

Employment Law v. Labor Law

Employment Law

The basic pattern of law which deals with employment issues/the employment relationship: worker safety (OSHA), minimum wage, age/race/creed discrimination, Family Medical Leave Act, pension regulation.

Labor Law

The law which governs the relationship between the workforce and their employers, and the interests of employees to have representation (by the union). Union/Management Relations.

Origins of the Labor Movement in America:

When did the Labor Movement start? Possibly with The National Grange of the Order of Patrons of Husbandry (aka “The Grange” a fraternal organization for American farmers that encourages farm families to band together for the common economic and political well-being). There is some evidence of union activity back in Revolutionary era.

Immigrates learned their trade in apprenticeships/guilds. Trade unions, such as the Philadelphia journeymen shoemakers (or cordwainers), seemed like natural spokespersons. These trade unions attempted to put economic pressure on the employers through strikes, boycotts, etc. Employers pressed charges, labeling the union as a criminal conspiracy to create a nuisance, cause violence, to harm an employers business. (see the Philadelphia Cordwainers Case *Commonwealth v. Pullis*). Most of these conspiracy prosecutions were successful until *Commonwealth v. Hunt* which held collective bargaining was a contract worthy of recognition and protection.

But the labor movement really started with the Industrial Revolution. The agricultural economy gave way to the manufacturing economy. Certain elements gave rise to this economic shift towards industrialization:

1. Technology
2. Influx of EE's (employees) – Immigration
3. Raw materials – Coal, ore, lumber, etc out West
4. Transportation – Railroad

This shift in economy from primarily agricultural to industrialization created great wealth disparity between rich entrepreneurs (e.g. Rockefeller, Mellon, Carnegie, etc.) and working class. The working class becomes anonymous to the employer, and the employer may no longer understand the needs of his employees. Workers feel alienated (no direct communication) and powerless (no labor or employment laws). In order to overcome this individual alienation from their ER, the began to talking amongst themselves. It was apparent that they they need a spokesperson to speak with a single voice for all similarly situated EE's.

In 1869, six or seven tailors in Philadelphia came together and formed the Noble Order of Knights of Labor, a secret society. They decide that they need to make significant progressive changes to society visa-vie government including: free public educations, rights for women, government ownership of the railroads and telegraph, taxes on the rich, estate taxes. In 1881 the went public. The reached the zenith of their support in 1886 when they hit 700,000 members. After some unsuccessful strikes and infighting between the craft unions and industrial unions, the Knights of Labor came to an end around 1917.

The American Federation of Labor (AFL) was founded in 1886 at a convention of all the minor craft unions disaffected with the Knights of Labor. Samuel Gompers, a cigar makers from New York (but born in London) was elected the first president who works to create a constitution of laborers. The AFL was not as radical as the Knights of Labor and uninterested in broader social change. Gompers says if you're a member of the AFL, you couldn't be member of any other union (including the Knights of Labor). By 1914 there were two million members in the AFL. The huge growth of the AFL sparks a public debate about workers rights:

1. Church – In the Catholic Church, Pope Leo the 13th (aka as “The Workers Pope”) issues an encyclical called *Rerum Novarum* (latin for “Of New Things”) dictating certain moral obligations of employers as well as obligation of governments to protect workers.
2. Universities – Surprising turnaround in the modern era.
3. Authors: The rise of muckrakers including Upton Sinclair (“The Jungle”), John Spago (“The Bitter Cry of Children”), Edwin Markham.

Like the cordwainers union before them, both the Knights of Labor and the AFL make use of various means to put

economic pressure on their employers including strikes, boycotts, etc. Employers responded by appealing to the courts for **labor injunctions** and through **application of the Sherman Anti-Trust Act**.

The Labor Injunction:

Definitions:

Primary picket: When workers put pressure on their own boss.

Jurisdictional work dispute: Conflicting claims made by two or more different unions to an employer regarding assignment of the work or union representation.

Closed shop: An employer who agrees to only hire union members, and employees must remain members of the union at all times in order to remain employed. THIS IS AN UNLAWFUL VIOLATION OF SEC. 8(B).

Recognitional picketing: A strike implemented by workers in order to put economic pressure on their employer in order to recognize their union.

Vegeahn v. Guntner

167 Mass. 92, 44 N.E. 1077 (1896)

Facts: The union had gone on strike (a recognitional or economic strike) and had set up a picket line in front of their place of employment. This was a primary picket. The trial court found that there was evidence that some of the picketers had made “threats of personal injury or unlawful harm...to persons seeking employment...[though] no actual actual violence was used beyond a technical battery.” The trial court held that while the picket itself was not unlawful, the threats of violence could be enjoined.

Issue: Is it possible to enjoin a union from picketing?

Synopsis of Rule: A strike when instituted for the purpose of interfering with [an employer's business is] a private nuisance. Or, a labor union must pursue lawful ends by lawful means. Here the ends are lawful (the desire to secure higher wages) and the striking itself is a lawful means (consistent with the ruling in *Commonwealth v. Hunt.*), but the picket is unlawful.

Held: “No one can lawfully interfere by force or intimidation to prevent employers or persons from employed or wishing to be employed from the exercise of these rights...Intimidation is not limited to threats of violence or of physical injury to person or property...there also may be a **moral intimidation** which is illegal.” Making employment “unpleasant or intolerable” by means of moral intimidation is unlawful.

Dissent: Oliver Wendall Holmes says that this is an attempt to persuade, a social pressure, and therefore is lawful. If employers can conspire to knock out a competitor (this is before anti-trust) then why not workers? “One of the eternal conflicts out of which life is made up is that between the effort of every man to get the most he can for his services, and that of society, disguised under the name of capital, to get his services for the least possible return. Combination on the one side is patent and powerful. Combination on the other is the necessary and desirable counterpart, if the battle is to be carried on in a fair and equal way” Cox on pg. 22.

With regards to the conspiracy charges, if one worker could do it, how could the combination of workers working collectively be unlawful?

Plant v. Woods

167 Mass. 492, 57 N.E. 1011 (1900)

Facts: An employer has a union in Lafayette, IN but the defendants wanted the workers to be represented by a Baltimore, MD union. This is a jurisdictional work dispute. The defendant's union tried to enlist the employers support in getting the workers in the plaintiffs union to switch membership. They sought to do this by refusing to recognize the IN union members as “union workers” and by asking the ER to enforce a “closed shop.” While they didn't seek to have the IN union workers discharged, they did insinuate that if the EE's did not switch membership, the def. union would strike and picket the employer.

Issue: Is the strikes against the ER who was unable to convince their EE's to switch membership a legitimate means to a legitimate means?

Synopsis of Rule: If a unions means is too remote from a lawful purpose, it is an unlawful interference with worker's right to dispose of their labor free from interference, and thereby enjoined.

Held: No. While the ultimate end may be legitimate (getting workers to join a union) the specific means (putting pressure on an ER to have him pressure his EE's to switch membership) was too "remote". "The purpose of these defendants was to force the plaintiffs to join the defendant association., and to that end they injured the plaintiffs in their business and molested and disturbed them in their efforts to work at their trade." The right to "dispose of one's labor with full freedom [and free from molestation and disturbance]...is a legal right, and is entitled to legal protection"

The majority does however create a justification exception: "...Acts manifestly coercive and intimidating in their nature, which cause damage and injury to the business or property of another, and are done with intent to cause injury, and partly in reliance upon such coercion, are justifiable." Cox on pg. 24

Dissent: Oliver Wendell Holmes (OWH) says that the court must be conceding to OWH's reasoning in *Vegeahn v. Guntner* by saying that primary disputes are justifiable because they are DIRECTLY working for better wages and benefits by adding to their numbers and strengthening themselves.

History of Labor (Continued):

Courts were not the only means that ER's used to break strikes. Often times, violent intimidation was used by the ER as was the case in the Pullman Strike of 1894. The strike in Pullman, IL was one of the bloodiest strikes in American history. In response to the national outrage to the violence, Congress set up the Strike Commission which urges better communication between management and labor in order to avoid strikes. "Strikes would not occur if there was better communication between management and labor as each side obtains a better understanding of the actual state of industry, of the conditions which confront the other side, and of the motives that influence them." "Most strikes and lock outs would not occur if each party understood exactly the position of the other." In 1894, the US government passes the Erdman Act, applying only to railroads, which made it a criminal act for an ER to discharge or threaten to discharge a worker for joining a union. Ten years later, SCOTUS declares Erdman Act unconstitutional because it violated the 5th Amendment because it denied the ER personal liberty and property rights.

Erdman Act: It shall be unlawful for any railroad employer to discharge an EE because they attempted to form a union. Declared unconstitutional by the SCOTUS

Employers also responded by appealing to the courts for labor injunctions and through application of the **Sherman Anti-Trust Act**.

The Sherman Anti-Trust Act:

Loewe v. Lawlor
208 U.S. 274, 28 S.Ct. 301, 52 L.Ed. 488 (1908)

Facts: The defendants, the United Hatters of North America, had organized a primary boycott of certain hat manufacturers who were not unionized as well as a **secondary boycott** of the wholesalers selling any (even a small fraction of total sales) hats from non-unionized manufacturers. Part of the reasoning for organizing a boycott was that organized hat makers would have higher prices (because paid better wages, etc.). Thus, the boycott made sure that non-organized hat makers are economically disadvantaged. The plaintiffs (a wholesaler of some non-union made hats) alleged that this secondary boycott was a violation of the Sherman Anti-Trust Act. The lower court dismisses.

Issue: Does the Sherman Anti-Trust Act apply to unions where they are engaging in a consumer boycott?

Synopsis of Rule: If any group of individuals or businesses concertedly obstructs the free flow of commerce across state lines it shall be deemed a violation of the Sherman Act.

Held: Yes. SCOTUS says the the Sherman Act applied to “ any combination whatever to secure action which essentially obstructs the free flow of commerce between the states or restricts, in that regards, the liberty of a trader to engage in business.” They concluded that there is a narrowing of the market, because the boycott sought to stop all interstate commerce (even if some of the actions were local, must look at the actions as a whole and in aggregate.) To reach this decision SCOTUS noted that Congress considered, but didn't exempt, labor from the purview of the Act.

History of Labor (Continued):

Clayton Anti-Trust Act (Labor's “Charter of Freedom): The courts may not enjoin any combination or conspiracy of workers to put economic pressure on their employer.

In 1912 Congress passed the Clayton Antitrust Act to amends the Sherman Anti-trust Act to exempt labor disputes. Samuel Gompers called this Labor's “charter of freedom,” preventing courts from enjoining labor disputes. However, in *Duplex Printing Press Co. v. Deering*, SCOTUS says that Clayton Act only exempts lawful strikes and boycotts from the Sherman Act, but with regards to unlawful strikes/boycotts the Clayton Act would not apply. **Secondary boycotts** (boycotts of those persons with whom there is not a direct labor dispute) are unlawful.

Woodrow Wilson becomes president in 1913 and in 1917 the US officially enters WWI. Wilson realized that in order to fuel the war effort, he would need a unified, non-confrontational work force. In 1914 Wilson, claiming authority under the the War Powers clause, established the **War Labor Board** which made it unlawful for any ER to refuse recognition of a majority representative of the labor union. Refusal to recognize a union under this presidential order would result in your business being taken over into trusteeship. This went through to 1920's.

In 1932, FDR is elected to address the Great Depression. He runs on the New Deal. He is determined to enact Keynesian economic policies, to infuse money into the economy, such as the WPA and the TVA. In 1932, there is a separate attempt to deal with the Court's hostility to labor concerns. Congress passes the Norris LaGuardia Act which established that courts can't enjoin strikes, putting themselves in line with OWH's vision. They also pass the National Industrial Recovery Act which was subsequently overturned by SCOTUS. FDR threatens to pack the court. The NIRA also established the National Labor Boards.

Norris LaGuardia Act (aka Anti-Injunction Act): Prevented the courts from issuing an injunction in ANY type of dispute (primary, secondary boycott, jurisdictional work dispute.)

After seeing the horrors of the Triangle Shirtwaist Fire, Francis Perkins becomes a labor icon, ultimately leading to her appointment by FDR to be Secretary of Labor. See: “The Woman Behind the New Deal.” Perkins advocates passage of the Wagner Act (named after Senator Wagner from NY), also known as the National Labor Relations Act. Perkins was later subject to impeachment proceedings for failing to deport a labor leader in CA. Dept. of Labor was in charge immigration at the time.

Structure of the Act

Section 7 of the National Labor Relations Act (aka “Wagner Act”)

Section 7 of the National Labor Relations Act (1935) says that workers have the right to:

1. Join, form or assist labor unions. (need not been done concertedly)
2. Bargain collectively through representatives of their own choosing, with regards to wages, hours, terms and conditions of employment.
3. To engage in concerted protected activity for mutual aid and protection.

Preamble to the NLRA:

The denial by some employers of the right of employees to organize and the refusal by some employers to accept

the procedure of collective bargaining lead to strikes and other forms of industrial strife or unrest

The inequality of bargaining power between employees who do not possess full freedom of association or actual liberty of contract and employers who are organized in the corporate or other forms of ownership association substantially burdens and affects the flow of commerce, and tends to aggravate recurrent business depressions, by depressing wage rates and the purchasing power of wage earners in industry and by preventing the stabilization of competitive wage rates and working conditions within and between industries.

NLRA is not neutral. While enforced impartially, the statute is clearly a statement that collective bargaining is a right and inherently social good, will improve the economy by raising wages, preventing strikes and improving communication between EE's and ER's.

Sections of the NLRA that which will be covered in this course:

Sec. 2	Sec. 8
Sec. 3	Sec. 9
Sec. 4	Sec. 10

Section 2 “Definitions”:

Who is an ER under the statute (Sec. 2-2)?

“Any person acting as an agent of an employer, directly or indirectly, but shall not include:

1. the United States (federal), or
2. any wholly owned Government corporation (for example, Fannie Mae, Freddie Mac, Sallie Mae, FDIC, Corporation for Public Broadcasting, Amtrak, Tennessee Valley Authority, etc.)
3. any Federal Reserve Bank
4. any State or political subdivision (including cities, counties, towns or municipalities) thereof, or
5. any person subject to the Railway Labor Act (and the airline industry was included under an amendment to the Act.), or

Under the Railroad Labor Act, there is an presumption that EE's want a union. If a member of the unit does not vote, it is recorded as a yes vote. One must vote affirmative against forming a union for it count as a “no” vote. Additionally, there is no inherent right to strike; there is a statutory cooling off period. President may further order mandatory fact-finding.

6. any labor organization (other than when acting as an employer)

Who is an EE under the statute (Sec. 2-3)?

“Any employee, and shall not be limited to the employees of a particular employer, unless the Act [this subchapter] explicitly states otherwise, and shall include any individual whose work has ceased as a consequence of, or in connection with, any current labor dispute or because of any unfair labor practice, and who has not obtained any other regular and substantially equivalent employment, but shall not include:”

1. Any individual employed as an agricultural laborer, or
2. in the domestic service of any family or person at his home, or
3. any individual employed by his parent or spouse, or
4. any individual having the status of an independent contractor, or
5. any individual employed as a supervisor, or
6. any individual employed by an employer subject to the Railway Labor Act

What is a “labor organization” (Sec. 2-5)?

What is “commerce” (Sec. 2-6, 2-7)?

See NLRB JURISDICTION

Who is a “supervisor” (Sec. 2-11)?

Who is a “professional” employee (Sec. 2-12)?

Who is an “agent” (Sec. 2-13)?

What is a “health care institution” (Sec. 2-14)?

Section 3 “Structure of the National Labor Relations Board (NLRB)”:

<p><u>THE BOARD</u></p> <p>STRUCTURE: Consist of 5 members, 1 chairman (honorary title only) and 4 other members.</p> <p>MEMBERS: All the members of the Board are appointed by the POTUS, with the advice and consent of the Senate. Each member shall serve for five years, with a new member coming up for appointment every year. (As an unwritten rule there are always three members from the majority party and two members from the minority party). Each board member has a number of “law clerks” under them.</p> <p>JURISDICTION: The board review appeals from cases that come before it from regional administrative law judges (ALJs).. There are 48 ALJs now. It is not an Art. 3 court and so the decision of the NLRB are not binding. However if the parties do not comply with the Board's decision, the Board may appeal to the Circuit Court of Appeals for the District in which the administrative law judge resides. And then ultimately to the SCOTUS.</p> <p>REVIEW STANDARD: Appellant standard is not to review de novo but only to determine whether the Agency acted rationaly and if the decision was supported by evidence. Great deference is granted to the Board because of their expertise in the matter.</p>	<p><u>THE GENERAL COUNSEL</u></p> <p>STRUCTURE:Headed by the General Counsel (Presidential appointee) with a 4 year term and starts the day the GC is appointed. Under the GC there are 33 regional offices and 33 regional directors appointed by the GC.</p> <p>REGIONAL DIRECTOR'S REPONSIBILITIES DELEGATED TO THEM BY THE GC”</p> <p>They are delegated by the GC with investigation and prosecution of unfair labor practices (ULP's) which are cover in Section 8, but this is not self initiating. Investigations are initiated by private complaints</p> <p>Field Work for the regional offices includes: Interviewing witnesses, investigating cases, litigate cases and file appeals as needed.</p> <p>REGIONAL DIRECTOR'S REPONSIBILITIES DELEGATED TO THEM BY THE BOARD:</p> <p>They are delegated by the Board with conducting representative elections pursuant to Section 9(a). This is likewise not self initiating, and is only initialized by the filing of a petition. Serve as hearings officer and write the original decisions.</p>
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Additional divisions of the NLRB:

Appeals Division: Every case the the regional director chooses not to issue a complaint on, the only appeal is to the GC office.

Office of Advice: Board's “Think Tank.” Considers novel issues of law and then disseminates it to regional offices.

Special Lit Division: Any special litigation in court, this divisions will represent the agency.

Contempt Branch: Agency will carry out the contempt (send out the U.S. Marshals) and handle arraignments.

