services which it provided were "interwoven and integrated"\textsuperscript{66} with the operations of an exempt agency. The court recognized the Board's discretion as the overriding factor in such cases.\textsuperscript{67}

Finally, the court rejected ADC's argument that it was an "adjunct"\textsuperscript{68} of the public school system because of its relationship to the

\textsuperscript{61} Id.
\textsuperscript{62} Id. at 792.
\textsuperscript{63} Id. at 790.

\textsuperscript{64} A leading case enunciating the "intimate connection" test is Rural Fire Protection Co., 216 N.L.R.B. 584 (1975), where the majority described the test as having two aspects: (1) whether the nonexempt employer retains sufficient control over its employees' terms and conditions of employment so as to be capable of effective bargaining with the employees' representative, and (2) where the employer retains such control, "the focus of necessity is on the nature of the relationship between the purposes of the exempt institution and the services provided by the nonexempt employer." Id. at 586. Recently the Board has said that it will not use the "intimate connection test" in the future. National Transp. Serv., Inc., 240 N.L.R.B. 565 (1979).

\textsuperscript{65} Even if jurisdiction is proper under the Act, the Board has traditionally followed the policy of declining to assert jurisdiction if it finds that to do so would not effectuate the purposes of the Act. See, e.g., Highview, Inc. v. NLRB, 590 F.2d 174 (5th Cir.), modified on other grounds, 595 F.2d 339 (5th Cir. 1979); Compton v. National Maritime Union of America, AFL-CIO, 533 F.2d 1270 (1st Cir. 1976); Herbert Harvey, Inc. v. NLRB, 424 F.2d 770 (D.C. Cir. 1969).

The Board has declined to assert jurisdiction over an employer that supplies an exempt institution with services that are an essential attribute of the purpose of the exempt institution. Thus, the Board has declined to assert jurisdiction over a private company that provided: (1) fire protection to a political subdivision, Rural Fire Protection Co., 216 N.L.R.B. 584 (1975); (2) police protection to a political subdivision, The Wackenhut Corp., 203 N.L.R.B. 86 (1973); (3) park maintenance to a political subdivision, Current Construction Corp., 209 N.L.R.B. 584 (1974). According to the Board, each of these services—fire, police, and park maintenance—is essential to the purposes of the political subdivision.

\textsuperscript{66} The court stated that "ADC has shown only that some of its employees must meet state certification requirements and that its facilities must comply with the building code. These restrictions . . . do not establish an intimate connection between the State Department of Mental Health and ADC." 606 F.2d at 790.

\textsuperscript{67} Id. at 791.

\textsuperscript{68} Board decisions recognize a discretionary limitation on the Board's jurisdiction where the employer provides special education services for a public school system in such a manner that the
Chicago Board of Education. ADC was not an "adjunct" of the public school system, the court ruled, because (1) the exemption is applicable only where the public agency chooses to contract with private employers as the primary means of satisfying its statutory obligation.\[^{69}\] and in this situation ADC merely handled the overflow of the special education programs of the Chicago Board of Education; and (2) the exemption only applies where the private school demonstrates direct and substantial control over its operations by the contracting agency.\[^{70}\] Since the record indicated only minimal control\[^{71}\] over ADC on the part of either the Board of Education or the Department of Health, the NLRB did not abuse its discretion in choosing to exercise its statutory jurisdiction.\[^{72}\] The court, accordingly, granted the Board's application for enforcement of its order against ADC.

Just six days after its decision in *Austin Developmental Center*, the Seventh Circuit confronted the jurisdictional issue again in *Lutheran Welfare Services v. NLRB*,\[^{73}\] this time denying enforcement of the Board's order. The employers\[^{74}\] in that case operated child care facilities in Chicago under the Federal Headstart and Daycare programs.\[^{75}\] The bulk of the funding for the involved facilities was received from Model Cities—Chicago Committee on Urban Opportunity,\[^{76}\] a local public agency charged with administering federally funded social welfare programs.\[^{77}\]

The court determined that Model Cities was empowered to exer-
exercise substantial control over labor relations at the Headstart and Daycare centers. The court concluded that Model Cities and the employers involved were “joint employers” under the NLRA, and since a collective bargaining agreement was not feasible under such circumstances, the NLRB lacked jurisdiction.

In three cases which, like Lutheran Welfare, involved the Model Cities, Headstart, and Daycare programs, the Seventh Circuit again ruled that the employers involved were exempt from the coverage of the Act. The court attempted to distinguish Austin Developmental Center by noting that it involved different public agencies and a different program, and that the employer in Austin had failed to establish that it lacked control over its labor relations sufficient to invoke the section 2(2) exemption.

The court’s attempt to reconcile Austin Developmental Center with Lutheran Welfare, and the later cases involving Headstart and Daycare facilities, is unconvincing. These cases all involve discretionary limitations on the exercise of Board jurisdiction. In such situations it is not the characterization of the relationship between the exempt and nonexempt entities involved which should control the exercise of the Board’s

78. The court noted that Congress had provided that the agency [Model Cities] charged with administering Headstart programs “shall adopt for itself and other agencies using funds or exercising authority for which it is responsible, rules designed to establish specific standards governing salaries, salary increases, travel and per diem allowances, and other employee benefits . . . .” 42 U.S.C. § 2928(f)(a) (1978) (emphasis supplied by the court).

79. Where “joint employment” exists, each of two employers has such significant control over the essential elements of labor relations with a single group of workers that collective bargaining which did not involve both employers would be ineffective. S. S. Kresge Co. v. NLRB, 416 F.2d 1225 (6th Cir. 1969).

80. 607 F.2d at 778.

81. NLRB v. Chicago Youth Centers, 616 F.2d 1028 (7th Cir. 1980). Three cases were consolidated on appeal and a brief per curiam opinion rendered which, relying on the decision in Lutheran Welfare Serv. v. NLRB, 607 F.2d 777 (7th Cir. 1979), denied enforcement of the Board's orders in all three cases.

82. 616 F.2d at 1030. The Austin Developmental Center was operated by the Illinois Department of Mental Health from 1969 to 1974. In 1974, it assumed the status of a private non-profit corporation. The Department of Mental Health and the Chicago Board of Education were the primary sources of the Center's funding. Of the 1975 total budget of $309,676, Department of Mental Health grants accounted for $236,837, in-kind contributions provided another $56,954, and Board of Education tuition reimbursements amounted to $11,698. NLRB v. Austin Developmental Center, 606 F.2d 775, 788 (7th Cir. 1979). The Board of Education is required by statute to pay the tuition costs for students attending non-public special education facilities where the reason for their attendance is the inability of the Board’s own special education programs to provide the needed services. ILL. REV. STAT. ch. 122, § 14-7.02 (1979).

The Headstart and Daycare programs involved were federally funded, see note 75 supra, and administered by a grantee designated by HEW, in this case the Model Cities—Chicago Committee on Urban Opportunity, an agency of the City of Chicago. NLRB v. Chicago Youth Centers, 616 F.2d 1028, 1029 n.2 (7th Cir. 1980).

83. 616 F.2d at 1030. See notes 55 and 57 supra.
discretionary jurisdiction, but rather the efficacy of applying the NLRA to the nonexempt employer.

In *Lutheran Welfare* and its progeny, the Seventh Circuit substituted its judgment for that of the NLRB in ruling that the purposes of the Act would not be furthered by the Board's assertion of jurisdiction. The court inadequately examined the efficacy of applying the NLRA to the nonexempt employer when it simply asserted that "collective bargaining is not feasible" in a joint employment situation involving an exempt employer. The employees of the operations involved in those

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84. In *NLRB v. Austin Developmental Center, Inc.*, 606 F.2d 785, 790 (7th Cir. 1979), the court emphasized the importance of properly classifying a jurisdictional limitation as statutory or discretionary. Oddly enough, the court failed to make the distinction between discretionary and statutory limitations on the exercise of Board jurisdiction in reaching its decision in *Lutheran Welfare Serv. v. NLRB*, 607 F.2d 777 (7th Cir. 1979). It seems clear, however, that joint employer status is no more an aspect of section 2(2)'s statutory limitation on Board jurisdiction than the so-called "intimate connection" test. See *Herbert Harvey, Inc. v. NLRB*, 424 F.2d 770 (D.C. Cir. 1969). A finding of joint employer status certainly does not render a private employer a political subdivision exempt from the coverage of the Act.