Section 8 – ULP's (Unfair Labor Practices)

§8(a) – Employer's Unfair Labor Practices

§8(b) – Unions' Unfair Labor Practices

§8(a): Employers

1. Can't *interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in section 7*
2. Can't *dominate or interfere with the formation or administration of any labor organization or contribute*

- financial or other support to it*
3. Can't *discrimination in regard to hire or tenure of employment or any term or condition of employment to encourage or discourage membership in any labor organization*
 4. Can't *discharge or otherwise discriminate against an employee because he has filed charges* or otherwise invoke the Board's services
 5. Can't *refuse to bargain collectively with the representatives of his employees*

§8(b): Unions

1. Can't *restrain or coerce (A) EE's in their exercise of Section 7 rights or (B) ER's in the selection of their representatives for the purposes of collective bargaining.*

Section 8(b)(1)(A) also confers upon the union a **duty to fairly represent all of its members**. However, the standard of what a Union has to do to satisfy the law is so minimal that it's rare that it is found.

2. Can't cause *ER to discriminate in violation of 8(a)3.*
3. Can't refuse to *bargain collectively in good faith.* The corollary to §8(a)(5) which outlines the ER's duty.
4. This Section comes from the Taft Hartley amendments from 1947
 1. Picketing – **Section 8(b)(4)(B)** the courts can enjoin picketing where the purpose is to put pressure on a secondary ER. Secondary boycotts are unlawful.
 2. Hand-billing – Constitutionally protected free speech which can't be enjoined.
 3. Jurisdictional Work Dispute are enjoinable under Section **8(b)(4)(D)** (Board resolves with a 10K hearing)
 4. Signal picketing (rats, banners, etc.)
 Republican Boards: Hand-billing becomes unprotected when done in conjunction with an inflatable rat because that it signal picketing. Not a single district court agreed; said nothing more than protected free speech.
 Obama Admin: The rat + hand billing not done in an overtly coerce way are protected free speech.
5. **Unlawful Fees:** Union can't charge excessive fees
6. **Feather Bed** – Unlawful for Union to cause employer to pay for work not done.
7. **Recognitional Picketing:** is lawful for reasonable period time (by case law has been found to be 30 days if no recognition petition having been filed.) under Sec. 8(b)(7)(C).

UFL APPEALS: Decision of the ALJ is appealable by which ever side loses.

Section 9(a) - “Representation and Elections”

Representatives designated or selected for the purposes of collective bargaining by the majority [must be a majority, can't be a tie] of the employees in a unit appropriate for such purposes, shall be the exclusive representatives of all the employees in such unit for the purposes of collective bargaining in respect to rates of pay, wages, hours of employment, or other conditions of employment...

NLRB, which has delegated the task to the regional directors of the GC's office, after receiving a representation petition, will determine if:

1. Is it appropriate to run an election at this time?
2. Is there jurisdiction?
3. Is the unit appropriate?
4. Are the EE's petitioning for representation EE's covered by the act?

REPRESENTATION APPEALS: Regional director issues a decision regarding the appropriate bargaining unit, who's eligible to vote, etc. Any appeal must go directly to the Board and there is no automatic right to appeal. You must file a request for review asking for permission to appeal.

Section 10 - “Enforcement”

The enforcement mechanism, including the statute of limitation.

Sec. 10(j): If a UFL is being committed and where the regional director has determined that not seeking an immediate injunctive relief would allow the ultimate remedy to be meaningless, Regional Director ask the GC for authority to petition the District Court for an immediate temporary injunction pending a review by the Board.

NOTE: Decisions of the Board go directly to the Court of Appeals and then to the Supreme Court.

NLRB Jurisdiction

What employers come under the Board's jurisdiction? How can the Federal Government tell a private individual what to do? NLRA is authorized under the Commerce Clause. Must be interstate commerce.

The Board has said that if you're not big enough to come under jurisdiction by means of interstate commerce, the Fed can't regulate you. It has outlined a few jurisdictional guidelines:

1. **A discretionary standard:**
 1. **Retail Concerns:** \$500K gross volume of business
 2. **Non-retail Firms:** All such firms with an annual outflow or inflow, direct or indirect, in excess of \$50K
 3. **Instrumentalities, Links and Channels of Interstate Commerce:** All such entities which derive \$50K or more annually from the interstate portion of their operations.
 4. **Public Utilities:** \$250K
 5. **Newspapers and Communications Systems:** Radio, TV, Telegraph and Telephone: \$100K; Newspapers: \$200K
 6. **National Defense:** All firms having "substantial impact on national defense."
 7. **Proprietary and Nonprofit Hospitals:** \$250K
 8. **Law Firms and Legal Assistance Programs:** \$250K
2. **A legal standard** of the ER being engages in interstate commerce, where retail goods must either be incoming or outgoing in interstate commerce. If discretionary standard is meet, the Board has said only a *de minimis* showing of interstate commerce must be show.

In a representational determination (conducted by the regional director), it can be appeal with permission to the Board. The Board's decision is an interim determination and is not directly appealable to the District Court of Appeals.

In *Catholic Bishop of Chicago v. NLRB* a group of teachers at parochial schools were going to organize. Regional director said that it could unionize and was under the jurisdiction of the NLRB. Decisions of the Board, as to the appropriateness of a bargaining unit are not directly appealable unless the Board were to violate it's own statute (for example, says that a group of supervisors is an appropriate bargaining unit. Therefore, the bishops got to CoA through a §8(a) violation (failure to bargain with recognized union). Ultimately SCOTUS says Board regulation would create a 1st Amendment issue. The D.C. Circuit says that even asking how religious you are is a violation of the 1st Amendment.

TEST: If the ER will be without the jurisdiction of the Board, if:

1. It's purpose is the promulgation/implication of faith
2. With regards to a specifically recognized religion.

The D.C. Circuit's 3 prong test from *University of Great Falls* says that an organization is exempt if:

1. it holds it self out to the students, faculty and community as providing a religious educational environment;
2. is organized as a non-profit; and
3. is affiliated with, or owned, operated, or controlled, directly or indirectly, by a recognized religious organization, or with an entity, membership of which is determined, at least in part, with reference to religion.

Examples:

BOARD DOES HAVE JURISDICTION:	BOARD DOES NOT HAVE JURISDICTION:
Manhattan College St. Vincent's Catholic Medical Center General Religious (i.e. Judeo-Christian)/Non-denominational Theme Park	Parochial Elementary School Parochial Secondary School Sunday School

The Establishment of the Bargaining Relationship

RULES:

Republic Aviation Corp. v. NLRB
324 U.S. 793, 65 S.Ct. 982, 80 L.Ed. 1372 (1945)

Facts: Company had a rule, no solicitation of any kind in the factory or offices. One employee was, on his own time, soliciting coworkers to sign a union card. Employer issues him a warning. Also three employees wearing shop steward buttons. All were fired.

Question Present: Did the company have the right to pass the no solicitation rule? Is it lawful? Does it violate Sec. 8(a)(1)?

Discussion: The Board determine that the discharge for wearing union buttons was discrimination under Sec. 8(a)(3). With regards to the “no solicitation rule,” the employer argues that they have the right to make legitimate rules to protect its business and productivity and for the good order of the work place. Furthermore, the rule makes no distinction between union solicitation and non-union solicitation. Finally, the ER argues that there was no actual **coercion**; no evidence that anyone felt threatened. The union argues that it **infers** and **restrains** Sec. 7 rights in violation of Sec. 8(a)(1).

Holding: While employers can have legitimate rules, rules which are narrow and clearly don't interfere with Sec. 7 rights, they can't have overly broad rules.

SCOTUS also says the Board fairly explicated the rational for finding its judgement and has the right to make presumptions based on its expertise on the subject matter to make presumptions. The Board explained that while there may not be direct evidence of coercion, based on the “reality of the workplace” the Sec. 7 right was infringed upon. **RULE:** You do not need to show actual coercion, if the conduct could **reasonably** be said to interfere with Section 7 rights.

Solicitation v. Distribution

Solicitation: Where one employee is on their break and another employee is working or also on their break. The working employee can still preform their job while listening to the solicitation. The Board says that solicitation by only be prohibited during Work Time.

Distribution: Where one employee on their break engages another employee to stop work to take or read literature. This is more disruptive. Distribution of literature may be limited to both Work Time and Work Hours.

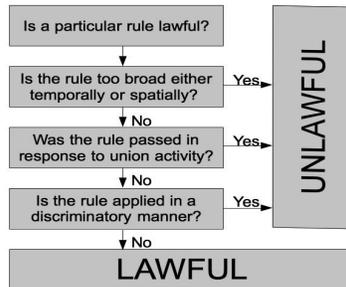
“Lawful Rules” Rule:

Rules may be unlawful under the NLRA if they are either too broad temporally or in terms of area.

<u>Working Time:</u>	<u>Working Hours:</u>
Working time is the time that you're required to work. It does not include lunch hours, breaks, etc. If the rule is limited to work time, it will not be deemed unlawful for reason of being too broad.	Working hours encompasses the entire time that a business is open/operational during the day. If the rule limits solicitation to “working hours” (ex. “There shall be no solicitation from 9AM to 5PM”), it is too broad and therefore unlawful.

<u>Working Areas:</u>	<u>Break Areas:</u>
An ER may lawfully prohibit solicitation in work areas, areas where work is actually being done.	An ER may not prevent solicitation in non-work areas (ex. break rooms, parking lots, etc.)

If a rule, facially lawful, is put in place in response to union activities it is unlawful. If the rule is facially lawful, but discriminatively enforced it is unlawful. (for example allowing the solicitation of Girl Scout cookies while banning union solicitation.)



Other possible contentious rules under Sec. 8(a)(1):

1. Abusive and **profane language** will not be permitted at the work place.

President Clinton's NLRB said in *Flamingo Hilton-Laughlin* 330 N.L.R.B. 287 that language rules were unlawful because it might include union propaganda. The board acknowledged that there are some profane words that come out in the context of collective bargaining that could potentially be violations under this rule. Therefore it might be reasonably understood as encompassing protected conduct and is therefore unlawful.

2. **Harassment** and verbal, mental or physical abuse will not be permitted at the work place.

TEST: In *Martin Luther Memorial Home*, the NLRB said if the rule **explicitly** restricts §7 activity, then unlawful. Otherwise, it is unlawful if:

1. Employee's could reasonably construe that the rule prohibits Sec. 7 activity.
2. The rule is promulgated in response to Sec. 7 activity.
3. The rule has been applied to union activity in the past.

3. An employee may not **loiter** at the workplace or **at any other location owned by the same employer**.

Board has said, an employer can only make a rule limiting the right of EE's to stay after work, if they have a legitimate business reason (such as a hotel which needs to protect the privacy and security of it's customers).

Additionally, according to the Board's decision in *Hillhaven Highland House* 336 N.L.R.B 646, EE's at one location may go to another non-unionized location of the same ER when off duty. An off duty employee has a non-derivative, free standing §7 right, even when trespassing, unless where the employer has a rule, based on a significant/legitimate business justification. The Board admitted that there is a tension between Sec. 7 and property rights of the ER, but inconvenience or even some dislocation of property rights may be necessary to safe guard the rights of EE's to collectively bargain.

4. An employee may not wear any **buttons** at the workplace.

In *Republic Aviation*, ER's say that by permitting people to wear shop steward buttons, you are implicitly signify

and recognizing those persons as the leaders of a union, which you have not in fact recognized. This argument was rejected because people know whether they have a union or not.

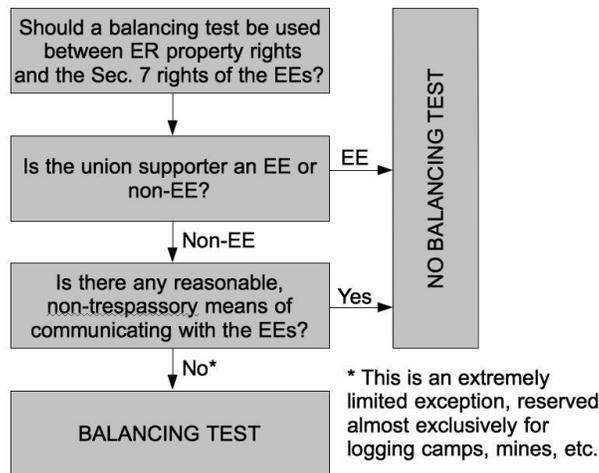
The Board in *Malta Construction* (1982) said that “there is a strong presumption in favor of” protecting EE's right to wear buttons. However, in *Caterpillar Tractor* (230 F.2d 357), the board said as long as the button is inoffensive, but suppositions by employers as to how the buttons will be perceived by customers is not enough to trigger this narrow exception. Also, there are exceptions for buttons on selling floors, where the buttons are visible to the public, especially in restaurants/hospitals. But if you are using the selling floor exception, you must outlaw all buttons, indiscriminately.

Lechmere, Inc. v. National Labor Relations Board
502 U.S. 527, 112 S. Ct. 841, 117 L.Ed.2d 79 (1992)

Facts: Unions want to organize workers at the anchor store of a strip mall owned by Lechmere. Lechmere also owns the strip mall's parking lot. A union member of Local 919 (not an employee) started distributing literature in the parking lot. Lechmere's manager boots the union rep for trespassing on private property. The union also puts ads in the newspaper. The set up shop on the grassy knoll at the entrance of the mall, to no avail. The union then starts collecting license plate numbers and went to the DMV to get home addresses of 41 employees. After mailing out literature, the union only gets one union card back. Union says that when the manager threw out the union rep, they violated 8(A)(1) by denying access to the premises. ALJ finds a violation. Board agrees, as does a divided Circuit Court of Appeals.

Holding: Clarence Thomas, writing for the majority, says that there is a difference between a union agent (non-EE) and employee's. Only EE's have direct §7 rights. Union agents attempting to organize a workplace only have derivative §7 rights. While an EE could have distributed literature, as protected by §7, a union agent can't.
Lechmere (cont.)

Balancing Test: To determine if a non-EE union agent can distribute literature, you only do the balancing test (between property and §7 rights) after a threshold has been met. The threshold test is whether there is any reasonable, non-trespass means of communications. This, according to SCOTUS is an incredibly limited exception (chiefly limited to logging camps and mines). Court says that because there were sufficient, reasonable means of communication (i.e putting up signs on the highway, grabbing license plates, etc.) it was acceptable for the manager to boot them. **The means only need to be reasonable, not necessarily successful.**



Dissent: The dissent says that the majority erred by reading the exception in *NLRB v. Babcock & Wilcox* too narrowly. Logging camps and mining camps were not meant to be the only exception. They said that the court had repeatedly refused to read *Babcock* so narrowly, but instead should have viewed it as a neutral flexible rule of accommodation. The availability

of means is one part of a **three part test**.

Also, there should have been deference paid to the agencies decisions, which have better knowledge of the realities of the work place, such as the NLRB. This is the two part test laid out in *Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc.* was:

1. Has Congress spoken to the precise question at issue?
2. If it has not, SCOTUS does not simply impose its own construction of the statute; rather, SCOTUS, determines if the agency's view is based on a permissible (not necessarily the best) construction and if so that the appellat court should enforce the decision..
 1. Is the Board's decision permissible? Well it must be: **reasonable and supported by evidence?**

Definitions:

Salting: Getting a union agent to take a job with a company with the sole intention of unionizing it. In 1995 the Supreme Court said that these **salts** were EE's under the broad definition set forth in the National Labor Relations Act. However, in *Toering Electric Co.*, 351 N.L.R.B. No. 18 pg. 225 (Sept. 29, 2007), the National Labor Relations Board (NLRB) concluded that workers can be fired if they are believed to not be "**genuinely interested**" in obtaining the job in order to be eligible for back pay after an unlawful discharge. Rep. Steven King's H.R. 2153 would amend Sec. 8(a) to say that "nothing shall be construed as requiring an ER to employ [salts]."

Labor Organization: Under Sec. 2(5) of the statute, a labor organization *means any organization of any kind, or any agency or employee representation committee or plan, in which employees participate and which exists for the purpose, in whole or in part, of dealing with employers concerning grievances, labor disputes, wages, rates of pay, hours of employment, or conditions of work.* Can be an in-house union. It doesn't need a formal structure, to have bylaws, a bank account or address. It could be an individual.

Union Formation

§9(a) *Representatives designated or selected for the purposes of collective bargaining by the majority of the employees in a unit appropriate for such purpose.*

Ways that unions can be established:

1. NLRB election, (aka **Board elections**).
2. **Voluntary recognition** by employer. (Though an employer can refuse recognition until a board election takes place.). Sometimes an ER will voluntarily recognize a group that would otherwise not be acceptable to the Board (i.e. includes supervisors, or dissimilar group of employees, etc.) The Board never gets involved and won't challenge this unless there is an ULP.
3. Operation of law:
 1. **Pre-recognition bargaining:** Bargaining before recognition, about the requests of a union, it is tantamount to granting recognition (this starts at the exchange of proposals).
 2. **Undertaking to verify a majority** is tantamount to granting recognition. So if you take a look at all the cards to make sure there is a majority, you are bound by the results, even if you find a third party to verify.

Once any of these takes place, the 9(a) relationship starts and the parties are bound to "meet at reasonable times" and "confer in good faith regarding wages, hour, terms and conditions of employment." If the employer refuses recognition, under '47 amendments to the Act, recognition picketing is illegal if done for an unreasonable amount of time (normally understood to be more than 30 days without having filed a petition for a Board Election)

Standard Board Election Procedure:

1. **Formal election petition is filed.** A Board Election is not a self-initiating; a formal election petition must be filed. The petition will include the name of the company, the number of employees that work there, and the type of industry the ER is in, and propose the appropriate unit. Any petition filed with the board must also have a

“**sufficient showing of interest**” (Board has said at least 30% of employees from the bargaining unit). Showing of interest is confidential matter. If ER thinks it achieved through fraud, they can submit an affidavit to the Board saying that they don't believe there is a showing of interest because of certain evidence (i.e. “twelve of the fifteen employees have come to us and said that they did not sign cards”) . However, this is an administrative function and is **non-litigable**. Board may conduct an investigation if they receive compelling evidence from the ER.

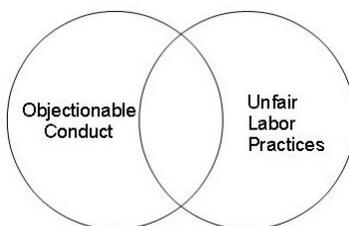
2. **Parties must agree to the terms of the election:** These terms include the appropriateness of a bargaining unit, the time/date/place of the election, whether there is a bar to the election, or whether the NLRB lacks jurisdiction. If the parties can't agree or raises a defense to the election, the Board conducts **a hearing**. These issues are litigable but **there is no right to appeal a Board representation case***. If is considered an interim order. Instead of a direct appeal, the ER will refuse to bargain which is an unfair labor practice which will lead to a Board order, which is a final order, reviewable by the Court of Appeals.

*The SCOTUS held in *Leedom v. Kyne* that the federal district court has jurisdiction to determine if the **Board has violated its own statute** (for example, including supervisors in a bargaining unit). This exception only applies where there is no issue of fact. This is a very narrow and infrequent exception.

3. Election is held and certified.

Election Appeals

The board permits for it's elections to be scrutinized to determine if **objectionable conduct** took place that would prevent labor from having a fair election. Objectionable conduct may be in the form of an unfair labor practice (ULP) but not necessarily so. Objectionable conduct can only occur during the critical period and must be filed within 5 business days or 7 calendar days of the election.



The remedy to the objectionable conduct during an election is to declare the election void.

Critical Period: The time during which the winning party may be scrutinized by an appeal. It starts the day a petition is filed and runs until the day that an election is conducted. Election standards must be conducted under “**laboratory conditions**,” meaning free from outside influences.

Bars

Before an election is held, the Board must determine whether there is or is not an already certified bargaining representative and if it would be inappropriate to hold a new election because of any of the bars listed below:

Contract Bar:

If there is a collective bargaining agreement, during the life of that contract but not to exceed a **maximum of three years**, the Board is barred from holding another election. The ER will say that a QCR (“question concerning representation”) can not be raised at this time. This is called a contract bar. However, evidence of a contract alone is not sufficient, there must also be evidence that the contract has been implemented.

Open Period: 90 days prior to the contract expiring (or from the deals third year, if the terms exceed three years) until 60 days prior to expiration, there is an open period. During this period, parties can decertify or another union can seek a Board election. After that 30 day window, there is a insulation period. If there is no agreement in this insulation period, a new

union if free to file a petition. If it is a hospital or a healthcare facility, the window shifts 30 days earlier (between 120-90) During the life of the contract there is a irrebutable presumption that the union represents/is the exclusive bargaining representative for the bargaining unit. After three years, it becomes a rebuttable presumption.

Election Year Bar

Once a board has run a election, and the union had lost, the Board won't run an election in that bargaining unit again for one year. Once certified, for one year there is a irrebutable presumption that the certified. After a year, there is still a presumption, but it becomes a rebuttable presumption.

Recognition Bar

If the employer has granted recognition, they don't get a full term of exclusivity. Case law has determined that if the ER has unilaterally recognized a bargaining representative, then for a "reasonable period of time" there shall be a presumption of exclusive bargaining representative status. This reasonable about of time, according to case law, shall not be less than 6 months

Employees

Unpaid Employees

Are unpaid personnel considered EE's under the statute? WBAI Pacifica Foundation was a non-profit organization that ran a radio station. About 90% of the employees were volunteers. About 10% were paid employees. There was a union that represented everyone. ER challenged whether unpaid employees were EE's under the statute in *WBAI Pacifica Foundation*, 328 NLRB No. 179, 1999 NLRB LEXIS 586. If you were unpaid you could be **reimbursed, upon providing a receipt**, for any money spent to support the radio station (i.e. buying wires at Radio Shack). If you had a child, the ER provided child care for both paid and unpaid employees. Unpaid didn't receive health benefits, sick leave, etc.

Board decision held that , **NO**, unpaid employees are not EE's covered under the Act. The employment relationship is fundamentally an economic relationship. Volunteers are not employees. Employees must be compensated to be covered. *Seattle Opera v. NLRB*. Are auxiliary chorus members EE's under the Act? They all received a handbook which outlined how there were excepted to behave, and they had sign an agreement regarding attendance and decorum in order to be considered an auxiliary chorister. At the end of the chorus year, everyone was **given a a stipend** of \$200 dollars to cover transportation, cleaning of garments, etc.

YES, The board said as little as the compensation was, it was sufficient because it was not dependent based upon receipts for expenses. Board said sufficient economic relationship.

Boston Medical Center Corp. said that **medical school residents** and interns completing their residency requirements were EE's under the act, reasoning that they had already earned their degrees. They also are paid a small amount.

New York University 332 NLRB 1205 (2000) said that graduate **teaching assistants** are EE's under the act. The Bush Board reversed in *Brown University* 342 NLRB 483 (2004) and said graduate teaching assistants are not EE's because they have a predominately academic relationship with their schools rather than and economic one. There would be a conflict of interest where the ER is also the degree granting institution. After Obama election, chances are it will be reversed again in what might be called NYU II

Independent Contractors

Originally the Board and SCOTUS' position was that nothing in the Act excluded independent contractor from the definition of EE's. In response, Congress amended §2(3) in 1947 to specifically exclude independent contractors. Right to Control Test: "Do you retain **entrepreneurial control** of your business?"

Roadway Express

- In order to get hired you need to own a truck.

Dial-a-Mattress

- In order to get hired you need to own a truck.

- If you can't afford a truck, Roadway Express will help.
- The trucks had to be branded Roadway Express.
- The truck has to be left in their parking lot at the end of the night.
- If you can't afford a truck, Dial-a-Mattress will help.
- There is no requirement for branding on the truck.
- At the end of the day, you can use the truck for whatever you want.

Board says that the EE's did not retain entrepreneurial control over their truck/business and were therefore employees under the act.

Board says that the EE's did retain entrepreneurial control over their truck and were therefore independent contractors under the act.

Mandatory Terms and Conditions.

For a doctor to be able to see patients covered under *AmeriHealth* (a health insurance company) they must agree to certain terms and conditions (for example, a certain number of chairs in the waiting room, all patients must be seen within 10 minutes, doctors must be in their office a certain number of hours, if taking vacation they must find a AmeriHealth certified replacement, limited to only procedures pre-approved by AmeriHealth.)

Board had a hearing. However they said they were independent contractor. They arrived at this conclusion because the doctors can control their business (because AmeriHealth only accounts for 7% of the business). However in their decision, they invited the parties to resubmit with different fact, because if the insurer had controlled, for example, 80-90% of the market, there might be a different outcome.

Supervisors

Under §2(11) the term "supervisor" means any individual having authority [or effectively to recommend such action, (usually generally followed)], **in the interest of the employer**, to:

- | | |
|-----------------|------------------------------------|
| 1. hire, or | 7. discharge, or |
| 2. transfer, or | 8. assign, or |
| 3. suspend, or | 9. reward, or |
| 4. lay off, or | 10. discipline other employees, or |
| 5. recall, or | 11. responsibly to direct them, or |
| 6. promote, or | 12. to adjust their grievances, |

AND the foregoing ... exercise of such authority [must] not [be] of a merely routine or clerical nature, but requires the use of **independent judgment**.

Lake Mary HealthCare Associates: ER, a nursing home, employed a number of professional nurses (nursing technicians) who would sometime tell their aides to, for example, "grab 12 cc's of medicine." The ER argued that this constituted assigning employee's under §2(11) of the statute and therefore the professional nurses were supervisors and thus not covered by the Act. Board says that this is professional work and not supervisory because it is not done in the interest of the employer, but in the furtherance of their own duties. SCOTUS, with Scalia writing, says that because nurses are EE's that of course this is in the interest of their employer and therefore nurses are not covered because they are supervisors.

NLRB v. Kentucky River Community Care: The Board again considers whether nurses are EE's under the statutes, this time at a Kentucky nursing home. The Board, in light of the decision in *HealthCare Associates*, argues that while these nurses were assigning workers certain tasks, it was not done based on **independent judgement**, but rather it was the exercise of professional judgement. Scalia again looks at this argument and said that it strains credulity to believe that professional judgement can be separated from independent judgment. However, Scalia says there may be a way out.

Oakwood Trilogy: In *Oakwood Healthcare* 348 NLRB 37, the lead case in the Trilogy, the Board defines the key Section 2(11) terms "assign," "responsibly to direct," and "independent judgment.": *Under Kentucky River*, SCOTUS upheld the Board's standard that the party alleging supervisor status (either ER or union) has the **burden of proof**. Absent compelling evidence, there is a presumption by the Board of non-supervisory status.

1. **Assign**: To assign involves the act of "designating an employee to a **place** (such as a location, department, or

wing), appointing an individual to a **time** (such as a shift or overtime period), or **giving significant overall duties**, i.e. tasks, to an employee.” In general, to “assign” refers to the designation of significant overall duties to an employee, not to the discrete instruction to perform a specific task.

2. **Responsibly to Direct:** The term “responsibly to direct” means “an act of directing what job should be done next or who should do it.” In addition, the supervisor may be **subject to “adverse consequences”** if he or she fails to direct employees properly (or rewarded if done correctly). As a result, the Board held that supervisors are not limited to “department heads” because supervisors can be a person on the shop floor with “men under him” who decides what task shall be undertaken next and who should do it.
3. **Independent Judgment:** A supervisor exercises “independent judgment” if he or she exercises judgment in non-routine and non-clerical matters that is **free of control by others** and “**form an opinion or evaluation** that is reached by discerning and comparing data provided that the act is not merely routine or clerical.” Additionally, it is not “dictated or controlled by detailed instructions, whether set forth in company policies or rules, the verbal instructions of a higher authority, or in the provisions of a collective-bargaining agreement.”

Technical Workers: Under *Croft Metal Inc.*, (one of the three Oakwood Trilogy cases) the Board said that **technical workers** who are monitoring instrument panels and then directing workers based on the readings (for example, “Get out to pump 3 and look at what is causing the pressure to drop”) were NOT exercising independent judgment, because their decisions were based on established procedures that did not allow any genuine discretion.

Under *Kentucky River*, SCOTUS upheld the Board's standard that the party alleging supervisor status (either ER or union) has the **burden of proof**. Absent compelling evidence, there is a presumption by the Board of non-supervisory status. Because this is a civil statute, the standard of proof is only “a **preponderance of the evidence.**”

Professionals

The term "professional employee" means--

(a) any employee engaged in work (i) predominantly intellectual and varied in character as opposed to routine mental, manual, mechanical, or physical work; (ii) involving the consistent exercise of discretion and judgment in its performance; (iii) of such a character that the output produced or the result accomplished cannot be standardized in relation to a given period of time; (iv) requiring knowledge of an advanced type in a field of science or learning customarily acquired by a prolonged course of specialized intellectual instruction and study in an institution of higher learning or a hospital, as distinguished from a general academic education or from an apprenticeship or from training in the performance of routine mental, manual, or physical processes; or

(b) any employee, who (i) has completed the courses of specialized intellectual instruction and study described in clause (iv) of paragraph (a), and (ii) is performing related work under the supervision of a professional person to qualify himself to become a professional employee as defined in paragraph (a).

When determining an appropriate bargaining unit, the Board may not put professionals and non-professionals in the same unit unless the professionals have voted to be included with the non-professionals.

Appropriate Bargaining Units

Sec. 9 [§ 159.] (a) Representatives designated or selected for the purposes of collective bargaining by the majority of the employees in a unit appropriate for such purposes, shall be the exclusive representatives of all the employees in such unit for the purposes of collective bargaining in respect to rates of pay, wages, hours of employment, or other conditions of employment:

The statute only says that the bargaining unit must be an appropriate unit, NOT the most appropriate unit. Additionally, units are determined by job titles, not individuals.

The Board uses an informal “**Community of Interests**” Test to determine whether a unit is “appropriate.” Douglas Leslie, of the University of Virginia outlined some of the factors that the Board considers in his law review article, *Labor*

Bargaining Units. They include:

1. Similarity in the scale and manner of determine earnings (salary/hourly, pay scale, benefits)
2. Similarity in employment benefits, hours of work and other terms and conditions of employment.
3. Similarity in the kind of work performed
4. Similarity in the qualifications, skills and training of the employees.
5. Frequency of contact or interchange among the employees
6. Geographic proximity
7. Continuity of integration of production processes
8. Common supervision and determination of labor-relations policy
9. History of collective bargaining
10. Desires of the affected employees
11. Extent of union organization.

Mallinckrodt Doctrine.

When a group of employees file a petition to take a particular craft out of an established bargaining unit they are governed by the Mallinckrodt Doctrine. The new approach outlined in *Mallinckrodt* involves an examination of all relevant "areas of inquiry" including, but not limited to, the following:

1. Whether or not the proposed unit consists of a distinct and homogeneous group of skilled journeymen craftsmen performing the functions of their craft on a nonrepetitive basis, or of employees constituting a functionally distinct department, working in trades or occupations for which a tradition of separate representation exists.
2. The history of collective bargaining of the employees sought at the plant involved, and at other plants of the employer, with emphasis on whether the existing patterns of bargaining are productive of stability in labor relations, and whether such stability will be unduly disrupted by the destruction of the existing patterns of representation.
3. The extent to which the employees in the proposed unit have established and maintained their separate identity during the period of inclusion in a broader unit, and the extent of their participation or lack of participation in the establishment and maintenance of the existing pattern of representation and the prior opportunities, if any, afforded them to obtain separate representation.
4. The history and pattern of collective bargaining in the industry involved.
5. The degree of integration of the employer's production processes, including the extent to which the continued normal operation of the production processes is dependent upon the performance of the assigned functions of the employees in the proposed unit.
6. The qualifications of the union seeking to "carve out" a separate unit, including that union's experience in representing employees like those involved in the severance action

The longer it takes to get to an election, the less likely a union will win. The **Employer Free Choice Act** attempts to allow certification bases on showing of interest alone, provided it was a majority, without holding and actual election. Goal is to get as many elections within a median of 42 days of the petition. If a hearing (on appropriate bargaining unit for example) is requested, median target of 45 days for a decision. Then an **election can't be held for 30 days after a hearing to allow time for an appeal.**

Multiple Locations

Board has said that there is a **presumption (not a rule) that a single location is an appropriate unit** unless the employer can show a multi-location unit is better. In 1995, the Board said that they were so successful using their rule-making authority with the healthcare presumptions in 1991 (see below). They were going to pass another rule that made the presumption that a single unit (one store) was an appropriate unit. Business wanted all local stores to be a single unit. Newt Gingrich Republican Revolution killed this proposed rule.

NLRB v. Chicago Health & Tennis Clubs, Inc.
576 F. 2d 331 (1977)

The regional director found that a single location unit was acceptable. An election was held and the employer refused to bargain. It heads up to the 7th Circuit.

<u>Saxon Paint</u>	<u>Chicago Health & Tennis Club</u>
<ul style="list-style-type: none"> • Every store was similar (looked the same) • Sales and promotions were all coordinated by a central office. • Hiring and firing was done by the central office. • Store manager could not pledge credit • Could not grant promotions • Couldn't discipline, or resolve grievances. • The could make recommendations, but these were not binding or even often followed 	<ul style="list-style-type: none"> • Different clientele (women only at one store, pools at another, tennis at another) and services • Store managers had direct authority to hire, fire, promote, etc. • Could reprimand, discharge and suspend in extreme circumstances. • Could deal with the complaints or grievances of employee's • Could grant or deny overtime.
<p>7th Circuit said the single location presumption had been overcome and that a single store unit was NOT APPROPRIATE.</p>	<p>7th Circuit affirms that a single store unit was APPROPRIATE.</p>

Other factors that the Board will consider in determining whether a multiple location unit is appropriate include:

- Geographic proximity of the locations
- History of collective bargaining
- Extent of employee interchange

Healthcare Institutions

In 1974 the Act was amended to bring within its purview all non-profit healthcare institutions. What is a health care institution? Sec. 2(14) defines a healthcare institution as follows:

The term "health care institution" shall include any hospital, convalescent hospital, health maintenance organization, health clinic, nursing home, extended care facility, or other institution devoted to the care of sick, infirm, or aged person.

In determining whether an institution falls under the purview of the statute, you must exam whether the institution in fact provides professional care for its patients. For example, the following types of institutions would be covered:

1. Hospitals
2. Psychiatric Care Facility
3. Rehab Facility.
4. Ambulette Service: Provided that the service includes basic life saving equipment and a trained EMT. Merely transporting an elderly person to the hospital for their care, does not make it subject to the healthcare amendments.
5. Blood Banks: Provided that they do more than simply store the blood, for example providing dialysis treatment.

Since providing healthcare was such a critical service, Congress was concerned about the burdens which would be imposed upon healthcare institutions by the "undue proliferation of bargaining units in healthcare institutions." If they were too busy negotiating collective bargaining agreements, the level of care they provided may suffer. Therefore during the Reagan Administration, the Board said that they would no longer use the "community of interest" standards for the healthcare industry. The Board says there should only be three units for the health care industry:

1. Professionals including doctors, RN's, social workers, pediatricians, pharmacist psychologist, etc
2. Security guards (as required by §9(b)(3))
3. Everyone else, unless union can show that some group's interests are **so dissimilar** that it would be inappropriate.