85. The characterization of the relationship between the exempt and nonexempt entities should only be considered relevant in an inquiry as to the propriety of the Board's exercise of its discretionary jurisdiction insofar as it defines the extent of the nonexempt entity's control over its own labor relations. Thus, while a joint employment relationship involving an exempt entity will often give rise to a situation where the Board should decline to exercise its jurisdiction, it is certainly not true that in all such situations the nonexempt employer will never be able to bargain effectively with its employees. See, e.g., *Herbert Harvey, Inc. v. NLRB*, 424 F.2d 770 (D.C. Cir. 1969).

In deciding to exercise its discretionary jurisdiction over *Lutheran Welfare Services of Ill.* and the other day-care centers operating under the aegis of Model Cities, the Board determined that the exercise of jurisdiction would effectuate the purposes of the Act. This determination was based upon a finding that the involved employers could bargain effectively with a union despite Model Cities' guidelines. See *Lutheran Welfare Serv.*, 216 N.L.R.B. 518, 519 (1975); *The Chase House, Inc.*, 235 N.L.R.B. 792, 793 (1978); *Chicago Youth Centers* 235 N.L.R.B. 915 (1978); *YMCA of Metropolitan Chicago*, 235 N.L.R.B. 788, 789 (1978); See also *Catholic Bishop Corp.*, 235 N.L.R.B. 776 (1978), and *Hull House Ass'n*, 235 N.L.R.B. 797 (1978).

86. See note 51 *supra*.

87. *Lutheran Welfare Serv. v. NLRB*, 607 F.2d 777, 778 (7th Cir. 1979). The court failed to adequately address a number of factual determinations underlying the Board's conclusions that the delegate agencies involved in those consolidated cases could indeed bargain effectively with their employees. For example, the Board heard testimony which established that Model Cities' guidelines did not prevent the involved employers from hiring or discharging their personnel without Model Cities approval. The nonexempt employers could also increase the compensation of their employees, beyond that provided by Model Cities' funds, through the use of private funding. See, e.g., *The Chase House, Inc.*, 235 N.L.R.B. 792 (1978). The Board also found that the employees at one day-care facility had successfully negotiated a collective bargaining agreement with an employer funded by Model Cities which changed existing personnel policies and significantly improved the working conditions of the employees. See *Hull House Ass'n*, 235 N.L.R.B. 797 (1978).

It is essentially a question of fact as to whether the exempt entity's control over the labor relations of operations of a nonexempt employer is such that the NLRA cannot be efficaciously applied. The Seventh Circuit has failed to show an adequate basis for overturning the factual determination of the Board that the Act could be efficaciously applied.

Although collective bargaining under these circumstances may present substantial difficulties
cases have been denied the protections of the Act. Decisions with such an impact deserve more careful consideration.

SEVENTH CIRCUIT REVIEW OF THE PRACTICES, PROCEDURES, AND STANDARDS OF THE NLRB

Denial of Enforcement of Board Orders

The Seventh Circuit decided a number of cases in 1979-80 in which the court's primary focus was on the practices, procedures, and standards employed by the NLRB. In those decisions in which the Seventh Circuit refused to uphold Board practices, procedures, or standards, the court relied primarily on determinations that the Board's conduct was in conflict with established judicial or Board precedent.

The Seventh Circuit relied on judicial precedent to deny enforcement of an NLRB order in Hendricks County Rural Electric v. NLRB.88 In Hendricks County, the Board had determined that a personal secretary was an "employee" within the meaning of the Act89 since she did not assist or act in a confidential capacity to persons who formulate management policy in the field of labor relations.90 The Seventh Circuit rejected the standard employed by the Board and indicated that all confidential secretaries are to be excluded from the coverage of the Act, regardless of any employment nexus with labor relations policies.91

In rejecting the standard employed by the Board, the Seventh Circuit relied extensively on the legislative history of the Taft-Hartley Act92 of 1947 as interpreted by the Supreme Court in NLRB v. Bell Aerospace.93 There, the Supreme Court had confronted the issue of whether buyers in an employer's purchasing department were statutory employees or excluded from the coverage of the Act as managerial em-

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88. 603 F.2d 25 (7th Cir. 1979).
89. Section 2(3) of the Act defines "employee" as follows:
The term 'employee' shall include any employee,. . . 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 . . . .
90. The NLRB has held that confidential employees are excluded from the coverage of the Act, but only if they "assist and act in a confidential capacity to persons who formulate, determine, and effectuate management policies in the field of labor relations." B. F. Goodrich Co., 115 N.L.R.B. 722, 724 (1956).
91. 603 F.2d at 30.
ployees. The Board conceded that the buyers were managerial, but argued that they were covered by the Act, since their jobs were unrelated to the "formulation and implementation of labor relations policies."94

The Supreme Court analyzed the legislative history of that provision of the Taft-Hartley Act which excluded "supervisors" from the coverage of the NLRA.95 Relying on this legislative history, the Bell Aerospace Court concluded that confidential employees were persons "who both the House and the Senate believed were plainly outside the Act."96 Proceeding from the interpretation that confidential employees were excluded from the coverage of the Act, the Court reasoned that managerial employees also should be impliedly excluded.97 The Supreme Court thus held that all managerial employees were excluded from the Act without regard to any nexus between their jobs and labor relations.

In Bell Aerospace, the Supreme Court did not consider whether all secretaries acting in a confidential capacity were to be excluded from the coverage of the Act without regard to a labor relations nexus. In Hendricks County, however, the Seventh Circuit relied on the Bell Aerospace Court's interpretation of the legislative history of the Taft-Hartley Act and determined that all confidential secretaries are excluded from the coverage of the Act.98 The court, therefore, remanded Hendricks County to the NLRB for a redetermination of the personal secretary's confidential status.99

While the conclusion of the Seventh Circuit in Hendricks County may be consonant with the dicta of the Supreme Court in Bell Aerospace, other circuits have reaffirmed the traditional "labor nexus" standard of the Board.100 The appropriate standard for determining

94. Id. at 272.
95. Section 2(11) of the Act provides:
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.
96. 416 U.S. at 283.
97. The Court concluded that "[s]urely Congress could not have supposed that, while 'confidential secretaries' could not be organized, their bosses could be." Id. at 284.
98. Hendricks County Rural Elec. v. NLRB, 603 F.2d 25, 30 (7th Cir. 1979).
99. Id.
100. See Union Oil Co. v. NLRB, 607 F.2d 852 (9th Cir. 1979), which reaffirmed the traditional Board standard under B.F. Goodrich Co., 115 N.L.R.B. 722, 724 (1956), that the employee, to be excluded, must assist in a confidential capacity with respect to labor relations. Accord, NLRB v. Allied Prod. Corp., 548 F.2d 644 (6th Cir. 1977).
confidential employee status, and the resolution of the conflict among the circuits, must therefore await a ruling by the Supreme Court.