The courts did not like these groupings. In response, the Board established a rule in 1989, establishing eight, and only eight, appropriate units for stand alone, **acute care hospitals** (if part of a campus and the union petitions both locations together than this rule does not apply):

- | | |
|---|---|
| <ol style="list-style-type: none"> 1. All registered nurses 2. All physicians 3. All other professionals | <ol style="list-style-type: none"> 4. All technical employees 5. All skilled maintenance units 6. All business office clerical employees |
|---|---|

7. All guards for in 4, 5, 6, 7
8. All nonprofessional, etc those separately accounted

The Board said that under special circumstances, you could argue that the above units would be inappropriate. One such accepted special circumstance was **if a unit would have five or fewer employees.**

American Hospital Association v. NLRB 499 U.S. 606 (1991):

The Board runs an election under the new rules, it's first application of the new standard, and the American Hospital Association files a petition challenging the Board's authority to do this. The district court enjoins enforcement of the election and the district court of appeals says that the ER's argument has no merit. It goes up to the SCOTUS.

ER argues that NLRB had no authority to create because under §9(B) says that the Board shall decide "in each case" that the unit is appropriate. Also this is an undue proliferation of bargaining units in healthcare against the consternation of Congress (when they were passing the healthcare amendments). Finally, that the designation were capricious and arbitrary.

The court rejects the first argument because §6 authorized rule making and this is not *sub silencio* repealed by §9. They say that the ER is placing far too much emphasis on the phrase "in each case." Also, congressional record is only informative if ambiguous which this statute is not. Finally the rule is not capricious and arbitrary because there is still an opportunity to be heard in "extraordinary circumstances." **SCOTUS upholds the rule making authority** of the board and the health care rule.

Objectionable Conduct:

Objectionable conduct is any conduct which occurs during the Critical Period (from submission of the petition to the election) which might prevent the election from taking place under "laboratory conditions."

Excelsior Lists : Duty to Provide Employees Contact Information

Seven days after:

1. the Regional Director has approved a consent-election agreement entered into by the parties pursuant to §102.62 (of the Board's Rules and Regulations), or
2. the Regional Director or the Board has directed an election pursuant to the §102.67 or
3. the Board has directed an election pursuant to §102.62

...the employer must turn over to the Board a list of **names** and **addresses** (not phone number, email, etc.) of all the employees in the bargaining unit, and the Board will then turn the list over to the unit. Failure to do so, or to do so late is objectionable conduct.

Excelsior Underwear
156 NLRB 1236 (1966)

An election was conducted and the union lost 206 to 35. The union filed an objection based on the employer's failure to supply it with the employee's names and addresses so as to facilitate a reply to the ER's anti-union communication. The Board said that providing contact information for the EE's was fundamental to having a free and fair choice in the election. Furthermore, the Board said that this information was not a trade secret and therefore not privileged. This ultimately goes before the SCOTUS on the issue of whether the Board could create this rule without going through the administrative process. Four justices say that yes, this is a rule, but done through the adjudicative process. Three say that it's a remedy to conditions that Board hoped to address. Either way, in a 7-2 decision, SCOTUS upholds the rule.

Incomplete Names

Originally, NLRB had a rule that incomplete name was only objectionable conduct if the ER did it on purpose to thwart the efforts of union. A few years later, in *North Macon Health Care Facility* 315 NLRB 359, (1994), the Board established the

current rule is **you must to provide the full name** on the *Excelsior* list.

Incomplete List

Eligibility Date: To be eligible to vote you have to be on the payroll immediately preceding the date of stipulated election agreement or the regional director's decision and on the payroll on the day of the election.

In determining whether the employer substantially comply the *Excelsior* standard, the board says that it will not only look at the number and the percentage of omitted votes, but also (1) whether the omission involved a **determinative number** of voters, (2) and whether the ER's **intentional omitted names** with the intent to prejudice the election?

Employer's Right to Free Speech

Section 8(c): *[Expression of views without threat of reprisal or force or promise of benefit] The expressing of any views, argument, or opinion, or the dissemination thereof, whether in written, printed, graphic, or visual form, shall not constitute or be evidence of an unfair labor practice under any of the provisions of this Act [subchapter], if such expression contains no threat of reprisal or force or promise of benefit.*

Threats v. Predictions

NLRB v. Gissel Packing Co.
395 US 575

Facts: This was a consolidation of a number of cases. In the *Sinclair* case, 11 of the 14 wire weavers had signed union cards so they demanded recognition and the ER refused. The union petitioned for an election. During the campaign, within the critical period, the ER noted that there had previously been a strike at the plant a few years ago and people “shouldn't forget past mistakes.” Additionally, ER said that the company was economically on “thin-ice” and a strike could lead us to close. Additionally, the ER said to his employee's “you're not so young any more; you might have trouble finding employment at your age.” Also, “there is no doubt the Teamsters could come in here and shut the wire weaving department down.” Two days before the election, the ER said that “this union is under hoodlum control.” Finally, with the last pay check before the election, the ER sent around a cartoon with a defunct competitor's name on a tombstone with a note about how all these defunct employers had had unions. The union ultimately lost the election and the Union filed an objection. The Board decided that language could reasonably be read a threats of jobs loss if the Union won. The ER said we have a right to free speech under **Section 8(c)**

Issue: Was the employer making a prediction or threats?

Synopsis of Rule: In order to be protected under Section 8(c), the communication must be:

*Must be **carefully phrased** [so not to be perceived as a threat] on the **basis of objective fact** to convey an employer's belief as to demonstrably probable consequences **beyond his [the employer's] control** or to convey a management decision already arrived at to close the plant in case of unionization.*

There can't be threats of job loss or violence, nor can there be promises of benefits. The ER can only grant a **wage increase** during the critical period if it was scheduled in advanced (or was a regularly scheduled increase) of a petition for election. If regularly scheduled, it must be consistent in amount when compared to previous increases.

Misrepresentation of Material Facts

Midland National Life Insurance Co. v. Local 304A, United Food & Commerical Workers
263 NLRB 127 (1982)

Facts: The Union loses the election 107 to 107, because an election must be won by a **majority** of the EE's in the bargaining unit. The day before the election, the ER handed out a flyer. It included part of the LM-1 report from the Dept. of Labor which shows data reported by Unions. Additionally there were photos f a local plant, the Mealman plant, as deserted. It included a caption that said that Local 304A had represented the union there, that there had been a strike, and violence ensued and that now the plant was closed. “Where is Local 304A's job security?” However, it turns out that the only strike at

the plant had occurred a year and a half before the plant closed. The LM-1 reports were misrepresented to indicate that all the dues were going to the union leadership and nothing to the members. The union objected claiming misrepresentation

Issue: What if the ER misrepresents facts in his anti-union literature?

Synopsis of Rule:

In 1962 in *Hollywood Ceramics*, misrepresentation which is a **substantial departure from the truth**, and mislead voters as to a **relevant issue**, made in a time where **an effective response can't be made by the union** can reasonable be expected to have impact on the election.

In 1977 in *Shopping Kart Food Market, Inc* the board reverses. The Nixon/Ford board says that the Board should not be involved in probing the veracity of campaign literature. EE's are mature adults and will discount campaign fluffery. However if there is **fraudulent misuse of government materials**, it WOULD be objectionable conduct.

In 1979, the Democratic board reverses *Shopping Kart* in a case called *General Knit of California*.

Finally, in 1982, the Reagan Board sets the present standard in *Midland National Life Insurance Co.*, which returned the Board to the *Shopping Cart* standard.

Racial Appeals

Sewell Manufacturing Company
138 NLRB 66 (1962)

Facts: The union lost the election in a small Georgia plant, close to the Alabama border by a vote of 985 to 33. The ER had circulated to all the employees at the plant copies of articles from a magazine called *Militant Truth*, for the 4 months preceding the election. The magazine had ties to Blacks, communism and anti-Christianity. Two weeks before the election, the ER sent out a picture of the union president, a White man, dancing with a Black woman. with an article warning against the “evils of race-mixing.” Also there was an article which discussed large contributions that the union, Amalgamated Clothing and Textile, had made to the Congress of Racial Equality and the ER said a large portion of your dues will go to support civil rights legislation.

Issue: Whether interjecting racial imagery into the debate during the critical period is objectionable conduct?

Synopsis of Rule: The Board had set the election aside arguing that the racism was so bad that the EE's were denied the the right to vote in a reasonable untrammelled manner. Some statements with racial overtones such as the unions position on segregation or union financial contributions to civil right groups – **will be appropriate**, but only if “**temperate in tone, germane, and correct factually,**” because employees are entitled to have knowledge about these matters. But “**the burden will be on the party making use of a racial message** to establish that it was truthful and germane, and **where there is doubt [it] will be resolved against him**”

Definition:

Area Standards Picketing: Lawful picketing where the Union protests lack of an area standards; or rather an employer's failure to pay wages and benefits comparable to those established in a geographic area by a union through collective bargaining. You can picket for that purpose as long as you don't interfere with deliveries or induce people not to cross your picket line.

ULP'S Sec. 8(a)(1)

Under Sec. 8(a)(1) While an ER can't **interfere** with, **restrain**, or **coerce** employees, a union is only prevented from **restraint** or **coercion**.

NOTE: You can have separate independent 8(a)(1) violations, but if you have an 8(a)(2-5) it is also an 8(a)(1) as a **lesser included offense**. Additionally, the **statute of limitations** on an unfair labor practice is six months (filed and server) according to 10(b).

Polling and Questioning:

NOTE: The Board does not need to prove actual **specific** restraint, interference or coercion but may use its expertise as an administrative agency to declare certain **conduct** to restrain, interfere or coerce.

Questioning

Interviewing on a one-on-one basis; interrogation. This can be UNLAWFUL.

Polling

Is when the employer conduct a survey. Done incorrectly, it can also be UNLAWFUL.

Polling

TEST: Polling is an ULP unless **all** of these are met (from *Struksnes* citing with approval *Blue Flash Express Inc.*):

1. The purpose of the poll must be to determine the truth of a union's claim of majority (serve a **legitimate interest**)
2. This purpose must be **communicated to the employees**
3. **Assurance against reprisal** must be given
4. The employees must be polled by **secret ballot**
5. The employer **may not engage in unfair labor practices** or otherwise created a coercive atmosphere.

NLRB v. Lorben Corp. (OVERTURNED)

345 F.2d 346 (2nd Cir. 1965)

Facts: The union been soliciting cards and got four (4) out of twenty-six (26). At this point, one of the EE's who had signed the card got fire. The Union, IBEW, holds a meeting to determine what to do and they decide to strike. They begin picketing with signs that said "The EE's of this ER are on strike; Please maintain decent working conditions." The signs indicated that the picketing was not related to the supposed ULP. It looks like a recognitional picketing. The ER passes out a piece of paper to the employees which says, "Do you want a union? Yes or No." He also said, "you're free to sign this or not." All the EE's signed in the "no" column.

Issue: When is the ER's polling considered unlawful?

Synopsis of Rule: This goes before the ALJ after the regional director issued a complaint alleging that the ER unlawfully questioned these employees in a poll. The ALJ found a violation because the ER never explained to the EE's why he was asking them this information and said that the action was coercive. He said failing to explain the purpose OR to give oral assurances that there would be no reprisals had a created a problem. However, he based his decision on the fact that there was no legitimate purpose.

The Board dais that based on all the factors: (1) failure to explain (2) failure to provide oral assurances and (3) lack of legitimate purpose made the polling unlawful. 2nd Circuit looks at this test and is not happy. It puts forward a new test:

1. The background, i.e., is there a **history of employer hostility** and discrimination?
2. The **nature of the information sought**, e.g., did the interrogator appear to be seeking information on which to based taking action against individual employees?
3. The **identity of the questioner**, i.e., how high was he in the company hierarchy?
4. **Place and method of interrogation**, e.g., was employee called from work to the boss's office? Was there an atmosphere of 'unnatural formality.

International Union of Operating Engineers, Local 49 v. NLRB (Struksnes Construction Co.)

353 F. 2d 852 (D.C. Circuit 1965), on remand, 165 NLRB 1062 (1967)

Fact: The ER is a highway contractor. The Union says they represent 20 of 26 employees and whats the ER to grant them

recognition. ER refuses initially, but then decides to conduct a poll asking, “Do you want the union? Yes or no?” Struksnes did this polling personally and asked each EE to sign. ER says it doesn't matter what you say. 24 sign, 19 vote no, 5 vote yes.

Synopsis of Rule: See the five part test above.

Allegheny Ludlum brought the *Struksnes* test into the modern era. An ER cannot required employees to participate in a video which makes them make a public acknowledgement of their support. In these cases the Board applied the test emphasizing that the polling must be secret, with assurances against reprisal.

Questioning (one-on-one interrogation):

Board used to say this was *per se* unlawful.

GENERALLY: Board in *Rossmore House* 269 NLRB 1176 (1984) put forward the following rule:

<u>Union Adherent</u>	<u>Non-Union Adherent</u>
When you deal with a known union adherent and you deal in a non-coercive manner , it's not unlawful. The Board reasons that an adherent (for example, someone with a button on saying, “Join the Union. Ask me why!”) is almost inviting the employer to ask. However, if you unlawfully threaten, the interrogation is also unlawful. Likewise, if the ER were to ask a known adherent to tell him who else supports the union, that is unlawful.	For non-adherent: 1. Who is the person that asked the question? 2. Where was it asked? 3. Look at the circumstances of what was said. If an unlawful threat, then unlawful interrogation .

ATTORNEYS: Under the NLRB procedure, there is not pretrial discovery (for example, asking the Board for its files). An attorney acting as an agent of ER defending them against a ULP violation, may exercise a limited privilege in questioning the EE's but must give them a *Johnnie's Poultry Co.* (146 NLRB 770 (1964) warning:

- | | |
|---|---|
| <ol style="list-style-type: none"> 1. Must communicate to the employee the purpose of the questioning, 2. Assure him that no reprisal will take place, and 3. Obtain his participation on a voluntary basis; 4. The questioning must occur in a context free from employer hostility to union organization and must not itself be coercive in nature; | <ol style="list-style-type: none"> 5. The questions must not exceed the necessities of the legitimate purpose by prying into other union matters, 6. May not elicit information concerning an employee’s subjective state of mind, 7. May not otherwise interfering with the statutory rights of employees. |
|---|---|

Surveillance

Surveillance (for example, following EE's after work. putting a camera in the break room, etc.) is an 8(a)(1) violation when committed by the ER and a 8(b)(1)(A) violation when committed by the union. Even the implication of surveillance is a violation (for example, “So did you have a good time at the union meeting at such and such location,” when there is no reason why the ER should know where the EE had gone.).However the surveillance must be tied to a union drive.

Threats and Implied Threats

Both explicit and implied threats are ULP's. For example, saying “if you guys vote for a union, the business will shut down,” would be an example of an explicit threat. Saying, “there are people who are loyal and people who are not. And I won't forget. I wouldn't want to be someone who was disloyal to me,” would be an example of an unlawful implied threat.

Promise of a Benefit

Soliciting complaints and implying that you will remedy them may be an ULP. You can't promise a benefit with the intent of discouraging people from unionizing.

NLRB v. Exchange Parts Co.

Right before and NLRB election, ER sent around letter listing out the benefits and said “It didn't take a Union to get any of those things and it won't take a Union to get additional improvements in the future.” Also gave an additional benefit. Justice Harlan argued that this was a “fist inside the velvet glove.” It is a unfair labor practice. It induces an instinct to reciprocity.

Civil Lawsuit

If an ER sues his EE's for libel, after they formed a union and said he's a bad boss; if it is done in retaliation for unionizing, than this is a 8(a)(1) violation.

ULP'S Sec. 8(a)(2)

*It shall be an unfair labor practice for an employer to **dominate** or **interfere** with the formation or administration of any labor organization or **contribute financial** or other support to it:*

This was one of the most controversial issues debated during the formulation of the National Labor Relations Act because the “company union” had become such an effect means of circumventing unfavorable bargaining situations.

Section 2(5) definition of a **labor organization**:

The term "labor organization" means any organization of any kind, or any agency or employee representation committee or plan, in which employees participate and which exists for the purpose, in whole or in part, of dealing with employers concerning grievances, labor disputes, wages, rates of pay, hours of employment, or conditions of work.

Electromation, Inc. v. NLRB
309 NLRB 163 (1994)

Facts: The employer was having financial difficulties. They promised the EE's a wage increase but in the end couldn't deliver and the EE's were understandably upset. The ER considered an interesting solution; in Japan they had a philosophy that EE's were not only the greatest asset, but also had the best understanding of what worked in the company and what doesn't. Japanese companies formed “**Quality Work Circles**,” which would work with the EE's. Electromation says that they will establish five committees with supervisors and workers on the committees, and post the names so that they can talk with their co-workers. The committees would deal with: absenteeism, no smoking policy, communication, pay progression (i.e. pay scale), and attendance bonus program. Simultaneous to the formation of these QWC's, there was a union drive, which the ER swears that he did not know about . The Board finds no evidence that the ER knew.

Issue: Where these “quality work circles” committees labor organizations? Yes.

Did the employer dominate or interfere with these labor organizations, in violation of Sec. 8(a)(2)? Yes. ER formed it, drafted the proposals, defined what the functions would be, the events took place entirely on ER's property, and the members were paid.

Synopsis of Rule: The ER said this was not a labor organization, but the Board uses a three part test to determine if it is a labor organization:

1. Did employees participate?
2. The organization exists, at least in part, for the purpose of “dealing with” (not, this is an even lower standard than collective bargaining) employers
3. These dealing concern “conditions of work” or concern other statutory subjects, such as grievances, labor disputes, wages, rates of pay and hours of employment.

“Even if it lacks a formal structure, has no elected officers, constitution or by laws, does not meet regularly, and does not require payment of dues.”

Dissent: Member Oviatt said in concurrence that, while this manifestation was unlawful, it could be structured in such a way as to make it lawful. ER is not prohibited from speaking with his EE's to determine how work might be done more efficiently or get employees opinions (ex. a suggestion box, etc.) Member Radabaugh said that if done in conjunction with traditional union representation, he would have found it to be lawful but Congress would have to fix the statute.

International Ladies' Garment Workers Union v. NLRB (Bernhard-Altmann Texas Corp.)
366 U.S. 731 (1961)

Facts: There's a union drive. No other unions involved. Some of the EE's go on strike and are disputing the fact that there ER had reduced there salaries, a dispute unrelated to the organizing drive (not recognitional strike) The ER speaks with the ER to enter collective bargaining negotiations with the union, and he does. Sees the demands and determines that they are fair so he grants recognition. However, when the ER granted recognition, the union did not represent that majority. One EE challenged it saying, "why should we be stuck with this union." The union says, while when the recognition was granted no majority, on the day the CBA was signed they did have a majority.

Issue: Was granting recognition to a union which only had **minority support** considered **providing support** labor organizations, in violation of Sec. 8(a)(2)? Yes.

Synopsis of Rule: SCOTUS looks at the statute and says the Wagner Act sec. 9(a) grants free choice to EE's in determining their bargaining representative. But here, when recognition was granted to a minority, that was a violation of 8(a)(2) and, as a lesser included offense of 8(a)(1). It did not matter that they had majority representation at the signing of the CBA, because the EE's felt coerced by the the recognitional status. **Good-faith** is not a valid defense.

Voluntary Recognition:

Midwest Piping & Supply Co. Doctrine: If there were two competing unions for recognition, ER can't unilaterally grant recognition, it must have an election. 63 NLRB 1060 (1945)

Bruckner Nursing Home Doctrine: While one competing union only had two cards, ER granted voluntary recognition to a much more supported union. The ALJ said that even 2 cards is sufficient to make a "color-able" claim and that it should have gone to the election. Board reverses Midwest Piping, and says **where there is a majority (on competing union over another) Employer can grant voluntary recognition.** Good-faith is not a valid defense. 262 NLRB 955 (1982). There was one exception in a case called *RCA Del Caribe, Inc.*, 262 N.L.R.B. 963 (1982) where there has already been a representation petition filed by one of the two unions, the ER can't grant recognition you must proceed to an election.

Dana Corp. Doctrine: The Bush Board began to consider making any voluntary recognition should be *per se* unlawful. In a compromise decision called Dana Corp. the Board said that that employer's can grant recognition, but they must **immediately notify NLRB and the NLRB will create a notice informing the grant of recognition which must be posted for 45 days.** If no petition is filed within those 45 days, then a binding certification. But if within 45 days of the notice, even if a majority, someone files a petition (even someone with only one card) workers can ask for a de-certification election. 351NLRB 28 (2007)

ULP'S Sec. 8(a)(3): Discrimination

Types of ER discrimination:

§8(a)

(1) to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in Sec. 7.

(3) by discrimination in regard to hire or tenure of employment or any term or condition of employment to encourage or discourage membership in any labor organization.

(4) to discharge or otherwise discriminate against an employee because he has filed charges or given

Types of Union discrimination:

§8(b)

(2) to cause or attempt to cause an employer to discriminate against an employee in violation of subsection (a)(3) [of subsection (a)(3) of this section] or to discriminate against an employee with respect to whom membership in such organization has been denied or terminated on some ground other than his failure to tender the periodic dues and the initiation fees uniformly required as a condition of acquiring or retaining membership;

testimony under this Act

Prima Facia Case for Discrimination (DON'T LOOK AT THE DEFENSE FIRST):

1. EE must have **engaged in some protected activity** under Sec. 7 of the Act. .
2. There must be **some discriminatory action***. (It can be either positive or negative. The minimum conduct that the Board will recognize is a written warning.)
3. There must be a **causal connection**
 1. Employer **knowledge** of EE activity.
 2. Evidence of **hostility**.^o

Evidence of **pretext**? You can infer **knowledge** or **hostility** by evidencing **pretext**.

1. **Disparate application** of the rules.
2. **Condonation** (ex. ER condoned coming to work late every day until EE engaged in Union activity)
3. **Timing**, closer to the exercise of section 7 rights, the easier to make pretextual case.
4. **Shifting the defense** (reasoning) of discharge. Also, **piling on** new reasons.

^o **Motive**: Motive/evidence animus does not need shown when action is “inherently destructive.”

* Lack of Discriminatory Action: There may be an prima facia case absent discriminatory action under the theory of “constructive discharge”. *Keller Manufacturing*, 237 NLRB 712. To prove this you must show:

1. *The burdens which were imposed caused or were intended to cause make the work so unbearable as to force the EE to resign.*
2. *Burdens were done because employee engaged in union activity.*

Mueller Brass Co. v. NLRB
544 F.2d 815

Facts: There was a long history of union activity (on their third union drive). Two EE's were fired. The first, Stone is out sick: 9 day stay in the hospital, 10 days later he returns to work. A supervisor says he saw Stone walking around town during the 10 additional days. Stone's doctor writes a note says that he was well enough to work on the 6th, before the 10 days malingering. Stone gets fired, who after that comes back with a new note. Stone alleged discrimination and pretext.

Mr. Rodgers also fired. At work one day, he seems to have a mechanized male sex organ. The next day he also propositions a women. ER investigates and finds another example one week earlier. Rodgers says that he was fired for union activities. ALJ says firing was pretextual because there were no complaints. Board affirms. Goes to CoA who dismisses both cases.

Dissent: Judge Godbold says he would have affirmed both decisions, for the following reasons:

<p><u>Stone</u></p> <ol style="list-style-type: none"> 1. There was evidence of animus 2. The company knew of Stone's affiliation, as a Union supporter. 3. There was no investigation, even though normally there was a three step process. The company admitted that it had no reason to doubt the authenticity of the revised note. So if the employer uses a different investigation method for other EE's then evidence of discrimination. 	<p><u>Mr. Rodger</u></p> <ol style="list-style-type: none"> 1. Pretext, this was common place in this work place. For him to be fired for this seemed pretextual. 2. The general foreman asked female worker to rate a pornographic picture and was not fired. So if the employer uses a different dismissal standard for EE's then evidence of discrimination.
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Protected Activity:

Activity, while protected, can be done in a manner that will cause it to lose its protection. For example, a union may be engaging in lawful picketing when one picketer picks up and throws it at one of the ER's trucks as it passes by. The ER may

fire that EE and the mere fact that he was engaging in protected activity does not shield him from being disciplined non-protected activity.

Southwest Bell Telephone Co.
200 NLRB 101

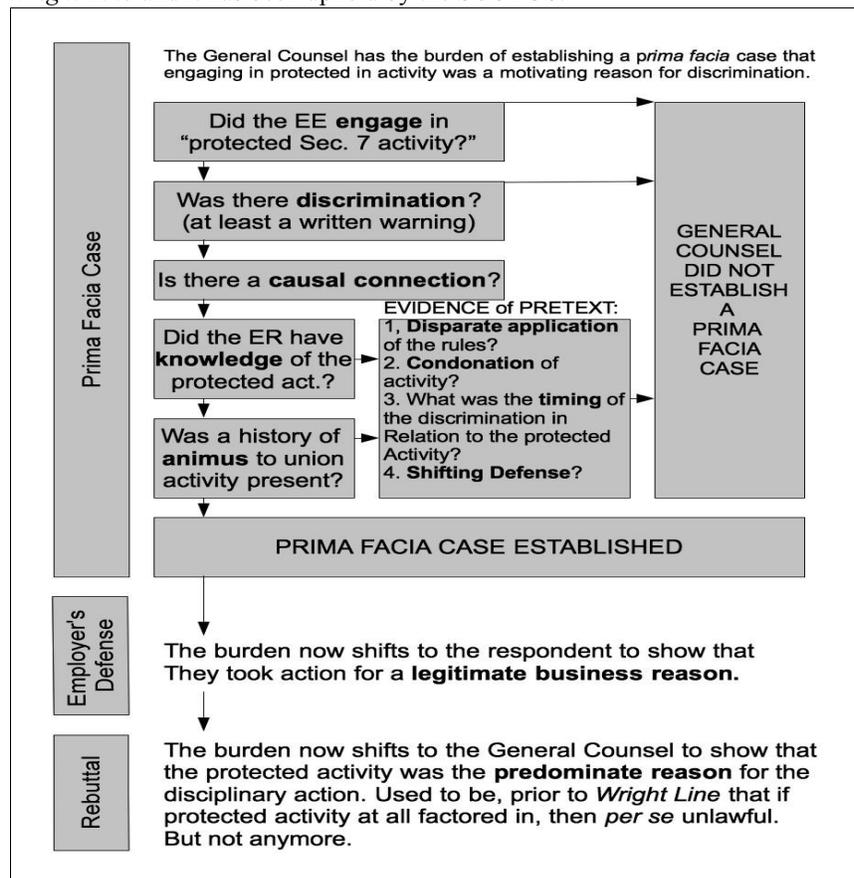
EE's were picketing for failure to negotiate. They carried signs that said "Ma Bell is a Cheap Mother." ER fired them arguing that it was not protected activity because it employed a well known obscenity.

ULP'S Sec. 8(a)(3): Discrimination (cont.)

Wright Line v NLRB
251 NLRB 1083

Wright Line Test:

1. The General Council must first establish the **prima facie case**.
2. Respondent puts forward a **defense** to show that they took the action for a legitimate business reason.
3. General Council rebuts the defense. **GC has the burden** to show that the protected activity was the **primary motivating factor**. The Board used to say that if the protected activity at all entered into the decision to take disciplinary action/discharge, then that action was *per se* unlawful. However, the Board abandoned this standard with *Wright Line* and it has been upheld by the SCOTUS.



Undocumented Workers and Discrimination:

In *Hoffman Plastics Compounds, Inc. v. NLRB*, 535 U.S. 137 (2002), the SCOTUS says that if the ER discriminates against a worker who is undocumented, that undocumented workers is an EE under the statute. However, undocumented workers

were not entitled to reinstatement or back pay until they could establish that they were in the country lawfully. However, in *Mezonas Bakery* ALJ Steve Davis considered the dissent from Justice Breyer in *Hoffman Plastics* and came up with a new rule.

1. Where the ER had **no knowledge** of the undocumented status there certainly can't be an economic recovery.
2. However, if the ER knowingly hired undocumented workers, then the Board could and should seek back pay.

ALJ'S will allow ER to raise undocumented status as a defense.

Hoffman Plastics was a reversal of the previous board position in *Sure-Tan, Inc. v. NLRB*

Section 10: Powers of the Board to Prevent ULP's

Sec. 10(a): *The Board is empowered, as hereinafter provided, to prevent any person from engaging in any unfair labor practice (listed in section 8 [section 158 of this title]) affecting commerce.*

This section broadly grants the Board the power to prevent ULPs.

Sec. 10(b): *Whenever it is charged that any person has engaged in or is engaging in any such unfair labor practice, the Board, or any agent or agency designated by the Board for such purposes, shall have power to issue and cause to be served upon such person a complaint stating the charges in that respect, and containing a notice of hearing before the Board or a member thereof, or before a designated agent or agency.*

The Regional Director is empowered, with the delegated authority of the General Counsel, to issue complaints and undertake investigations of unfair labor practices, and when applicable set forth a notice of hearing.

This section also sets the **statute of limitations** on ULP claims at six (6) months. In order to be within the statute of limitations, not only must the charge be filed, but it must also be served within that time. There is however some **tolling**:

1. If the charging party is a member of the armed forces
2. If the charging party is a minor
3. If there is fraudulent concealment of facts.

Other things found in Sec. 10(b):

1. The General Counsel, or his agent the Regional Director, may **amend** the complaint.
2. The respondent has the right, but not an obligation, to file an **answer** to the charges.
3. If no answer is filed however, the GC has the right to seek a **summary judgement** from the NLRB.
4. There is a **right to appear** in person before the Board and to have someone represent you.

The “**Rules of Evidence**” are not controlling but should be used so far as practical. Normally the ALJ will try to follow as close as possible, however they have the discretion as to when to abandon them.

Sec. 10(c) requires:

Legal Standard: The legal standard for all hearings is the civil standard of a “**preponderance of the evidence.**”

Remedies: The board has two main remedies:

1. **Cease and desist:** If the Board finds a 8(a)(1) or an 8(b)(1)(a) ULP, then the board will serve the violator with a cease and desist letter.
2. “**Make whole remedy**”: Make the person who has been unlawfully discharged whole by having them reinstated with or without back pay as required. Additionally, any out of pocket expenses incurred as a result of the unlawful discharge (i.e. medical expenses cause by lose of health benefits, job seeking benefits, etc.

If it was the Union who had forced the ER to discharge someone in violation of Sec. 8(b)(2), they shall be **jointly and severally** liable for all “make whole” damages.

3. The Board is not entitled to seek penalties (i.e fines, emotional distress damages, etc.).
4. The Board may seek extraordinary remedies, include postings for EE's all violations and remedies. For example, they will require an EE to post a notice saying that "We will no longer place our employees under surveillance and will reinstate Joe Smith after firing him for engaging in protected union activities." In some cases, the Board has ordered a reading of the violations and remedies.
5. The Board may also issue a decision finding no merit to the claim.

Sec. 10(j):

Allows the Board to go to Federal Court where the Board has reasonable cause to believe that there has been a serious violation and the traditional board remedy (which may take years) would be inadequate. The could then seek an injunction from the Court to immediately reinstate the worker. For example, when the ER attempts to "nip the bud" of union organization by firing the chief union organizer to scare the other EE's into inaction; you can't "unbreak the egg" if you wait a couple of years for a Board decision.

Definition:

Hiring Hall: The ER may agree to only hire through a hiring hall, as long as the Union do not discriminate on the basis of Union membership when operating this hiring hall.

Union Security Clause: A provision of the CBA that requires EE, after 30 days, become members of the union in good standing. Anything less than 30 days is an unlawful Union Security Clause. If the EE's do not pay dues after 30 days, than the Union can seek their discharge. **Section 14(b)** leaves mandatory union membership decisions up to the states.

"Right to Work" state: A state which has made union security clauses unlawful under Sec. 14(b) of the NLRA. 22 states are RtW states.

NLRB v. Adkins Transfer Co.
226 F. 2d 324 (6th Cir.1955)

Facts: Employer is a small (only 12 trucks) trucking company The truck drivers are all members of the Teamsters and there is a CBA in place. The relationship between the Union and the ER has been excellent, no evidence of animus. In fact, the ER only hires through the "hiring hall." In addition to the 12 truck drivers, there was also a mechanic and a helper. The mechanic and helper are un happy and seek representation. The ER grants recognition but when the mechanics seeks significantly hire wages, the ER says I can't afford to pay union scale, it so he's got to lay them off. It's purely a matter of costs. The ER subcontracts the work out. Regional Director files a complaint. ALJ says economic defense is acceptable. The Board says that speculation that the union "might strike," or "mike demand more money" was not enough to rebut a clear prima facia case. CoA says that discrimination under the NLRA is that which would discourage membership in a labor organization. They say there's no such evidence in this case.

Issue: Can ER's discharge employees for "purely economic reasons?"

Synopsis of Rule: An ER may **change** or **suspend its operations** so long as it doesn't do so anti-union reason. It may be true that joining the union was a secondary reason, but the primary decision was that the job could be done more cheaply by **subcontracting** work out. There was no showing of animus.

Miscellaneous Protected Activities:

Protected Activity	Unprotected Activity
1. Individually seeking enforcement of an existing CBA of which you were a 3 rd party beneficiary. <i>City Disposal. This is a SCOTUS decision.</i>	1. Individually seeking enforcement of someone else's CBA of which you are not a 3 rd party beneficiary. 2. Individually complaining to an independent

<p>2. To individually complaining to your supervisors about working conditions, wages and hours of employment. <i>Parexel International</i>. NOTE only a Board decision, not SCOTUS.</p> <p>3. To individually make an objection to a new rule in the presences of others. NOTE only a Board decision, not SCOTUS.</p> <p>4. To request and have Union representative at a investigatory interrogation, but only in a union setting. <i>Weingarten</i>. This is a SCOTUS decision.</p> <p>5. To distribute literature, both about the specific terms and conditions of employment with your own ER, but also literature which supports unions more generally. <i>This is a SCOTUS decision</i>.</p> <p>6. Engage in animal exuberance (i.e. yelling “SCAB!!!”, mooning your boss).</p> <p>7. To ask a customers or press for help, to secure better working conditions. °</p>	<p>government agency absent a CBA., <i>Meyer's Industry</i></p> <p>3. To request to have union representative at a investigatory interrogation, in a non-union setting. <i>IBM Corp.</i></p> <p>4. To engage in violence.*</p> <p>5. To use obscene language.* <i>Southwest Bell</i></p> <p>6. To use threatening language.*</p> <p>7. To attack the ER in a way unconnected to a labor dispute, <i>Jefferson Standard Broadcasting</i></p> <p>* Under <i>Caterpillar Inc</i>, if any of this action was provoked it will be forgiven.</p> <p>° Under <i>Jefferson Standard</i>, requests for help can't be devoid of connection to the labor disputes.</p>
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Employees Complaints

NLRB v. City Disposal Systems, Inc.
465 U.S. 822 (1984)

Facts: James Brown is a truck driver for City Disposal Systems, Inc. and while he's out driving his truck he is almost hit by another dump truck (#244). Takes it back to the shop and says that this is unsafe. Then he's driving a truck and reports it to the supervisor. Supervisor then says don't like that one? Then drive #244. In the CBA, says don't have to drive an unsafe truck, not to be unreasonably withheld. Brown says “Is the trash more important that the safety of your employees.” ER says half the trucks are unsafe. James Brown goes to the Union; they say there's no merit. Goes to the NLRB. ALJ says unlawful under the *Interboro* doctrine. See *Interboro Contractors, Inc.*, 1157 NLRB 1295.

Issue: Is it concerted activities under the NLRA for an EE to enforce a collective bargaining agreement alone?

Synopsis of Rule: Justice Brennan says the individual attempt to enforce the CBA is a **reenactment the original concerted bargaining** done to secure the CBA. There is nothing in *Interboro* inconsistent with the Act. NOTE: For there to be a reenactment, there must be an existing CBA.