The Seventh Circuit again relied on judicial precedent to deny an NLRB order in *Mary Thompson Hospital, Inc. v. NLRB*. 101 In that case, the court harshly criticized the NLRB for what it perceived as the "failure of the Board to adhere to established judicial precedent regarding bargaining unit determination in the health-care industry." 102 The NLRB had determined that a unit of four licensed stationary engineers employed by the hospital was appropriate for purposes of collective bargaining. 103 The hospital refused to bargain with the certified representative of the engineers, and the Board found that this conduct violated section 8(a)(5) of the Act. 104

The court was critical of the Board for continuing to rely upon its traditional "community of interest" standards, 105 developed in the industrial context, to determine proper bargaining units in the health-care industry. 106 The Board was further admonished for its failure to abide by a recent decision of the Third Circuit 107 which had employed similar reasoning to strike down a Board unit determination in the health-care field. 108

In *Midwest Stock Exchange v. NLRB*, 109 the Seventh Circuit again denied enforcement of a Board order, determining in this instance that the NLRB had impermissibly departed from its own precedent. The Exchange had challenged the validity of the NLRB's certification of a union representing all of its full and part-time office and clerical workers, alleging that the union's authorized election observer had engaged

101. 621 F.2d 858 (7th Cir. 1980).
102. The court stated that the Board seemed to ignore precedent from federal appellate courts in favor of its own interpretations of its own decisions. The court warned that such "flagrant disregard of judicial precedent must not continue." *Id* at 864.
104. Section 8(a)(5) of the Act provides that an employer commits an unfair labor practice if he refuses "to bargain collectively with the representatives of his employees, subject to the provisions of section 159(a) of this title." 29 U.S.C. § 158(5) (1976).
105. The Regional Director found that the licensed stationary engineers enjoyed a community of interest separate from other hospital employees because they were separately located, required to be licensed, performed a highly specialized function, and had minimal contact with other employees. 621 F.2d at 863.
106. The Seventh Circuit's specific criticism was directed to the failure of the Board to heed the congressional admonition against the proliferation of bargaining units in the health care field. *See S. REP. NO. 93-766, 93d Cong., 2d Sess., reprinted in [1974] U.S. CODE CONG. & AD. NEWS 3946, 3950.*
107. *St. Vincent's Hospital v. NLRB*, 567 F.2d 588 (3rd Cir. 1977), where the Third Circuit rejected the Board's determination that four licensed boiler operators at a hospital constituted an appropriate separate bargaining unit.
108. 621 F.2d at 862-63.
109. 620 F.2d 629 (7th Cir. 1980).
in unlawful electioneering activity.\textsuperscript{110}

An NLRB hearing officer found that the union’s election observer had engaged in numerous conversations with voters and that one such conversation had lasted for five minutes or longer.\textsuperscript{111} The Board affirmed the findings of the hearing officer that the conversations were innocuous and did not constitute unlawful electioneering.\textsuperscript{112}

The Seventh Circuit noted that judicial review of NLRB determinations regarding the validity of representation elections is limited,\textsuperscript{113} but concluded that the Board’s decision in \textit{Midwest Stock Exchange} was either a misapplication of, or an impermissible departure from, its previously announced policy.\textsuperscript{114} The Board’s previous policy, the Seventh Circuit held, had established a \textit{aper se} rule which required a second election whenever an election observer and a voter engaged in a conversation which lasted five minutes or longer, regardless of the content of the conversation.\textsuperscript{115} The Seventh Circuit, in effect, created a \textit{aper se} rule which the Board itself was unwilling to impose.

The court’s decision in \textit{Midwest Stock Exchange} should be compared to \textit{A & R Transport, Inc. v. NLRB.}\textsuperscript{116} In \textit{A & R Transport}, the Seventh Circuit refused to enforce that portion of a Board order relating to the coercive interrogation of an employee by an employer’s attorney. In preparation for an unfair labor practice hearing that was to be conducted three days later before an administrative law judge, the employer’s attorney, in the presence of its president, interviewed an employee who was expected to be a witness at the hearing. The attorney informed the employee that no reprisals would be taken against him for anything that he might say. However, the attorney failed to inform the employee that he could remain silent without fear of reprisal.\textsuperscript{117}

Although convinced that the omission of such assurances to the

\textsuperscript{110.} \textit{Id.} at 630-31.
\textsuperscript{111.} \textit{Id.} at 631.
\textsuperscript{112.} \textit{Id.} at 632.
\textsuperscript{113.} The Court, citing Celanese Corp. v. NLRB, 291 F.2d 224, 225 (7th Cir. 1961), noted that the Board has “wide discretion” in the initial promulgation of rules and regulations establishing the procedures and safeguards for conducting representation elections. 620 F.2d at 632. \textit{See also} NLRB v. A.J. Tower Co., 329 U.S. 324, 330 (1946).
\textsuperscript{114.} 620 F.2d at 635. In Milchem, Inc. 170 N.L.R.B. 362 (1968), the Board declared that elections would be overturned where representatives of any party to the election engaged in “prolonged” conversations with voters waiting to cast their ballots, regardless of the content of the remarks exchanged. In that case, the Board set aside an election where a union representative had engaged in an estimated five-minute conversation.
\textsuperscript{115.} 620 F.2d at 633-34.
\textsuperscript{116.} 601 F.2d 311 (7th Cir. 1979).
\textsuperscript{117.} \textit{Id.} at 312.
employee by the employer's counsel was "inadvertent and free from unlawful motivation," the ALJ concluded that it rendered the interrogation unlawful because of the Board's previous ruling in *Johnnie's Poultry Co.* In that decision, the Board had set forth certain rules to be observed by an employer in interrogating employees for a legitimate purpose, and declared that failure to strictly adhere to those rules would constitute a *per se* violation of the Act. The Board agreed with the ALJ's application of *Johnnie's Poultry* to the attorney's conduct in *A & R Transport.*

The Seventh Circuit, however, declined to approve the Board's *per se* rule and indicated that it would look to the "totality of the circumstances" surrounding the employee interrogation, including the purpose of the interview, the entire statement made to the employee, and the scope of the questioning. The court concluded that the circumstances presented by the interrogation at issue in *A & R Transport* indicated a lack of coercion and, therefore, it refused to enforce the provisions of the Board's order pertaining thereto.

Relying upon policy considerations, rather than judicial or NLRB precedent, the Seventh Circuit denied enforcement of a Board order in *NLRB v. Gold Standard Enterprises, Inc.* The NLRB determined that Gold Standard had committed various unfair labor practices and ordered it to take "negative" and "affirmative" action to remedy its unlawful conduct. The NLRB petitioned the Seventh Circuit for enforcement of its order in *Gold Standard Enterprises, Inc.* The court denied enforcement of the Board's order, finding that the circumstances presented by the interrogation at issue in *A & R Transport* did not warrant such enforcement.

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118. *Id.*
119. 146 N.L.R.B. 770 (1964), enforcement denied, 344 F.2d 617 (8th Cir. 1965).
120. The Board declared in *Johnnie's Poultry*:
   
   [The employer must communicate to the employee the purpose of the questioning, assure him that no reprisal will take place, and obtain his participation on a voluntary basis; the questioning must occur in a context free from employer hostility to union organization and must not be itself coercive in nature; and the questions must not exceed the necessities of the legitimate purpose of prying into other union matters, eliciting information concerning an employee's subjective state of mind, or otherwise interfering with the statutory rights of employees. When an employer transgresses the boundaries of these safeguards, he loses the benefits of the privilege.

116. *NLRB* at 775 (footnotes omitted).
123. *Id.* Thus, the Seventh Circuit, in *A & R Transport*, refused to enforce a *per se* rule established in *Midwest Stock Exch.*, which the Board was willing to impose.
124. 607 F.2d 1208 (7th Cir. 1979).
126. This is the court's own characterization of the Board's order. The affirmative portions of the order required reinstatement with backpay of the unlawfully discharged employee. The negative portions of the order consisted of generalized language requiring the employer to cease and desist from engaging in future unfair labor practices. 607 F.2d at 1208-09.
enforcement of its order, but withdrew the petition\textsuperscript{127} when Gold Standard voluntarily complied with the affirmative portions of the order.

The NLRB repetitoned the court for enforcement of the negative portions\textsuperscript{128} of its original order against Gold Standard after an administrative law judge found a subsequent unfair labor practice, unrelated to the others, had been committed.\textsuperscript{129} The Seventh Circuit characterized the Board's second application for enforcement of its original order against Gold Standard as an endeavor to have the court place additional pressure on that employer in connection with a subsequent unfair labor practice pending before the Board.\textsuperscript{130} The court noted that while it could readily ascertain whether an employer had complied with an enforced affirmative order, a determination of whether an employer had complied with the negative aspects of the order would have to be referred to a Master to conduct the appropriate evidentiary hearing.\textsuperscript{131} In view of the infirm basis of the merits of the Board's petition, the Seventh Circuit denied enforcement of the Board's order.\textsuperscript{132}

In \textit{Power Systems, Inc. v. NLRB},\textsuperscript{133} the Seventh Circuit declined enforcement of a Board order holding that an employer's civil suit against an employee for harassment did not constitute an unfair labor practice.\textsuperscript{134} The NLRB had determined that the filing of the civil suit against the employee constituted an unfair labor practice and ordered the employer to withdraw the civil action and reimburse the employee.

\textsuperscript{127} The application was dismissed by the court without prejudice. The Board later argued that since the dismissal was "without prejudice," it had an undoubted right to pursue the negative aspects of its original order when further or new unfair labor practices were committed. The Seventh Circuit rejected this argument by noting that the Board had failed to narrow its application to those matters as to which there had not been compliance. \textit{Id.} at 1209-10.

\textsuperscript{128} \textit{See note 127 supra.}

\textsuperscript{129} \textit{NLRB v. Gold Standard Enterprises, Inc., 607 F.2d 1208, 1210 (7th Cir. 1979).}

\textsuperscript{130} \textit{Id.} at 1213.

\textsuperscript{131} In the court's view, referral of the case to a Master would delay resolution of the case. \textit{Id.}

\textsuperscript{132} In effect, the court is placing the burden on the NLRB to develop an evidentiary record in unfair labor practice cases. This is undoubtedly where the burden belongs.

\textsuperscript{133} \textit{Id.} Although unnecessary to its decision, the court devoted a lengthy analysis to the standard of review to be applied to Board decisions which overrule the decision of an Administrative Law Judge. In \textit{dicta}, the court referred approvingly to the distinction urged by Judge Wallace of the Ninth Circuit between the deference the Board owes to the ALJ's "testimonial inferences" (great deference owed—based on witness demeanor) and "derivative inferences" (less deference owed—based on inferences from evidence itself). \textit{Id.} at 1211. \textit{See also} Penasquitos Village Inc. v. NLRB, 565 F.2d 1074 (9th Cir. 1977).

\textsuperscript{134} 601 F.2d 936 (7th Cir. 1979).

\textsuperscript{135} The employee filed a charge with the NLRB alleging, \textit{inter alia}, that the employer's civil suit was a violation of section 8(a)(4) of the NLRA. \textit{Power Systems, Inc., 239 N.L.R.B.} 445, 447 (1978). Section 8(a)(4) of the Act provides in pertinent part that it shall be an unfair labor practice for an employer "to discharge or otherwise discriminate against an employee because he has filed charges or given testimony under this subchapter." 29 U.S.C. \textsection{} 158(a)(4) (1978). \textit{See also} Nash v. Florida Indus. Comm'n, 389 U.S. 235, 238 (1967).
for expenses incurred in his defense. The Board's decision was premised on its finding that the employer had instituted the suit for an improper purpose.

The Seventh Circuit found that the only evidence in the record which supported the Board's finding of improper motivation was the prayer for injunctive relief. The court additionally found that there was substantial evidence to support a finding that the employer had a reasonable basis for its civil suit. The Seventh Circuit's denial of enforcement of the Board's order in *Power Systems* represents a retreat from the expansive protection previously afforded employees seeking recourse to the Board.

**Approval of Board Standards and Procedures**

As the previous cases demonstrate, the Seventh Circuit during its 1979-80 term clearly was dissatisfied with some of the practices, procedures, and standards employed by the NLRB. In other cases, however, the court did approve a variety of Board standards and discretionary practices.

The Seventh Circuit approved an evidentiary ruling of the Board


136. The NLRB has consistently recognized the principle that the filing of a civil lawsuit by an employer or labor organization is not a violation of the Act, so long as the suit is brought in good faith and not in furtherance of an unlawful objective. *See, e.g.*, Clyde Taylor Co., 127 N.L.R.B. 103 (1960); S.E. Nichols Marcy Corp., 229 N.L.R.B. 75 (1977).

In *Power Systems*, the Board found that the employer lacked a reasonable basis for its civil action and, therefore, an improper motive should be inferred. The Board inferred that the suit "had as its purpose the unlawful objective of penalizing Sanford [the employee] for filing a charge with the Board, and thus depriving him of, and discouraging employees from seeking access to the Board's process." 239 N.L.R.B. 445, 449-50 (1978).

137. The court noted that the prayer for injunctive relief was withdrawn upon the employer's filing of an amended complaint. 601 F.2d at 940.

138. The court emphasized the fact that the Board had established special procedures to handle the numerous complaints filed previously by the employee against other employers. The court also noted with approval that *Power Systems* had inquired of the Board whether the contemplated suit would violate the Act. (The answer was not affirmative, although it was inconclusive.) *Id.*

The court chose to ignore the fact that the employee had filed only one other charge with the Board against Power Systems, that being the instant case. *See Power Systems, Inc.*, 239 N.L.R.B. 445, 446 (1978).

139. The Board has consistently given an expansive scope to the protections afforded by section 8(a)(4), thereby confirming the crucial importance of that section to the effective operations of the NLRA. *See, e.g.*, General Nutrition Center, Inc., 221 N.L.R.B. 850 (1975) (section 8(a)(4) protects supervisors as well as employees); Lamar Creamery Co., 115 N.L.R.B. 1113 (1956) (section 8(a)(4) protects job applicants); Howard Mfg. Co., 231 N.L.R.B. 731 (1977) (employer violated section 8(a)(4) by refusing to pay witness fees and mileage allowances to employees it had subpoenaed to appear at a Board hearing). The Supreme Court has approved of the Board's expansive interpretation of section 8(a)(4) of the Act. *See NLRB v. Scrivener, d/b/a AA Electric Co.*, 405 U.S. 117 (1972); *NLRB v. Industrial Union of Marine & Shipbuilding Workers*, 391 U.S. 418 (1968).
in \textit{NLRB v. Local 90, Plasterers and Cement Masons}.\textsuperscript{140} In that case, the Board had ruled that illegally obtained recorded phone conversations were admissible in an unfair labor practice proceeding.\textsuperscript{141} The court noted that although the evidence was obtained in violation of the Illinois eavesdropping statute,\textsuperscript{142} it is admissible in a federal administrative proceeding, such as a Board hearing, because federal law, not state law, governs admission of evidence.\textsuperscript{143}

In \textit{NLRB v. Pan Scape Corp.},\textsuperscript{144} the Seventh Circuit upheld the denial of a continuance by an administrative law judge. In that case, the notice of hearing sent to the company specified that the hearing was to be held on a specified date and "consecutive days thereafter until concluded."\textsuperscript{145} The hearing did not begin as scheduled on the specified date because of the absence of the ALJ.\textsuperscript{146} The ALJ commenced the hearing the following day and denied the request for a continuance presented by the company's counsel. The Seventh Circuit affirmed the ALJ's decision, noting that the grant or denial of a continuance is within his discretion and will not be overturned absent a clear showing of abuse.\textsuperscript{147} The court concluded that the denial of the continuance in \textit{Pan Scape Corp.} was a reasonable exercise of the ALJ's discretion.\textsuperscript{148}

In a different context, the Seventh Circuit, in \textit{George Ryan Co. v. NLRB},\textsuperscript{149} again affirmed the reasonableness of the Board's exercise of its procedural discretion. In \textit{George Ryan}, the NLRB had approved an informal post-complaint settlement agreement\textsuperscript{150} over the objections of

\textsuperscript{140} 606 F.2d 189 (7th Cir. 1979).
\textsuperscript{141}  Id. at 191.
\textsuperscript{142} The recorded telephone conversations admitted by the Board into evidence were obtained in violation of ILL. REV. STAT. ch. 38, § 14-2(a) (1978). The unfair labor practice involved a section 8(b)(1)(A) charge. \textit{See} 29 U.S.C. § 158(b)(1)(A) (1976). The nature of the unfair labor practice involved would appear, however, to be irrelevant to the holding of the case.
\textsuperscript{143} 606 F.2d at 192. The court also indicated that this case did not raise a strong labor policy requiring exclusion of taped conversations. \textit{Id.} at 192 n.2. \textit{Cf.} Carpenter Sprinkler Corp., 238 N.L.R.B. 974 (1978) (tapes of collective bargaining negotiations excluded).
\textsuperscript{144} 607 F.2d 198 (7th Cir. 1979).
\textsuperscript{145} \textit{Id.} at 199.
\textsuperscript{146} Although the ALJ did arrive on the specified date, the company's officers, who were to serve as witnesses at the hearing, and its counsel had already departed. \textit{Id.} at 199-200.
\textsuperscript{147} \textit{Id.} at 201.
\textsuperscript{148} The court concluded that what "precluded" the company from presenting its witnesses at the hearing was not the denial of the continuance by the ALJ, but rather the affirmative decision of the company not to participate in the proceedings. The court also indicated that the company had received adequate notice because the notice of the original hearing had related that the proceedings would continue for "all consecutive days thereafter until completed." \textit{Id.}
\textsuperscript{149} 609 F.2d 1249 (7th Cir. 1979).
\textsuperscript{150} The complaints alleged that a union had violated § 8(b)(1)(A), 8(b)(4)(i) and (ii)(B), and 8(e) of the NLRA, 29 U.S.C. § 158(b)(1)(A), 4(i) & (ii)(B), (e) (1976). Those subsections of § 8 make it an unfair labor practice for a union (1) to coerce employees in the exercise of their § 7 rights, including the right to refrain from union activities, (2) to engage in secondary activity, or
the charging parties. The Seventh Circuit held that the Board's summary denial of the charging parties' appeal was not an abuse of procedural discretion, because the substantive contentions on which the request was based did not involve questions of Board discretion, but questions of statutory construction which had already been decided by the courts. The court acknowledged that its position conflicted with that of four other circuits.