Dissent: Justice O'Connor says self interested acts done alone are not protected.
Myers Industry, Inc.:
281 N.L.R.B. No. 118 (1986)

Facts: Unlike *Brown*, Meyer's Industry has no CBA or union. The EE complained to a state agency that his ER was using unsafe trucks. He was terminated.

Synopsis of Rule: The NLRB in *Myers* overruled *Alleluia Cushion Co.*, 221 N.L.R.B. 999 (1975), said had held that individual activity that inured to the benefit of others was “constructively concerted”. The Board said that one person can not be protected absent a preexisting union CBA when they complain to an independent Government Agency.

Parexel International, LLC
56 NLRB 82 (2011)

Facts: A nurse complained to her Supervisor about wages and working conditions, but not to any of here co-workers.

Synopsis of Rule: Board said that under certain circumstance, EE's who have engaged in no concerted activities, may still be protected. A single complaint to your supervisor is the first step to concerted activity and is therefore protected. The Board said that this was the first step towards a union drive and the ER acted to “nip in the bud” that effort. An adverse action taken against an employee on the belief that they have engaged in union activity is unlawful even if that **belief is**

mistaken. Similarly a **mass discharge** with no regards to who may or may not have engaged in union activity is likewise unlawful. The Obama board's reasoning is that it was not what the the ER's did in these instances that made it unlawful, but rather what they intended to do, which was to **thwart an EE from engaging in union activity.**

Worldmark by Wyndham
356 NLRB 104 (2011)

Facts: The ER passed a new rule saying that EE's must tuck in their shirts. One EE was wearing a Tommy Bahama shirt and refused, saying that it was not appropriate to tuck in that kind of shirt.

Synopsis of Rule: Board found it to be concerted under *Meyers*. They said that what the EE was doing was, by making this objection in the presences of others, he was inciting others to join with him in action. The Board said it was important that the supervisor had **just** informed the employees of the new rule.

Investigative Interviews

NLRB v. Weingarten, Inc.
420 U.S. 251

Facts: An EE was suspected of being responsible for cash shortages and was called to interview with the store manager; the store manager interrogated her in the presence of a security specialist and refused her request to bring in the union steward or some other union rep.

Issue: Is there a Sec. 7 right of the EE to ask for union representative.

Synopsis of Rule: In a union setting, there is a fundamental right under Sec. 7 to have a **union representative at any interrogation**. Where a union has lost an election, *Weingarten* does not apply. *IBM Corp.*, 341 NLRB 148. This has gone back and forth a number of times (*Materials Research, Dupont, Epilepsy Foundation, IBM*).

Distribution of Literature

Eastex, Inc. v. NLRB
437 U.S. 556

Facts: ER refused to allow union to distribute literature, which advocated supporting labor more broadly (in state elections, right to work provisions, encouraging members to register to vote, etc.)

Issue: Does this violate Sec. 8(a)(1) for the ER to refuse to allow the union to distribute literature which supports labor more broadly?

Synopsis of Rule: SCOTUS first looks at Sec. 2(3) the definition of EE's which does not limit that term only to the direct EE's of an ER. They go on to say that Sec. 7 is not limited to a specific dispute between an ER and an EE., but can argue for the rights and conditions of employment for people at other employers (i.e. state or national activities.) ER's is wrong to say that EE's are limited to only attempting to affect the terms and conditions of employment only through the channels of their own employment.

Provocation

Caterpillar Inc.
322 NLRB 674 (1976)

Facts: EE was engaging in protected activities when the ER fires him unlawfully, which provoked him to call his boss a "motherfucking liar," to threaten to "deal with him outside" and finally pushes his boss with his finger.

Synopsis of Rule: The Board says if ER provokes the action, here by unlawfully discharging him, Board is willing to forgive it and protected activity does not lose protection. The level of assault might be a factor (punching someone v. slightly pushing them)

Other examples:

Tubari Ltd. Inc.
287 NLRB 1273

DuPont de Nemours
263 NLRB 159

Facts: Employee pulls off gloves and rushes the ER before being physically restrained by this co-worker.

Facts: Employee pushes ER.

In *Atlantic Steel, 245 NLRB 814 (1979)*, the Board laid out 4 factors to be considered in determining whether an employee's protected activity loses protection because of conduct that may have been provoked by the ER. The Board will look at:

- 1) the place of the discussion;
- 2) the subject matter of the discussion;
- 3) the nature of the employee's outburst; and
- 4) whether outburst was provoked by the employer's unfair labor practice.

Defamation

NLRB v. Local 1129, IBEW (Jefferson Standard Broadcasting Co.)
346 U.S.464 (1953)

Facts: Union represents the radio station and the company is going to start a television show. Negotiation with the technical EE doesn't go well, so negotiations break off. Union engages in peaceful picketing at break times (don't strike). Then a handbill was distributed that was, according to the ER a "vitriolic attack on the employer," (which says that the programming was not very good; lacks the technical expertise to show live content and that the ER doesn't buy proper equipment because they think Charlotte is a second-class city.) The ER decided to fire the 10 EE's they think to be responsible. Union files a complaint with the board. The Trial Examiner (now called a ALJ) says unlawful discharge. Board says 9 out of the 10 were responsible and fired lawfully, but the one remaining was unlawfully discharged.

Synopsis of Rule: The attack was **not in the context of a labor dispute**, this attack on the the ER was the same as physical sabotage.

Complaints on New Media

Facebook: There is no case law on this. It falls somewhere between protected concerted activities and the *Jefferson Standard* decision.

Email: *The Guard Publishing Company, d/b/a The Register-Guard*, 351 NLRB No. 70, held that employees do not have a protected right to use employer email systems for solicitations or communications regarding union-related topics.

Strikes

Two main types of strikes:

1. **Economic Strike:** Where workers cease working (withhold labor) to put economic pressure on their ER to get better wages, etc.
2. **Unfair Labor Practice:** ER has violated a Sec. 7 violation and the union is protesting.

Strikes can convert from an economic strike to an unfair labor practice strike. The type of strike determines whether workers have a right to return after their strike.

Economic Strikes

Replaceable?: The ER may permanently replace striking workers.

Unfair Labor Practice

Replaceable?: The ER may NOT permanently replace striking workers.

Definition:

Wildcat Strikes: Strikes called by the EE's themselves and unsanctioned by the union. These are unprotected.

Sympathy Strikes: EE of Company A sees people on strike at Company B, and does not do his work duty for Company B.

Whipsaw Strike: Union picked one ER in a multi-employer bargaining. This is not unlawful

Protected Activities:

Protected Activity

1. Picketing individual (because it's engaging in union activity, which does not need to be concerted.
2. Sympathy strikes. However a sympathy striker "stands in the shoes" of the strikers. If their strike is unlawful so is the sympathy strike.
3. Whipsaw strikes.

Unprotected Activity

1. Partial strikes (ex. "I'll do this job, but not this job") / slow downs/ "Blue Flu" (calling out sick). There is no case law on striking day one, working the next.
2. Wildcat strikes.
3. Secondary strikes.

HealthCare Institutions

Under Sec. 8(g) of the NLRA, any union that wants to picket a healthcare institution must first give ten (10) days notice.

NLRB v. Mackay Radio & Telegraph Co.
304 U.S. 333 (1938)

Facts: The ER has facilities throughout the United States and operate a telegraph service. The operators and clerks form a union. Union at the San Francisco location goes out on strike. This was an **economic strike**. ER goes out and hires workers to replace them permanently. Eleven striking EE's tell the ER that they want to return, but ER says that they have been replaced. However, the ER concedes and allows five people back. Coincidentally, the EE's taken back on were the five least active union members. Union says discrimination. The Board agrees. The CoA refuses to enforce the Board order and it goes to the SCOTUS.

Issues: Does ER have a right to permanently hire workers as replacements for striking workers?

Synopsis of Rule: Sec. 13 says that the ER can't interfere with the right to strike, but nothing in the act prohibits the ER from continuing the business. Therefore, in an economic strike, the ER may "permanently replace" striking workers. The ER has not fired them (unlawful motive), they have been permanently replaced (lawful motive). **They retain status as EE's during the strike.**

When it's an ULP strike, the ER MUST hire strikers back. They may only "temporarily replace" strikers. Under the Bush board, Union must prove that they knew of and were striking (when they took the strike vote) because of a specific unfair labor practice. There is a **presumption that any strike is an economic strike.**

Before a Strike Begins (NOTE: If you don't do both of these you can't strike or lockout):

1. 8(d)(1) Notice: The party who wishes to modify the CBA has to provide the other party **written notice** no less than sixty (60) days before the contract expires (and before they strike).
2. 8(d)(3): Thirty (30) days before the expiration of the contract, the party has to alert the Federal Mediation and Conciliation Service, or any state or local mediation service, that the parties are getting close to the end of a contract so that they will have available negotiators/mediator if need it be.

For **healthcare institution's** you add thirty (30) days to both numbers above.

After the Strike Ends:

1. If the ER has not permanently replaced EE, they have to offer the job to union members.
2. When reinstated after a strike, you must be put in a **substantially equivalent** position.
3. ER can't **discriminate on degree of union involvement** when hiring back.
4. Must be an **unconditional offer to return**.
5. **Replacement workers become members of the union** unless the union reject them.

NLRB v. Erie Resistor Corp.
373 U.S. 221

Facts: The EE's are on strike. The ER tries to attract replacement workers by saying that replacement workers would be granted 20 years of seniority. Strike breaks quickly after a number of replacement workers had been hired. The union accepts the ER's terms and the strike ends. However, 178 EE's leave the union saying this union can't do anything for us. About a year later, the ER is having financial difficulties and announces layoffs. Because the strikers were no longer the most senior employees, they were laid off. The union files discrimination charges. The ER argues that this is a business decision, in *Mackay Radio* the ER promise permanent jobs; here we're offering super-seniority.

Synopsis of Rule: Court says this goes well beyond a legitimate business purpose. This is different then *Mackay* because it affects bargaining in the future. It renders future bargaining futile. The practice is unlawful if there is evidence of:

1. Unlawful intent*, and
2. A lasting effect (discriminates both during and after the strike)

The Board may infer intent by the conduct of the ER.

NLRB v. Great Dane Trailers, Inc
388 U.S. 26

Facts: The EE's were several weeks into their strike. The union was dispersing funds from their strike fund. The EE's had earned vacation time, and attempted to get vacation pay, which they were entitled to, from their ER. Employer says that they have made a change to the vacation policy and were going to withhold funds for strikers. The ALJ and the Board says that this is purely discriminatory. The CoA says based on the records that strikers and non-strikers are treated differently, but there is no evidence of discriminatory motive. They muse that an economic argument could be made to justify this (valid business decision).

Synopsis of Rule: The SCOTUS its an ULP under Sec. 8(a)(3) where the action is premised upon the discriminatory conduct that results in discouragement of union participation. There's no question this is discrimination. But ER says there is no evidence that they did it retribution and could have and a legitimate business justification, echoing the opinion of the CoA. SCOTUS lays out the “**inherently destructive**” standard.

If the employer's legitimate business reasons has a “inherently destructive” impact on Sec. 7 rights no need to prove motive. THIS IS A VERY HIGH THRESHOLD. If “**comparatively slight**”, then there is a need to prove motive.

Sympathy Strikes

Board has long held that **sympathy strikes** are protected activity; and are not considered intermittent striking (i.e. selectively choosing what jobs you will do.) However, you “**stand in the shoes of the strikers**”, so if it's an unlawful strike (ex. a secondary strike, wildcat strike, etc.) you're acting unlawful. You have an absolute right to throw your lot in with the union engaging in mutual aid and protection by assisting unions.

No Strike Clauses

Employers will normally seek to put a “no strike clause” into the CBA. How no strike provisions are read depend on the make up of the Board:

Republican Boards

Read no strike clause broadly to say that it includes sympathy strikes.

Democratic Boards:

Require that for sympathy strikes to be covered by a “no strike clause” they have to have to be **explicitly waived** in the contract.

Metropolitan Edison Co. v. NLRB
460 U.S. 693

Facts: ER is working on the nuclear power plant at Three Mile Island. Two unions on site; one was the electrical workers and the other was the operating engineers. The operating engineer's union goes on strike. The electrical engineer's union has a “no strike provisions.” The ER calls in the elec. engineer's union head, Wang, and say you better make sure your workers cross the picket line (and don't engage in a sympathy strike) because we have a contract. Wang says talk to the operating engineers and see if they will picket at only one entrance; that way we can set up a **reserve gate system** (Union A pickets at gate A, Union B and all their suppliers only use gate B). They can't make it work and the electrical engineers honor the picket line. The ER disciplines everyone who honored the line (with between 5 and 10 day suspensions) but Wang gets 25 days. ER says union reps did not make a good faith effort to get their unions to comply with the terms of the CBA. The ALJ say this is discriminatory. CoA disagrees. Goes to the SCOTUS.

Issue: Can ER may unilaterally define what actions a union rep must take to enforce a no strike clause in the contract?

Synopsis of Rule: SCOTUS says no, this is discriminatory to impose harsher discipline on union official because they can't get their members to comply. They can't unilaterally dictate how union reps must act. The relationship between ER and union should be one of arms length.

Laidlaw Rights and the Right to Return

Laidlaw Corp.
171 NLRB 1366 (1968)

Facts: The union notifies the ER that they are going to go on strike. The Plant manager, the day before the strike, tells the EE's that anyone that strikes will never be hired back in the industry. (they will be “black balled”). They end up going on strike. One EE, Massey, decides he has to go back to work. The ER says “the positions been filled but **if** you come back you'll be hired back as a entry level position.”

A month later the rest of the strike breaks and make unconditional offer to return. The ER says they have have no jobs left but when subsequent vacancies occur, the ER never considers or contact the strikers. At the same time, there is an ad in the paper soliciting new EE's.

Synopsis of Rule: A ER can **never** remove seniority, or start a striker at a lower salary, unless they negotiate and agree to a lower salary

The fact that the EE's were not hired back after their unconditional offer to return to work was discriminatory. Once you've **made an unconditional offer to return to work, it is ongoing**. Striker does not need to call in every day to offer work. Upon the opening of a position ER must proactively offer them to strikers. UNLESS:

1. The striker has taken **substantially similar employment**.
2. If the EE can establish a **legitimate business reason** for downsizing, no obligation to reinstate
3. After one year has passed. Replaced workers have the **right to vote** in elections for one year.

Lockouts

The Board used to say that the ER could only make use of a lock out **defensively** to prevent a strike. If they were to employ **offensively**, to exert economic pressure on their EE's than it was an unfair labor practice.

You can't lockout and then permanently replace.

American Ship Building Co. v. NLRB
380 U.S. 300 (1965)

Facts: Steinbrenner, owned a company American Ship Building Co. which did repairs on ships. ER had a long term relationship with the Unions. Because the work was largely seasonal, the Union tended to call strikes at the busiest time of the year. Union said they don't want to strike, but there had a strike before every negotiation. They claimed these were "wildcat strikes," unsanctioned by the union (these are unprotected.) The ER issues a memo notifying certain employees that they would be laid off because of the labor dispute. In Chicago, the entire facility closed; in Toledo, all but two employees were laid off, etc. Union files charges that these "lockouts" were coercive under 8(a)(1) of the NLRA. Board holds that this was an unlawful offensive lockout. Gets up to the SCOTUS

Synopsis of Rule: ER may lock out employees; it is a strike initiated by the employer. There is **no absolute right of the union to pick the time of the strike**. If the this was **done with a hostile motive** of preventing union membership than it would be unlawful, as seen in *Erie Resistor*. Likewise, if it's done for an **unlawful purpose**, then it is unlawful. For example, the owner of Rockettes tried to lock out musician union right before Christmas show, because Union leader said something mean about Owner. Owner said there would be a lock out unless there was a formal apology in the newspaper. You can't condition negotiations (an unlawful bargaining position) or for a discriminatory purpose.

Local 15 IBEW v. NLRB
429 F. 3d 651 (2005)

Where ER's behavior is inherently destructive, the effect must be more than a temporary one. **Inherently destructive** always do one of the following things

1. Always **harm the collective bargaining process** (more than one worker, large unions)
2. **Interferes with peoples right to strike.**
3. Directed on **employees union status.**

"Where the ER's actions are inherently destructive, they must be submitted to the most stringent test of balancing between employer economic benefits and harm to collective bargaining."

Contractor's Labor Pool, Inc. v. NLRB
323 F.3d 1051

The Clinton Board found an inherently destructive situation where the ER had hired temporary workers using a policy where "if you make more that 30% of our wage rate we won't hire you." This had a disparate impact on union workers. The Board says unlawful. The D.C. Circuit disagreed with the board.

Obligations to Bargain Collectively

Employer Refusal to Bargain ULP – Sec. 8(a)(5):

*It shall be an unfair labor practice for an **employer** to refuse to bargain collectively with the representatives of his employees, subject to the provisions of section 9(a).*

Union Refusal to Bargain ULP – Sec. 8(b)(3):

*It shall be an unfair labor practice for a **labor organization** or its agents-- to refuse to bargain collectively with an employer, provided it is the representative of his employees subject to the provisions of section 9(a)*

Sec. 8(d):

*For the purposes of this section, to bargain collectively is 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, or the negotiation of an agreement or any question arising thereunder, and the **execution of a written contract incorporating any agreement reached if requested by either party**, but such obligation **does not compel either party to agree to a proposal** or require the making of a concession: Provided, That where there is in effect a collective- bargaining contract covering employees in an industry affecting commerce, the duty to bargain collectively shall also mean that no party to such contract shall terminate or modify such contract, unless the party desiring such termination or modification--*

Multi-employer Bargaining

Sometimes unions will agree to multi-employer bargaining, for example SAG, DGA, hospitals, etc.

What are the benefits for an ER?

Shared costs (or attorneys, etc.), smaller ER benefit from the larger ER's strength, no single ER is at an economic disadvantage relative to any other ER in the multi-employer bargaining unit.

What are the benefits for Unions?