The representation proceedings of the NLRB were examined in Chicago Truck Drivers, Helpers, & Warehouse Workers v. NLRB. In that case, the Board had dismissed the representation petition of a union after determining that the employer involved was subject to the jurisdiction of the National Mediation Board pursuant to the Railway Labor Act. The union filed suit in the district court seeking an order to compel the Board to conduct an election.

The Seventh Circuit noted that NLRB decisions regarding certification proceedings are not generally reviewable in the courts. The
union argued that the NLRB's decision not to exercise jurisdiction fell within the exception to this proposition established by the Supreme Court when it held that representational decisions were reviewable where the NLRB had acted in contravention of an express statutory mandate. The Seventh Circuit in *Chicago Truck Drivers* was unable to conclude that the NLRB disregarded a clear, specific statutory directive and, therefore, affirmed the district court's dismissal of the action for lack of subject-matter jurisdiction.

In *In re Shippers Interstate Service, Inc.* the Seventh Circuit confronted the issue of whether the filing of bankruptcy proceedings operated as an automatic stay of NLRB unfair labor practice proceedings against the debtor corporation. The court held that where the assets of the estate are not threatened and the company is being reorganized rather than liquidated, the filing of a bankruptcy proceeding does not operate as an automatic stay on the proceedings of the Board. The court indicated that a stay could be imposed on a discretionary basis where a proper showing was made that the regulatory proceedings threatened the estate assets. The court's decision avoided providing an instantly available, cheap and easy sanctuary from all federal regulatory proceedings.

**Other Seventh Circuit Labor Law Cases In Brief**

The Seventh Circuit rendered decisions in three other areas of labor law during the 1979-80 term which merit brief comment. These cases involved the duty to bargain in good faith, sympathy strikes, and employee protected activity.


158. *Chicago Truck Drivers* v. NLRB, 599 F.2d 816, 820 (7th Cir. 1979). The court did not reach a decision on the ultimate merits of the union's contention that the employer was subject to the NLRA. The court's decision was based on a finding that the NLRB did not ignore a specific statutory directive in declining to conduct the representation election. *Id.*

159. 618 F.2d 9 (7th Cir. 1980).

160. The corporation in the case had filed for bankruptcy under Chapter XI of the Bankruptcy Act of 1898. 11 U.S.C. § 701 (1978). Bankruptcy Rule 11-14 provides in part that a petition filed under Chapter XI shall operate as a stay of the commencement or the continuation of any court or other proceedings against the debtor. As the court noted, the issue raised by this case will soon become moot, inasmuch as the Bankruptcy Act of 1978 will apply to cases filed on or after October 1, 1979. 618 F.2d at 10.

161. *Id.* at 13.

162. *Id.*
Duty to Bargain

The National Labor Relations Act, as amended, provides that it shall be an unfair labor practice for an employer to "refuse to bargain collectively with the representatives of his employees." Collective bargaining is defined as "the performance of the mutual obligation of the employer and the representative of the employees to meet at reasonable times and confer in good faith with respect to wages, hours, and other terms and conditions of employment." These provisions obligate the employer and employees' representative to bargain with each other in good faith with respect to "wages, hours and other terms and conditions of employment."

The Seventh Circuit upheld an NLRB determination that an employer had engaged in bad-faith bargaining in *NLRB v. Wright Motors, Inc.* The court recognized that it is sometimes difficult to distinguish bad-faith bargaining from hard bargaining, but concluded that the employer's insistence on unreasonable provisions was designed to avoid negotiation on economic issues and to ensure that no bargain be reached.

In two other cases involving an employer charged with refusal to bargain, the Seventh Circuit considered the parameters of mandatory subjects of collective bargaining. The issue before the court in *Keystone*

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166. 603 F.2d 604 (7th Cir. 1979).
167. The court recognized that sometimes, especially if the parties are sophisticated, the only indicia of bad faith may be the proposals advanced and adhered to. *Id.* at 609-10. The court quoted the opinion of the ALJ setting forth the unreasonable provisions insisted upon by the employer:

An "open shop" was guaranteed, limiting the Union's right to secure members and check off authorizations to pay for the costs of union representation. A lengthy management rights clause, not subject to the grievance procedure, gave the Company exclusive control over hours, work rules, and production, and authorized the Company to subcontract, curtail or shut down its business completely without regard to the effect on employment. An extraordinary no strike-no lockout clause required the Union to fine "any employee" who engaged in a prohibited work interruption, granted the Company the right to seek an injunction and damages against the Union without arbitrating the claim, made the Union, "its officers, agents, and members" liable individually and collectively for damages, required the Union to waive its legal right to remove a suit from a State or Federal court, provided for a $20,000 bond to be forfeited as liquidated damages in the event of a violation of the article (in addition to actual damages), and limited the authority of an Arbitrator in providing a remedy. An article on arbitration provided only for limited and permissive arbitration. Hourly wage rates and promotions would be set at the Company's sole discretion.

*Id.* at 608 n.5.
168. *Id.* at 6.
Steel & Wire v. NLRB\textsuperscript{169} was whether a change in administrators of a company’s hospital, medical, and surgical benefits program is a term and condition of employment subject to mandatory collective bargaining.

The Board had held\textsuperscript{170} that the company’s unilateral change of the administrator of the benefits program was a violation of the Act\textsuperscript{171} because the identity of the administrator “vitaly affected”\textsuperscript{172} terms and conditions of employment. The Seventh Circuit noted that although the judgment of the Board was subject to judicial review, the Board’s determination as to what is a mandatory bargaining subject is entitled to considerable deference.\textsuperscript{173} The court, however, expressed doubt that the Board had applied the proper standard and reasoned that the “vitaly affects” test was inapplicable because the identity of the administrator was “an aspect of the relationship” between the company and its employees, without a third-party interest being directly implicated.\textsuperscript{174} The Seventh Circuit adopted a case-by-case approach and employed the legal test of material or significant effect, or impact, upon a term or condition of employment to determine if a change in program administrators was a mandatory subject of collective bargaining.\textsuperscript{175} Finding

\textsuperscript{169} 606 F.2d 171 (7th Cir. 1979).
\textsuperscript{170} See Keystone Steel & Wire, 237 N.L.R.B. 763 (1978).
\textsuperscript{171} The Board determined that the change of administrators violated 29 U.S.C. §§ 158 (a)(5), 158 (d)(3) (1976). \textit{Id}. at 768.
\textsuperscript{172} 606 F.2d at 175-76. The Board argued that language of the Supreme Court in Allied Chemical & Alkali Workers Local I v. Pittsburgh Plate Glass Co., 404 U.S. 157, 179 (1971) determined the applicable text for selecting subject matters for mandatory bargaining. The Supreme Court had stated:

We agree with the Board that the principle of \textit{Oliver} [Local 24, International Bhd. of Teamsters v. Oliver, 358 U.S. 283 (1959)] and \textit{Fibreboard} [Fibreboard Paper Products Corp. v. NLRB, 379 U.S. 203, (1964)] is relevant here; in each case the question is not whether the third party concern is antagonistic to or compatible with the interests of the bargaining-unit employees, but whether it vitally affects the terms and conditions of their employment.

\textsuperscript{173} 606 F.2d at 176. The Seventh Circuit noted that the Supreme Court had recently observed that the legislative history evidenced a congressional desire to delegate to the NLRB the primary responsibility for selecting the subject matters for collective bargaining. \textit{Id}. at 176 n.6, \textit{citing} Ford Motor Corp. v. NLRB, 441 U.S. 488, 496-97 (1979).

\textsuperscript{174} \textit{Id}. at 177, \textit{quoting} Ford Motor Co. v. NLRB, 441 U.S. 488, 501 (1979), where the Supreme Court stated:

\textit{Pittsburgh Plate Glass} . . . made it clear that while § 8(d) normally reached “only issues that settle an aspect of the relationship between the employer and employees . . . matters involving individuals outside the employment relationship . . . are not wholly excluded.” . . . In such instances, as in \textit{Teamsters Union v. Oliver} . . . and \textit{Fibreboard Corp. v. NLRB}, . . . the test is not whether the “third-party concern is antagonistic to or compatible with the interests of bargaining-unit employees, but whether it vitally affects the ‘terms and conditions’ of their employment.” . . . Here, however, the matter of in-plant food prices and services is an aspect of the relationship between Ford and its own employees. No third-party interest is directly implicated, and the standard of \textit{Pittsburgh Plate Glass} has no application. (citations omitted).

\textsuperscript{175} \textit{Id}. at 178.
that the change in administrators met this test,\textsuperscript{176} the court upheld the Board's position.

In \textit{Davis v. NLRB},\textsuperscript{177} the Seventh Circuit considered whether an employer's economically motivated decision to close a full-service restaurant and to reopen the facility five days later as a self-service cafeteria was a subject of mandatory collective bargaining. The traditional position of the Board has been that in all circumstances, except where an employer has decided "to eliminate itself as an employer," or completely shuts down a "discrete line of business," the decision to terminate a portion of the business is a mandatory subject of bargaining.\textsuperscript{178} The Board accordingly found that the employer's change in the nature of the restaurant's operation was a mandatory subject of collective bargaining.\textsuperscript{179}

The Seventh Circuit employed the four-pronged analytical approach set forth in the Supreme Court's decision in \textit{Fibreboard Paper Products Corp. v. NLRB}\textsuperscript{180} to determine whether the employer's change in operations was a mandatory subject of collective bargaining. At the outset, the court reasoned that the closing of the full-service restaurant and the reopening of a self-service cafeteria is a "condition of employment" for purposes of the Act, because such a decision leads to the termination of at least some employees.\textsuperscript{181} Second, the court determined that bargaining over such a change in operation would promote a basic purpose of the Act.\textsuperscript{182} Third, the court found that requiring the employer to bargain in the circumstances of this case would not significantly abridge his freedom to run his business.\textsuperscript{183} Finally, the court considered the interest of the employees in bargaining over the change in operations and found that interest to be substantial.\textsuperscript{184} The Seventh Circuit, therefore, concluded that the conversion of the restaurant to

\textsuperscript{176} The court enumerated six changes which affected the benefits, coverage, and administration of the benefits plan due to the change in administrators, but placed special emphasis on the loss of a labor consultant to assist with claim problems. \textit{Id.} at 179.

\textsuperscript{177} 617 F.2d 1264 (7th Cir. 1979).


\textsuperscript{179} \textit{Holiday Inn of Benton}, 237 N.L.R.B. 1042 (1978).

\textsuperscript{180} 379 U.S. 203 (1964). (The Supreme Court held it was a refusal to bargain in violation of the Act when the employer, in an attempt to cut labor costs, subcontracted the work his employees had previously performed without first negotiating with the collective bargaining unit.)

\textsuperscript{181} \textit{Davis v. NLRB}, 617 F.2d 1264, 1268 (7th Cir. 1980).

\textsuperscript{182} Bargaining, the court stated, would "encourage the peaceful settlement by the parties themselves of labor disputes." \textit{Id.} at 1268-69.

\textsuperscript{183} The court emphasized the fact that the change in operations did not involve a major capital investment or disinvestment. \textit{Id.} at 1269.

\textsuperscript{184} \textit{Id.} at 1270.
the cafeteria was a mandatory bargaining subject.\textsuperscript{185}

\textit{Sympathy Strikes}

While the Norris-La Guardia Act\textsuperscript{186} deprived the federal courts of the power to enjoin strikes, section 301(a) of the Taft-Hartley Act\textsuperscript{187} gave them the power to enforce collective bargaining agreements.\textsuperscript{188} The Supreme Court has indicated some willingness to enjoin strikes where the applicable collective bargaining agreement contains mandatory arbitration and no-strike clauses. In \textit{Boys Markets, Inc. v. Retail Clerks Union, Local 770},\textsuperscript{189} the Supreme Court held that federal courts may specifically enforce arbitration clauses by enjoining strikes; but in \textit{Buffalo Forge Co. v. United Steelworkers},\textsuperscript{190} the Supreme Court refused to extend \textit{Boys Markets} to allow injunctions against sympathy strikes not based on an arbitrable issue.

In \textit{Design & Manufacturing Corp. v. UAW},\textsuperscript{191} the Seventh Circuit ruled that a sympathy strike could not be enjoined pending arbitration of the issue of whether the strike itself violated the no-strike clause of an applicable collective bargaining agreement.\textsuperscript{192} The Seventh Circuit found that the case was directly controlled by \textit{Buffalo Forge}, and that an injunction against the strike would constitute an "unwarranted judicial intrusion into the merits of the controversy."\textsuperscript{193} The Seventh Circuit's decision is consistent with the broad statutory prohibition which prevents a federal court from enjoining strikes in a labor dispute.

In \textit{W-I Canteen Service, Inc. v. NLRB},\textsuperscript{194} the court considered the legality of a sympathy strike in the context of an unfair labor practice proceeding. The NLRB had determined that an employer's discharge

\begin{itemize}
\item \textsuperscript{185} Id.
\item \textsuperscript{186} 29 U.S.C. §§ 101-115 (1976).
\item \textsuperscript{187} 29 U.S.C. § 185(a) (1976).
\item \textsuperscript{188} These two provisions of federal labor law have presented the courts with conflicting congressional directives. On the one hand, federal courts are directed to uphold collective bargaining agreements, many of which contain no-strike clauses. If a union strikes in breach of such an agreement, the only method available to the federal courts to enforce the contract is an injunction against the strike. On the other hand, the broad proscriptions of the Norris-La Guardia Act direct the federal courts to refrain from interfering in labor disputes through the issuance of injunctions. The Supreme Court has recognized this inherent conflict in federal labor policy, and has indicated some willingness to enjoin strikes where the applicable collective bargaining agreement contains mandatory arbitration and no-strike clauses.
\item \textsuperscript{189} 398 U.S. 235 (1970).
\item \textsuperscript{190} 428 U.S. 397 (1976).
\item \textsuperscript{191} 608 F.2d 767 (7th Cir. 1979), cert. denied, 100 S. Ct. 2158 (1980).
\item \textsuperscript{192} Id. at 770.
\item \textsuperscript{193} Id. at 769, citing Zeigler Coal Co. v. UAW, Local 1870, 566 F.2d 582, 584 (7th Cir. 1977), cert. denied, 436 U.S. 912 (1978).
\item \textsuperscript{194} 606 F.2d 738 (7th Cir. 1979).
\end{itemize}
of several employees for engaging in a sympathy strike was a violation of the Act. The issue before the court was whether the employees had waived their right to engage in sympathy strikes through clear and unambiguous provisions of the collective bargaining agreement.

The Seventh Circuit examined the no-strike clause of the applicable collective bargaining agreement and concluded that not only was there no implied exclusion of sympathy strikes, but that in fact the union had affirmatively waived the right to engage in sympathy strikes. The court also examined extrinsic evidence, relating primarily to bargaining history, to determine if the parties intended the no-strike provision to constitute a waiver and concluded that the parties did so intend. Finding the discharges to be lawful, the Seventh Circuit reversed the Board’s decision.