The bargaining unit merges into a multi-employer unit. Hospital A has 3,000 EE's! Hospital B has 5,000, etc. In total the the multi-employer bargaining unit has 10,000 EE's. Now in order to decertify, there would have to be a 30% showing from 10,000 rather than just 3,000 or 5,000. This means strength for the union.

While joining a multi-employer bargaining unit is completely voluntary, you can't unilaterally withdraw from a multi-employer bargaining unit once bargaining has started as this is untimely. There are a few exceptions in special circumstances. *Retail Associates, Inc.* 120 NLRB 388 (1958).

There is also **co-ordinated bargaining** which is not a formal relationship, but they will share information.

Additionally, **“me too” bargaining**. Small ER's may not wish to join a multi-employer bargaining unit but will agree to go along with what the larger parties agree to (i.e. film production companies agree to be bound by the SAG/DGA agreements even though they weren't parties to them). However, once you agree to this, you can't back out if you don't like the deal that the other parties agree to.

Charles D. Bananno Linen Service, Inc. v. NLRB
454 US 404

Facts: There is a multi-employer bargaining unit made up of laundry service providers. Bonanno is upset with the way bargaining was going and the groups got to an **impasse** (the point where further negotiations will not result in an agreement). Bonanno is struck by the union (an economic strike), and no-one else. The ER hires permanent replacements under *McCay Radio* while the striking workers retain *Ladelaw* rights and status as employees. Union reaches agreement with the multi-employer unit. Bonanno is upset because even though he was the only ER that was struck, the ME unit didn't get a good deal so Bonanno tries to get out. ER argues that impasse was an extraordinary circumstance which permitted him to withdrawal. ALJ disagrees; Board orders Bonanno to execute the contract that the ME had negotiated and that the withdrawal was untimely. CoA agrees.

Synopsis of Rule: While ME are not discussed at all referenced in the statute. But can't unilaterally withdraw once bargaining has commenced. Impasse is not an extraordinary circumstance.

General Electric Co. v. NLRB
412 F.2nd 512 (2nd Cir. 1969)

Facts: GE has 290,000 EEs, 60 plants, 80 unions and roughly 150 bargaining units. The ER typically would play one unit against another. The Unions decided that they would establish a committee to coordinate bargaining with GE. At the beginning of bargaining for that contract the IUE joined with seven other unions to coordinate bargaining. They asked for a preliminary meeting. ER says, I will only bargain with IUE. Union says they're not voting members, just here to help us and advise us. Board sought an injunction against ER to bargain with this committee. District Court grants the injunction against the ER. Goes up to the 2nd Cir. CoA. ER says that union is effectively circumventing the predetermined and agreed upon bargaining unit. Union says we're just trying to bargain more effectively.

Issue: Is it lawful for a union to have other members on it's committee and can that justify an ER from not bargaining with them?

Synopsis of Rule: Sec. 7 allows EE's to select a representative of their own choosing; therefore committees are allowed. Sec. 8(b)(1)(B) says that it's an ULP for a union to coerce or restrain an ER from selecting their own representative.

Majority Status and Union Cards

There are three types of **union authorization cards** will say one of two things:

Membership Card: “I, Jane Doe, hereby authorize ABC union to represent me.”

“Election Authorization Card”: “I, Jane Doe, hereby authorize an election to be preformed by the NLRB regarding representation by ABC Union.

Dual Purpose Card: Both authorizes representation and an election.

How reliable are cards? There are many coercive tactics for getting people to sign union cards. There are a number of ways that union authorization cards could be unlawfully obtained:

Physical violence or intimidation
Trickery/Fraud

Social Pressure
Bribery

Congress considered banning cards entirely when debating the 1947 amendments; but ultimately didn't.

NLRB v. Gissel Packing Co.
395 US 575 (1969)

Facts: A petition was filed and an election was run, but the Union lost. The Union files an objection, claiming that they had majority status until ULP dissipated their support. They also file and 8(a)(5) refusal to bargain. In the second case, union had filed a petition but the election had been blocked because of torrent of ULP. The Board will **block an election** in this situation, but only where there is sufficient evidence. In the third case, the ER committed the ULP so face that the Union didn't even file a petition as soon as it had majority status, instead filed a ULP.

Issue: Can an employer, once presented with evidence of union majority status based on union authorization cards, refuse to bargain?

Synopsis of Rule: SCOTUS says cards can be reliable evidence of majority status and are enough to meet the *prima facie* case for majority status, but the employer has the absolute right to litigate their authenticity.

Discussion:

History:

1. **Joy Silk Doctrine**: ER could lawfully refuse to bargain with a union claiming representative status through the possession of authorization cards if he had a “good faith doubt” as to the union's majority status; instead of bargaining, he could insist that the union seek an election in order to test out his doubts. The Board, then, could find a lack of good faith doubt and enter bargaining order in one of two ways. It could find:

- (1) that the employer's independent unfair labor practices were evidence of bad faith showing that the employer was seeking ...(page 328)
- (2) or the ER had no good reason for doubt and refused to bargain.

2. **Aaron Brothers Doctrine**, came later:

ER does not have to offer a reason. Burden shifts to the GC to show bad faith and that an employer “will not be held to have violated his bargaining obligation simply because he refuses to rely on cards... rather than an election.” If the UFL were so serious as to poison the election process. ER can legally demur, not answer and force an election.

Counter Arguments:

1. ER argues that they did not have sufficient time to exercise their free speech rights.

Small Shop Doctrine: The Board says that in any small workplace, everyone knows everything that is going on, including a unionization drive. This doctrine rebuts ER's argument that they did not have sufficient time to exercise their free speech rights. SCOTUS upholds this doctrine.

2. ER argues that it is too easy for the cards to be secured in an unlawful manner

SCOTUS considers the argument that cards could be fraudulent. SCOTUS says Board has ways to address this.

The Board is required to prove majority. They do this by introducing **cards into evidence and then they could**

authenticated (ex. comparing the signatures against the W-4; calling each and every member of the bargaining unit up to testify to say “that it’s my card”, sworn testimony of the solicitors, etc.). The **ER has a chance to challenge the GC’s case for authenticity.**

Cumberline Shoe Doctrine: Cards are valid if **clear on their face** and **EE is bound by their signature** unless what the solicitor says is different than what was signed (i.e **misrepresentation**).

Gissel Remedies

Three levels of unfair labor practices (pg. 335):

<u>Type of ULP:</u>	<u>Remedies:</u>	<u>Examples of ULP:</u>
1. Hallmark Violations: ULP, the effect of which is so bad that it has completely ruined the chance of running a fair election.	A remedial order mandating bargaining is definitely appropriate. The Board will say that there is no run an election, however there must have been a majority showing at one point.	Mass discharges; threats of plant closure; across the board wage increases
2. Less Pervasive Violations (not to a wide group of people) but still undermine majority status.	A remedial order mandating bargaining could still be appropriate.	Interrogations; targeted individual threats
3. Minor Violations	A traditional cease and desist is a sufficient remedy	One threat, one interrogation.

NOTE: 2nd Circuit hates Grissel rules because bargaining unit has changed many times over (turnover) in the two or three years it takes to get to CoA. Unions will therefore look for Sec. 10(j) injunctions for an interim bargaining order.

Linden Lumber Div., Summer & Co. v. NLRB
419 US 301(1974)

Issue: In the absence of evidence of ULPs can a union that has a majority be denied by the employer?

Synopsis of Rule: ER is absolutely privileged to not acknowledged a majority (until an election), unless the ER says “show me,” or conducts a poll. Once the ER undertakes to verify a majority, the are bound by the results.

Brooks v. NLRB
348 U.S.75

Facts: The union wins an election and is certified by the Board. The day before the certification, the majority of the workforce signs a petition saying that they don’t want the Union.

Synopsis of Rule: EE’s are stuck with the union. This policy forces EE’s to act more seriously. **Irrebuttable for a year, from the election going forward.** There are two exceptions that excuses the ER from bargaining:

1. Where the union has had a schism/breaks up, or
2. Where there is a huge change in the size of the bargaining unit.

Minority Bargaining Orders

Conair Corp v. NLRB
721 F 2d. 1355 (DC Cir. 1983)

Facts: A union drive was underway and there appeared to be trend of people signing cards that would have given the union a majority status in just a few more days. Then the ER holds a meeting where they threaten to close the plant (a ULP) and the signatures dry up. **Majority status was never achieved, but for the meeting it appears it would have.**

Synopsis of Rule: While they had not yet achieved a majority they would have but for the ULP and therefore a *Gissel* remedy (i.e. remedial order mandating bargaining) would have been appropriate.

Gourmet Foods v. Warehouse Employees of St. Paul.

Synopsis of Rule: Reagan's Board said there is no such thing as minority status and overturned *ConAir*. While the 3rd Cir. agreed with *ConAir*, the D.C. Cir. affirmed *Gourmet Food*. There is a split in the circuits so it could wind up in the SCOTUS.

Withdrawal of Recognition

Obligation to bargain only exist when there is a designated 9(a) rep. So how does the 9(a) representation end? **ER can withdraw recognition of the union**, but only after one year from the election because the majority status is irrebutable because of the **election year bar** (or six months where there was voluntary recognition). Also, during the life of a contract, the status is irrebutable. After that year or at the end of the contract, ER acts at heir own risk, because if there is still a majority support for the union, every time they act with regard to a mandatory bargaining subjects, they are liable for any economic damage. *Levitz Furniture Co.*

NLRB v. Curtis Matheson Scientific, Inc.
494 U.S. 755 (1990)

Facts: ER makes lab equipment. The union was recognized in 1970 and there have since been three contracts. The ER makes a last best offer and the union refuses it. The ER then locked the EE's out; the union strikes in response. Now the ER can permanently replace works and hires 29 replacement workers for the 27 bargaining unit positions. Additionally 5 of the EE's cross the picket line. The EE concede to the ER's demands and move to accept the last best offer. The ER says that it's now off the table and that they doubt the majority status of the Union. Union makes a request for information; asking who is in what unit. ER says that it's refused recognition and therefore does not need to provide that information. The Union files charges with the Board. The Board says there is no good faith basis for withdrawal of recognition; divided CoA says that there is a good-faith basis.

Issue: Is the NLRB, in evaluating an ER's claim that is had a reasonable basis to doubt a union majority status, required to presume that striker replacements oppose the union?

Synopsis of Rule: If the union was the majority rep, then there replacement workers are presumed to want the union in the same proportion as the original vote. SCOTUS says if they didn't then collective bargaining would have not meaning because the ER could just fire and rehire to eliminate majority status.

Discussion: SCOTUS states the **appellate review standard**; saying that NLRB applies policy and therefore their decisions are **entitled to deference** if they are **rational** and **consistent with the purposes** and policies of the Act (and unstated, was there a **sufficient record of facts** for the Board to reach the conclusion that it made)This is so even if the Justices would have decided differently if they were sitting on the Board.

Board makes certain presumptions; including that there is a majority of EE's that want the union represent them at the bargaining table. How can the ER rebut this presumption. Can the ER presume that EE's that broke the strike no longer want the union?

History

The Board's original position, in *Stoner Rubber Co*, was that assumed that replacement workers did not support the union. In *Cutten Supermarket*, the Board reverse it's position in *Stoner Rubber Co* to hold that the replacement workers supported the union in the same proportion as the strikers they replaced. In *Station KKHII*, the Board says either presumption is flawed and each instance must be reviewed individually.

“Good Faith Doubt”

Facts: Union and the ER have a long standing relationship. One day, the ER says that the economy is bad and we're going to close up shop. A group of the managers say that this is a great opportunity and decide to pool their resources and buy the company. The new managers hire 32 of the 40 original EE's for the new enterprise. 8 EE's say that they no longer want the union. This could be coercive interrogations. But this does not become an issue. Ron Moore (a shop steward) says that he doesn't think the union has majority status anymore. Kermit, from the night shift, says he didn't believe the union had any support in his shift. Based on this ER's decide to conduct a poll. They get a Catholic priest to conduct the secret poll. Union loses 19-13. ER withdraws recognition. ALJ says that while the poll was lawful under *Strucknes*, the ER had no legal basis to conduct it and therefore could not be used to justify the withdrawal of recognition, because it was "fruit of a poisonous tree." The Board affirms. CoA enforces the Board's bargaining order over a vigorous dissent.

Synopsis of Rule: The union has the right to claim representational status as the 9(a) rep where the ER continues the business is substantially the form and the new company has a majority of it's workforce from the original company.

Standard of Evidence for "Good Faith Doubt": Hearsay is sufficient to create "uncertainty," and the Board's evidentiary standard is irrational. There was a reasonable good faith uncertainty and a poll was a reasonable means of resolving it.

Discussion: Where the ER is unsure about whether the union still has majority status, there are four things ER can do:

1. Poll the employees.
2. File an RN petition. The showing of interest would be the evidence that the ER has.
3. Withdrawal recognition and refuse to bargain.
4. Continue to bargain.

With regard to the first three actions, the Board has a single standard: ER must establish a "reasonable good-faith doubt."

Scalia has two concerns:

First, if elections are the gold standard for resolving this doubt, why shouldn't the ER's threshold burden be easier? Additionally, if the EE's lose an election, there is the one year bar. If the ER withdraws recognition, the EE's are free to file a petition. But ultimately he says that it's not so irrational a to overrule it.

Secondly, what is doubt? Scalia says that doubt, by its dictionary definition is merely "uncertainty." Scalia says that the Board seems to think that it is more than that. If you have to prove the 50% plus one EE's don't support the union that's certainty, not doubt.

Board Response:

In *Levitz Furniture Co.* ER may unilaterally withdraw recognition from and incumbent union only where [employer has actual evidence that] the union has ACTUALLY lost the support of the majority of the bargaining unit employees. If employer is wrong, then it's strictly liable for economic damages.

General Council Memo GC0201: ER sustains his evidential status of actual lost of a majority by providing a petition with numeric majority of a EE's who no longer support the union. However the Union may rebut this evidence.

Section 8(d): Good Faith Bargaining

The War Labor Board said "parties were required to take up the differences in an earnest effort to reach an agreement on all points at issue."

Definitions:

Good Faith: The ER and the Union must have a **present intention** to reach an agreement. You have to bargain for as long as it takes to reach an agreement or until you reach **impasse** (The point where further negotiation will no longer result in agreement.) Impasse allows ER to offer it's last best offer.

Boulwarism: Lemuel Boulware was VP of Labor Relations at GE. Creates the “take it or leave” bargaining tactic. ER can't go in and say take it or leave it. This is not good-faith bargaining, you have to “go through the dance.”

Terms and Conditions of Employment: A subject which defines the work relationship between the EE and ER

Zipper Clause: Both parties waive the right to demand bargaining on any matter not dealt with in the contract,

Bargaining Subjects:

Three types of subjects of bargaining:

1. **Mandatory Subjects:** Once the union is in place, the ER has an obligation to bargain about any change to mandatory subjects.
2. **Permissive Subjects:** Unless the subject bears a direct, significant relationship to the terms of employment they're permissive but you can't insist on them (i.e. go to impasse). During the life of the CBA though, permissive subjects are treated like mandatory subjects.
3. **Illegal Subjects:** Any topic that violates the NLRA

Mandatory:

Wages- Pay rates, premium pay, shift differential, stock options, pensions for current employees, bonuses (not gifts), overtime pay, merit pay, parking discounts, thrift plan contributions.

Hours of employment: start time, shift work, weekends off, lunch and break times, etc.

Other terms and conditions of employment: management functions (rights) clauses, work rules, discipline, hidden surveillance cameras, job-bidding procedure, grievance arbitration procedures, drug testing for current employees, medical examination, seniority provisions, shift preference, assignments, polygraph exams, layoffs, recalls, promotions within the unit, merging or **changing health plan unless mere change in carrier (has to be material different)**, zipper clause, union access to plant, bulletin board use, safety, rules on telephone usage, breaking and talking at work, uniform allowance, length of the contract; union security clause, etc.

Permissive subjects:

Placement in the unit or scope of unit (so the ER can't go to impasse on this and unilaterally remove people from the unit), internal union matters, stewards to be selected by jointly by ER and Union; industry promotion plan, **interest arbitration** (unless in the CBA. If in the CBA, when renegotiations take place this **converts to a mandatory subject**); promotion to supervisor or selection of individual as supervisor; calling a strike; performance bond; hold harmless release; pre-employment drug testing; use of court reporters at negotiations; tape recording of grievance meetings; withdrawal of lawsuit; concerning funds or Board charge; Agency fee amount paid by non-union members; etc.

Illegal subjects

Closed shop; preference for steward other than super-seniority for layoff purposes (it is lawful to grant super-seniority for layoff purpose because shop stewards have extensive training); hot cargo clause; contractual benefits for union members.

Charges to Preexisting Mandatory Bargaining Subjects During Negotiations

What if the employer traditionally gives a cost of living but once bargaining began they took that off the table.? Originally in *LA Daily News*, the Board held that the ER can't change a mandatory subject (such as a preexisting cost of living increase) during contract negotiations

In *Neighborhood Housing Association* 347 NLRB 52 (2006): Bush Board said as a general rule, where parties are engaged

in negotiations for a CBA, ER must maintain status quo on all mandatory bargaining subjects until impasse. However Board has set forth an exception if it a discrete recurring event and that event is scheduled event is due to occur during the course of the negotiations for an initial contract, the ER may implement a change in that event if they give sufficient notice and provide a meaningful opportunity to bargain.

Bottomline rule: You cant go to impasse on one issue , because you have to go to impasse on all the issues, unless there is an extraordinary circumstance (i.e. you're going to go out of business un less you unilaterally implement it.)

Individual Contracts

J.I. Case Co. v. NLRB
321 U.S. 332 (1944)

Facts: Each EE was offered an individual contract. Seventy-five percent (75%) of the EE's signed these individual contracts. However, a majority also want collective representation. ER says, we'd love to negotiate with you, but we already made these individual contracts. You can choose unionization after the individual contracts expire. NLRB conduct an election and Union wins. But ER still refuses to bargain. Charges are filed with the Board.