A waiver of the right to strike should be in clear and unmistakable language. The general language of the no-strike provision in \textit{W-I Canteen} is considerably less than that. Absent a clear and unmistakable waiver, the right to participate in a sympathy strike is an employee right guaranteed by law. The court’s decision in \textit{W-I Canteen} fails to adequately protect that right.

\textbf{Employee Protected Activity}

In the Wagner Act of 1935, Congress announced that concerted


196. The no-strike language reads (Art. XVII): “The Company and the Union agree that there will be no strike . . . so long as the Company and Union . . . submit to arbitration any differences which may arise which are not covered by this Agreement.” 606 F.2d at 740.

197. \textit{Id.} at 744.

198. \textit{Id.} at 746.


201. \textit{See note} 197 \textit{supra}. The Board has held that similar (or even more explicit) no-strike language is not as clear as it might seem to be, and that implied in any such undertaking is an unspoken but real limitation, namely that the duty to refrain from striking is no broader than the terms of the grievance and arbitration machinery which is also contained in the contract. This view finds support in various court decisions. \textit{See Island Creek Coal Co. v. United Mine Workers,} 507 F.2d 650 (3d Cir. 1975); Gateway Coal Co. v. United Mine Workers, 414 U.S. 368 (1974); Parade Publications, Inc. v. Philadelphia Mailers Local 14, 459 F.2d 369 (3d Cir. 1972).


employee activity was to be affirmatively protected as a means of promoting some measure of equality of bargaining power between employee groups and management. The catalogue of protected activities is set forth in section 7: "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..."204 to which was added in the Taft-Hartley amendments205 of 1947 "the right to refrain from any or all of such activities. ..."206

Employers were forbidden under section 8(a)(1) "to interfere with, restrain, or coerce employees in the exercise of the right" to engage in such concerted activities.207 An employer is free, however, to discharge or otherwise discipline an employee, consistently with the Act, for engaging in activity which is not protected by section 7. Whether employee activity falls within or without the shelter of section 7 is thus a definitional issue of utmost importance in the administration of the Act.

The protection of section 7 rights is most clearly invoked in those cases dealing with employees who are engaged in union solicitation, organization or bargaining. The Seventh Circuit confronted such a case in Chicago Magnesium Castings Co. v. NLRB.208 The company involved in that case had laid off the union's shop steward for the day on which a grievance meeting was scheduled. Without the steward's knowledge, the company had also arranged for a stewardship election to be conducted while the grievance meeting was being held.209 The union refused to recognize the validity of the stewardship election and, as a result, the company refused to continue to process grievances. The company claimed to have laid off the steward for failure to meet production standards.210

The NLRB determined that the company's involvement in the shop steward election and the lay-off of the shop steward constituted

207. 29 U.S.C. § 158(a)(1) (1976). The discharge or discipline of an employee which is so motivated will also (at least in cases where a union is being organized or is already on the scene) violate section 8(a)(3), which forbids an employer "by discrimination in regard to hire or tenure of employment... to encourage or discourage membership in any labor organization." 29 U.S.C. § 158(a)(3) (1976).
208. 612 F.2d 1028 (7th Cir. 1980).
209. Id. at 1031-32.
210. Id. at 1034-35.
violations of the Act.211 The company contended that it had "lawful reasons" for the lay-off and that its conduct in doing so was, therefore, not violative of the Act.212 The court rejected this contention, noting that in the Seventh Circuit "the presence of valid grounds for an employee's discharge does not legalize a dismissal which was nevertheless due to a desire to discourage union activity."213 The remedial order of the Board was therefore enforced.

In Chicago Magnesium Castings Co., the Seventh Circuit dealt with the type of employee activity which is clearly protected by section 7.214 When the employee involved is not a union official engaged in protected union conduct, the task of delineating the scope of the protection afforded by section 7 becomes more difficult.215

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211. The Board determined, inter alia, that the company’s conduct violated §§ 8 (a)(1) and (3) of the NLRA, 29 U.S.C. § 158(a)(1) and (3) (1976). The Board ordered the company to reinstate the steward with backpay, and to cease and desist from interfering in employee protected activity. Chicago Magnesium Castings Co., 240 N.L.R.B. No. 57 (1979).

212. The company contended that the lay-off of the steward was the result of his failure to meet production standards. Chicago Magnesium Castings Co. v. NLRB, 612 F.2d 1028, 1033-34 (7th Cir. 1980).

213. Id. at 1034, citing Borek Motor Sales, Inc. v. NLRB, 425 F.2d 677, 680 (7th Cir. 1970), cert. denied, 400 U.S 823 (1970); Satra Belarus, Inc. v. NLRB, 568 F.2d 545, 548 (7th Cir. 1978).

214. It is well established that the prosecution of employee grievances is protected by section 7 of the Act. NLRB v. Ben Pekin Corp., 452 F.2d 205, 206 (7th Cir. 1971). When union officials pursue such complaints, they are engaged in protected union activity. Glenroy Constr. Co. v. NLRB, 527 F.2d 465, 468 (7th Cir. 1975).

215. The source of this difficulty often lies in proof of causation. That is, was the employee discharged or otherwise disciplined because of the exercise of his/her section 7 rights, or because of some other legitimate and lawful reason? The further removed an employee is from union activity, the more difficult it becomes to prove that the employer's actions were motivated by an unlawful purpose (i.e., to discourage the exercise of section 7 rights).

In Chicago Magnesium Castings Co., for example, it was undisputed that the steward who was laid off had failed to meet the company's production standards (although there was a dispute as to whether the company had ever informed that employee of the existence of such standards, or given him an adequate opportunity to meet them). Absent discriminatory purpose, the steward's lay-off might not have entailed any violation of the Act (the lawfulness of such a lay-off would also depend on other factors, for example, the terms of the applicable collective bargaining agreement). However, because of the steward's active involvement in union affairs, there was little difficulty in presenting sufficient circumstantial evidence to the Board and the court to establish that the lay-off was discriminatorily motivated. As an employee's relationship to the union becomes more attenuated, it becomes more difficult to establish that his/her involvement in union or other protected activity was a motivating factor in the employer's actions.

An employer's decision to discharge or discipline an employee may be influenced by myriad factors. To what extent must the employer's decision be motivated by considerations of the employee's involvement in protected activity, before such a decision becomes a violation of the Act? It is clear on the face of the statutory text, see 29 USC § 158(a)(1) (1976), that it is unlawful for an employer to discharge or discipline an employee solely because he has engaged in activities protected by section 7.

Some circuits apply a "but for" standard. If an employer has established a good reason for a discharge, the discharge does not violate the Act unless the employer's action would not have been taken "but for" the improper motivation. NLRB v. Eastern Smelting & Refining Corp., 598 F.2d 666, 673 (1st Cir. 1979). Accord, Stein Seal Co. v. NLRB, 605 F.2d 703 (3rd Cir. 1979). The
In *Nacker Packing Co. v. NLRB*\(^{216}\) the court confronted a case in which the NLRB had determined that the company unlawfully harassed and discriminated against an employee through a program of written and oral warnings and several suspensions. The Board had summarily affirmed the decision of an Administrative Law Judge that the company’s warnings to, and suspensions of, a certain employee were motivated by that employee’s involvement in activity protected by section 7.\(^{217}\)

The Seventh Circuit reviewed the record in *Nacker Packing Co.* and found that the program of oral and written warnings was unlawfully motivated, but that the suspensions were premised on the employee’s “substandard production performance, his unresponsive work attitude, and his insubordination.”\(^{218}\) The court noted that while a written warning system had been in force since 1962, only one such warning had been given to the employee prior to his participation in an
Since his reinstatement following the strike, the employee had received six written warnings and numerous oral admonitions. Although unimpressed by this evidence, the court deferred to the determination of the Board that the increase in the number of warnings was discriminatorily motivated.

The Seventh Circuit refused, however, to accept the Board's determination that an unlawful motive had similarly tainted the company's decision in regard to the suspensions of the employee. In part, the court based its rejection of the Board's determination on the failure of the ALJ to sufficiently credit the proffered testimony of other company employees to the effect that the suspensions were not discriminatorily motivated, but were instead due to the employee's lack of production.

In *NLRB v. Campbell "66" Express, Inc.* the Seventh Circuit overruled a determination of the Board that the company had unlawfully discharged an employee for engaging in activity protected by section 7. The record before the court contained numerous indications that the company had just cause to discharge the employee, and the court noted that the employee's only union activities consisted of filing two grievances.

The administrative law judge who originally heard the case had

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219. *Id.* at 461-62.

220. In noting the disparity in the treatment accorded the employee who had engaged in the strike activity, as compared to other members of the company's production department, the court said:

Other production employees who were told during the several months prior to Rekow's [the employee who had engaged in the strike] reinstatement that their production was too slow were not given written warnings. Additionally, the record supports the conclusion that Rekow was particularly carefully watched by the Company's supervisors from the time of his reinstatement. Not only was this unique supervision system applied only to Rekow upon his reinstatement but other evidence supports the conclusion that the system was applied in less than even-handed manner. *Id.* at 460.

221. The court adhered to its previously enunciated standard, whereby the suspension or discipline of an employee, if motivated even in part by a desire to discourage protected activity, is action violative of the Act. *Id.* at 463.

222. *Id.* To further bolster its determination that the first suspension was properly motivated, the court pointed to the employee's "failure to follow company instructions" with respect to a work assignment, and concluded that the company was motivated by "legitimate production and disciplinary concerns." *Id.* at 464. The court indicated that the second suspension followed an act of insubordination by the employee. According to the court, the ALJ determined that the employee, upon being told to increase his production, had told his supervisor to work faster himself. *Id.* at 464 n.8. In the court's view, the company's action in suspending the employee was, therefore, motivated by justifiable cause. *Id.* at 464.

223. 609 F.2d 312 (7th Cir. 1979).

224. The record indicated, *inter alia*, that the employee had falsified his job application, stole "time" and parts from the company, and failed to report to work on several occasions. *Id.* at 313.

225. *Id.*
determined that a motivating factor behind the company's discharge of the employee was the filing of the grievances. The Board affirmed that decision. The Seventh Circuit, however, was unconvinced and concluded that the Board had failed to demonstrate "an affirmative and persuasive reason why the employer rejected the good cause and chose the bad one." The court ignored the fact that the company made no effort to discharge the employee prior to his filing of a grievance, despite having just cause to do so. While the court focused on the em-


It is axiomatic that punishment of an employee for attempting to file a grievance is interference with protected activity prohibited by section 8(a)(1). Greencastle Mfg. Co., 234 N.L.R.B. 272 (1978); Clara Barton Terrace Convalescent Center, 225 N.L.R.B. 1028 (1976). Complaints of this nature are concerted because they involve the implementation and enforcement of a labor agreement which is an "extension of the concerted activity giving rise to that agreement" which section 7 of the Act guarantees. Bunney Bros. Constr. Co., 139 N.L.R.B. 1516, 1519 (1962). This is so even though the complaint may be unmeritorious and is asserted by a probationary employee. See Interboro Contractors, Inc., 157 N.L.R.B. 1295, 1298 (1966), enforced, 388 F.2d 495 (2d Cir. 1967); ARO, Inc., 227 N.L.R.B. 243 (1976).

It is equally well settled that the advancement of a collective grievance is protected activity, even if the grievance in question is not formally stated or does not take place under the auspices of a contractual grievance procedure. NLRB v. Washington Aluminum Co., 370 U.S. 9 (1962); NLRB v. Hoover Design Corp., 402 F.2d 987 (6th Cir. 1968); NLRB v. Walls Mfg. Co., 321 F.2d 753 (D.C. Cir. 1963).

227. 609 F.2d at 313, quoting an opinion of the Fourth Circuit for the appropriate standard of review:

[W]hen an employer demonstrates . . . that it had a good ground for the discharge of an employee apart from any antiunion animus or activity, it is not sufficient to establish a violation of the Act for the Board to declare that the discharge was "pretextual." . . . "When good cause for [the] criticism or discharge appears, the burden which is on the Board is not simply to discover some evidence of improper motive, but to find an affirmative and persuasive reason why the employer rejected the good cause and chose a bad one." "Were the rule otherwise, any employee who had been guilty of conduct warranting discharge could protect himself by openly engaging in Union activities, and run for luck . . . ."

Firestone Tire & Rubber Co. v. NLRB, 539 F.2d 1335, 1337 (4th Cir. 1976) (citations and footnotes omitted).

The Fourth Circuit's standard places an additional and undesirable burden upon the Board by requiring it "to find an affirmative and persuasive reason why the employer rejected the good cause and chose a bad one." Such a requirement is undesirable because it assumes that the employer was motivated by a single cause, either a "good" or "bad" one. In many instances, an employer is motivated by numerous factors. The employer may not have chosen a "bad" cause, but if such a cause played any part in the decision to discharge or discipline an employee, a violation of the Act has occurred. See note 215 supra. The fulfillment of section 7 guarantees demands no less.

Fortunately, the court's use of the Fourth Circuit standard in this case appears to be an aberration. In both Nacker Packing Co. v. NLRB and Chicago Magnesium Castings Co. v. NLRB, which were decided after Campbell "66" Express, Inc., the Seventh Circuit reverted to its traditional standard whereby an employer's discharge or discipline of an employee is unlawful if motivated, even in part, by a desire to discourage protected activity.

228. Despite the employee's absences from work, and probable theft of "time" and parts, no effort was made to obtain his discharge until after he filed a grievance against the company. The investigation of the employee's falsified job application was undertaken after, and motivated by, the employee's filing of a grievance.

Before the ALJ, the Company's representative conceded that he considered the employee's
ployee's falsified job application, it failed to consider the employer's motivation in undertaking the investigation which eventually established falsification of the application as a lawful reason for the employee's discharge.\(^{229}\)

If the company's investigation was instigated for the purpose of finding a pretext to terminate the employee because he had exercised his section 7 right to file grievances, the employee's discharge was unlawful.\(^{230}\) The right of an employee to file grievances, regardless of whether or not they are meritorious, must be protected. The Seventh Circuit should have examined the employer's motivation more closely in *Campbell “66” Express*.

**Conclusion**

The Seventh Circuit's recent decision in *Bliznik v. International Harvester Co.* may provide a useful analytical tool in defining the parameters of a labor organization's duty of fair representation. Although the case lacks precedential value, it illustrates the approach employed by the Seventh Circuit in determining whether a union's duty has been fulfilled. In that respect, *Bliznik* provides guidance not only to labor organizations, but to the other parties (i.e., employers and individual employees) with a stake in defining the scope of the duty of fair representation.

During its 1979-80 term, the Seventh Circuit examined the practices, procedures, and standards employed by the NLRB. The court analyzed the actions of the Board to determine whether they comport with established judicial and Board precedents. The applicability of the NLRA to federally funded day-care centers was examined, with the court concluding that such operations were exempt from the filing of a grievance "the last straw" and began his investigation of the employee's job application after learning the grievance was filed. The ALJ considered this testimony the key to his determination that the discharge was unlawfully motivated. *Campbell “66” Express, Inc.*, 238 N.L.R.B. 953, attached decision of ALJ at p. 18, 25-26 (1978). It is well settled that the court must ordinarily defer to the findings of the ALJ regarding factual issues, particularly when, as here, the credibility of witnesses is critical. NLRB v. Gogin, 575 F.2d 596, 605 (7th Cir. 1978).\(^{229}\) In the court's words: "When Patt [the company's representative] learned that Darnell [the employee] had falsified his job application concerning former employment and heard the totally derogatory reports of his former employers, he had good reason to discharge Darnell." 609 F.2d at 313.

\(^{230}\) The fact that the investigation ultimately resulted in the uncovering of information which could, under other circumstances, provide a legitimate basis for lawful discharge does not resolve the issue. Where the investigation itself was aimed at undermining the employee's section 7 right to file grievances, the subsequent discharge entails a violation of the Act. *See American Motors Corp.*, 214 N.L.R.B. 455 (1974), enforced, 525 F.2d 695 (7th Cir. 1975); *Aro, Inc.*, 227 N.L.R.B. 243 (1976).
coverage of the Act. The Seventh Circuit also considered cases involving the duty to bargain in good faith, sympathy strikes, and employee-protected activity. With some exceptions, the court’s decisions in those cases were consistent with established precedent.