Issue: Can the ER as a defense to a refusal to bargain charge claim that existing individual contracts bar him from doing so?

Synopsis: The Board says that the flyers informing EE that the ER would not bargain because of the individual contracts were unlawful under 8(a)(1). 8(a)(1) does not require animus on the part of the ER. If the ER expresses to its EE's that exercise of their Sec. 7 rights would be **futile**, it violates Sec. 8(a)(1).

With regards to the individual contract “bar”, the Court looks at the nature of the collective bargaining arrangement. The CBA is not an employment contract; EE's are merely third party beneficiaries. The parties to the CBA are the ER and the bargaining representative, not with the individual. **Individual contracts are not a valid defense to collective bargaining.**

What happens when there is a discrepancy between the terms of the individual contract and the collective bargaining agreement? **Where ever the individual contract is in conflict, it must yield to the CBA?** More advantageous terms of the individual contract may survive, but the issue is not raised here

In professional sports contracts: the CBA only sets league minimum salaries, but **the union allows** players to negotiate individual contracts above these levels.

Definitions:

Yellow Dog Contract: The ER requires an EE to sign a contract that he, the EE, will never join a union. The courts use to uphold these as contracts. However, they are unlawful under the NLRA. Why unlawful? It would violate the Sec. 7 right to join or support unions.

Exclusivity of Bargaining Representative

Emporium Capwell Co. v. Western Addition Community Organization
420 U.S. 50

Facts: The ER has a union contract which among other things has an anti-discrimination clause in it, prohibiting discrimination based on race, a no strike provision (or wildcat strikes). The union had concerns about race discrimination by the ER. The Union tells the EE's that they are willing to process any grievances base on race discrimination. Union conducted a meeting with the California Fair Employment Practices Commission and testimony was taken on the ER's conduct. Union decides that the ER is a discriminatory ER. The EE's allege that the discrimination was systematic and the contract language and the grievance procedures were in adequate to address their needs. A group of EE's demanded a meeting with the ER president to negotiate a broader agreement that would deal with race discrimination. When the ER refused to meet with them, the group of employees boycotted and picketed the store. They were hand-billing that included

statements like “the Emporium is a 20th century plantation” and calling the ER a “racist pig.”

Issue: Can the ER threaten to discipline these workers, or is that an 8(a)(1) violation because it's protected activity.

Synopsis of Rule: Where there is a union, EE's must go through the Union for all negotiations/bargaining because the Union is the ER representative of the Union. Even though racism holds a special place in our legal system, it does not invalidate the exclusivity of the representation status of the union. The Union may not sub-divide itself to represent different groups within the union.

Duty to Bargain:

Section 8(d) has only three requirements:

1. Both parties must meet at **reasonable times**, and
2. Confer in **good-faith** with regards to wages, hours, terms and conditions of employment
3. And if they reach an agreement it must be **reduced to writing** if one of the parties require it.

NLRB v. A-1 King Size Sandwiches, Inc.
732 F. 2d 872 (11th Cir)

Facts: The union wins the election. In 11 months the ER and the union meet 18 times without reaching a conduct.. The union files charges claiming a violation of Sec. 8(d), failure to confer in good faith. ER argues that they've meet eighteen times and that alone is sufficient evidence of bargaining in good faith. No evidence that the ER refused to meet. ALJ said that these 18 meetings were sufficient.

ER's proposal with regard to wages is “every six months we'll establish wage increases based on what we think is appropriate.” The Union asked for a wage scale. There's an extraordinarily broad management right's clause, retaining all rights that it held before the union came in (i.e. hire, fire, etc.) They propose a zipper clause which says that during the life of the contract there would be no bargaining over anything include in the contract. The no strike provision prevented strikes even in response to unfair labor practices. The discharge and discipline provision proposed by the union said that the ER could fire for “just cause,” the ER said we can fire for any reason. The union wanted a dues check off provision (where the ER takes dues directly out of the EE's paychecks), the ER says no. Ultimately the UNION says we'll give you the zipper, management rights and no strike clause, as onerous as they are, if you give us seniority for layoffs and just cause. The ER refuses.

Issue: Did the ER have a “present intention” to reach an agreement?

Synopsis of Rule: Appealing the order to bargain is not sufficient evidence of a 8(d) violation. They have a right to bring legal action. However, is what the ER done at the bargaining table evidence of bad faith? Yes, the The fact that the ER refused to include non-controversial proposals and their counter proposals were so unusually harsh, made this **surface bargaining**. Sometimes, albeit very rarely, you can infer from the bargaining proposals only that there was no present intent. Conduct away from the table which may evidence the intention of the parties not to reach an agreement. **Hard bargaining** is lawful, surface bargaining (going through the motions, but not having an intention to reach an agreement) is unlawful. **As long as you have made some other meaningful concessions, you can take an uncompromising positions on others.** Sophisticated parties may only evidence bad faith in the proposals themselves. THIS IS RARE. Also, putting a “poison pill” into the agreement, a term which the union will never agree too may be evidence of surface bargaining.

Definitions:

Regressive Bargaining: Bargaining that moves backwards, where counter proposals are worse than the original offers or if EE would be better off not signing the agreement than signing it.

Impasse Doctrine: Once there is a bargaining obligation, they can't make changes with wages, hours, terms and conditions, without bargaining. **Parties must negotiation until they reach impasse or an agreement.** However,

the impasse doctrine allows ER to implement their last best offer, or one substantially similar. Impasse is a **issue of fact** and must be proven by the employer. The ER must maintain the status quo, and can't bargain from a position lower than that from which they started. Additionally, they could not undermine the Union by offering a deal better than what they offered to the union. You can't reach impasse on only one issue except in extraordinarily, dire or emergency circumstances when union was given **notice** and an **opportunity to bargain**. *Mast Window Cleaning Enterprise dba Bottom-line Enterprise*. 302 NLRB 373

Wage Re-opener Provision: A provision of the CBA which allows the parties to renegotiate within the life of a CBA the wage provision, only.

Economic Weapons and Bad Faith

NLRB v. Insurance Agent's International Union.
361 U.S. 477 (1960)

Facts: Union wins election and they enter into a CBA. The time comes for the CBA to be renewed and the parties enter into negotiations. The EE's were not happy with how the negotiations were going so they came up with a plan called the "working without a contract plan." EE's refused to solicit new business, they refused to comply with the ER reporting measures, they engage in a sit-in, they showed up late to meetings, they picketed, distributed leaflets and went to ER's customers to get them to sign a petition. ER's file an 8(b)(3) charge for the union failing to negotiate in good faith. What should have been done is for the ER to discipline his workers because this was not protected activity as it was a partial strike. But the attorney decides to pursue a complaint of failure to act in good faith. Board says that this is the antithesis of reasoned discussion contemplated by the act. The fact that the union met at the table wasn't enough, conduct away from the table was a *per se* violation.

Synopsis of Rule: Just Brennan says application of 8(b)(3) was not applicable. What was really going on? The parties are allowed to use economic weapons. Good faith and economic weapons go hand in hand. Quotes **Archibald Cox** (author of our text), "bargaining power is strong or weak in accordance with the degree of economic power the parties possess." Collective bargaining is rough and tumble negotiation. It is not an academic pursuit. The use of economic power is not inconsistent with the duty to bargain, indeed it is part of it.

Duty to Confer

NLRB v. Katz
369 U.S. 736 (1962)

Facts: The ER is into steel fabrication. Merit pay is raised as a bargaining proposal. This is a mandatory item. Some dispute on whether there as an agreement on a term, a joint commission of ER and union members who would jointly make merit pay decisions. Sick pay also raised. No agreement. 8 months later, still bargaining. Union follows a charge because the ER unilaterally changes contested terms. ER defends this under Insurance Agents. The Board says that yes, it was a violation. The 2nd Circuit says this is just an economic weapon, consistent with *Insurance Agents*.

Issue: Does ER violate 8(a)(5) when institute unilateral changes in bargaining subjects during negotiations?

Synopsis of Rule: SCOTUS agrees with the board that this is unlawful bargaining. This was a change without bargaining. Sec. 8(D) requires the parties to **confer** in good faith. This is not an example of bad faith but rather not bargaining at all. Unilaterally implementing is acting without bargaining and with out conferring.

Management Rights Proposals Which Strip Unions of Power

McClatchy Newspapers, Inc. v. NLRB
131 F. 3rd 1026 (D.C.Cir. 1997)

Facts: Two separate newspapers and two separate contract negotiations, which are almost identical. CBA has expire in both cases. ER wants to change the wage scale and once an EE has hit the maximum wage level, they will only get pay increases

through merit pay increases. Union wants to do away with the merit pay and only expand the wage scale. ER says “wait you want to do away with merit pay and only have wage scale? We want the opposite.” ER's proposal was very narrow, they would determine what merit pay under what criteria and who gets it. Union can make recommendations, but they were not binding. ER goes to impasse on this. Board finds a violation saying that ER had an obligation to negotiation, ER says that we did and implemented out last best offer. Board says that **ER is asking EE's to waive their ability to bargain** (no negotiations). The Court of Appeals says what the ER has done is clearly wrong, but the Board hasn't articulated a proper explanation for it. “What's happening here looks like the de-collectivization of bargaining, but the board should consider what it's doing so and we don't like what they said so were remanding it.” On remand the Board says, “**you can not bargain to impasse one something which eliminates the union as the functioning exclusive rep.** They have no authority to bargain anything on the wage package. ER to implement a merit only pay package and the union has no say. In effect, the union is eliminated.

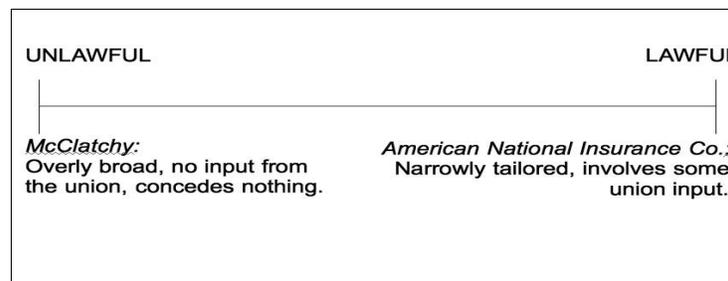
Synopsis of Rule: The act is silent an impasse doctrine is a product of case law. The SCOTUS has never held that they have an absolute right to implement everything they reach impasse over. The Act does not preclude the Board from passing exceptions to the impasse doctrine. *Bannon Linen* gives board wide latitude to **monitor the bargaining process.**

NLRB v. Insurance Agents' International Union
361 U.S. 477 (1960)

Facts: The Union is bargaining for a contract and proposes a full CBA at the very first session. The ER objects to one of the proposals and responds by drafting a **management function (management rights) clause**. Some subjects under the management function clause would be solely the prevue of the management (promotions, etc.) which would not be subject to binding arbitration. Parties reach agreement on all issues and the MF clause excluded promotions etc. However, issue still went forward because they wanted to know if lawful. Board says *per se* violation of 8(a)(5).

Synopsis of Rule: SCOTUS says that this is not a *per se* violation. This can't be bad faith, because management function clauses all the time. When the union says that everything should be arbitral and the ER could have just said no. Board says the making of the counterproposal was *per se* unlawful. However, SCOTUS says that you can't make making a counterproposal unlawful. The Board had conceded that there was nothing illegal proposed in the clause, but it became unlawful when they insisted on it. SCOTUS says that this doesn't make sense. Some are broad (and perhaps unlawful like McClatchy) some are narrow like here and are lawful.

Discussion: SCOTUS say act doesn't regulate any parties proposals nor mandates the parties reach an agreement. During Taft Hartley amendment negotiations, there was a fear that the Board was too involved with judging each proposals. Congressman Hartley suggested good faith be removed but it was not. It is clear that the statute does not require marathon negotiations. Board can't compel concessions.



Mandatory vs. Permissive Subjects

NLRB v. Wooster Division of Borg Warner
356 U.S. 342

Facts: Bargaining going on. Union already certified. Representation case petitions were filed by the international unions and when they were certified, the international union would designate a local of their international to service that contract. The international was the certified rep. Together at the bargaining table both the international and the local are making proposals. The ER makes two proposals. The first is a “ballot provision” which asked the union to agree that what ever the ER's last

offer, the appropriate unit has to vote on it and reject it before strikes. If it was voted down the ER got 72 hours to revise it and sweeten their last offer. The second proposal said that the ER only wants to work with the local union and not the International. The union files charges saying that ER says they can go to impasse. Union says that if ER removed those two provisions, they would have accepted the whole thing. Board said ER can't insist to impasse on these two proposals.

Synopsis of Rule: The SCOTUS looks at the two proposals in turn:

Ballot Proposal Provision: SCOTUS says this is not mandatory bargaining subject but rather permissive. Mandatory subject settles a term or condition of employment that **defines the relationship between ER and EE**. A union, having received bargaining representative authority, doesn't have to have ratification before accepting ER's proposal, they are empowered to agree unilaterally. This provision therefor doesn't redefine the ER/EE relationship, but rather the union/EE relationship..

Exclusive Bargaining Representative Provision: Court says ER can ask but not insist. Union could offer voluntarily

Other cases:

Ford Motor Co. (Chicago Stamping Plant) v. NLRB
441 U.S. 488 (1979)

Facts: ER is a plant in the state of Texas. The plant is very removed from any urban areas so there were no restaurants that EE's could go to on their lunch break. The EE break room however had a number of vending machines. Prices on the vending machine had been raised. Union says that ER didn't bargain. ER says too trivial to be a mandatory proposal.

Synopsis of Rule: Supreme Court finds that this is the only way that EE's can get food and therefore not trivial. Whether or not changes to the the kind of sandwich, etc. has not been litigated.

Union's Duty to Respond:

In *WPIX Channel 11*, the ER had it's own production company. The ER reached out to the union concerning a proposed change to a mandatory subject and the union didn't respond. Union can't refuse to meet.

Entrepreneurial Decisions:

Fibreboard Paper Products Corp. v. NLRB
379 U.S. 203 (1964)

Facts: Steelworkers Union represents the whole company's EE's including maintenance dept. The ER decided to subcontract out of maintenance work. At the first meeting of the renewal contract negotiations, the Union is told by ER that they had determined that they would subcontract out the maintenance because it it was cheaper. Union filed 8(a)(1) (lesser included offense), (3) claiming the EE's were fired for discriminatory purpose, and (5) for failure to bargain. The Regional Director files a complaint. The ALJ says finds no evidences of unlawful motive so no 8(a)(3), but says that they there was a 8(a)(5) violation. As a remedy ER had to rehire back all those employees and give back pay. CoA enforces the order.

Issue: Whether a decision by the ER to subcontract out the maintenance work, was it a mandatory bargaining subject.

Synopsis of Rule: The SCOTUS says clearly ending the work relationship is certainly an impact on the definition of the ER and EE relationship, and is therefore a mandatory subject of bargaining. However the ER says that this is a valid business/entrepreneurial decision. The SCOTUS then asks, well if so, how has the business changed. The Court says that the ER **wasn't changing their business operation** (i.e. they didn't reinvest capital, there was no new machinery for which the existing EE's were not trained to use, there was no change in location, etc.) The ER was merely replaced one group of workers with another. Therefore, requiring collective bargaining would have no adverse impact.

Remedy: The remedy here must be a make whole remedy; a cease and desist letter would not be sufficient. While the Courts are loathe to order reinstatement remedies, there was no evidence here that it would have been an undue burden on the ER.

Often times the Board will ask instead for (as opposed to make whole) a *TransMarine* remedy where the ER would agree to pay at a minimum two (2) weeks and keep tilling until bargaining is done, creating an impetus to reach an agreement.

Dissent: Not every managerial decision that results in workers losing jobs requires bargaining.

Duty to Provide Information:

The Board uses a very broad based discover standard of what is relevant because the ER or Union may ask for any information that is relevant or potentially relevant to the bargaining process. If it relates to a **mandatory subject, it is presumptively relevant**. If not presumptively relevant that the petitioning party **bears the burden of establishing relevancy**.

Common defenses to information requests:

Too Voluminous: The Board has said that in these circumstances the petitioned party can provide a summary, provide that the petitioning party has access to the original documents if they so request.

Confidential Trade Secret: There's a burden on the ER to prove that there is confidential issues or employee privacy concerns. ER must attempt to speak to Union to work out method of how to handle it. *Silver Brothers*

Privacy Concerns: Must be releases but only with EE's permission. Professional ethical concerns (ex. Hippocratic Oath, et. al.) don't trump statutory duty.

Financial Inability to Pay:

NLRB v. Truitt Manufacturing Co.
351 U.S. 149 (1956)

Facts: The ER had offered a two and a half cent wage increase. The union had asked for a ten cent increase. The ER says that "your demand would break us. If we agreed to what you were asking for we'd be out of business." Union says, "OK, let's have our accountant take a look. ER says no. Board says if the ER makes a claim of financial inability to pay, good faith requires you to substantiate that claim. The CoA reverses the Board's decision.

Issue: Does 8(a)5 require an ER to hand over relevant information?

Synopsis of Rule: SCOTUS reverse the CoA decision and returns to the Board standard. If the ER makes a **claim of financial inability to pay, good faith requires you to substantiate that claim**. Otherwise, it's an ULP. If upon review of the books, the Union determines that the ER is telling the truth and cannot afford to pay the wage increases, it becomes an ULP for them to insist upon it.

When the ER's Business Intention is to Flip a Company:

Stelladoro (on appeal to the 2nd Cir.) t

Facts: The ER was a defunct cookie company. *Stelladoro* bought the company in a fire sale with the intent of spinning it off for a profit. *Stelladoro* asked the EE's to retire and be hired back on as independent contractors and to take pay cuts. EE's said that they couldn't accept those terms, *Stelladoro* says they couldn't make a profit (on flipping the company) without this.

Issue: If the ER's purpose is not to make profit, but to flip the business is there a duty to provide information?

Synopsis of Rule: Same as *Truitt*.

Inability to Pay v. Inability to Compete

In *Nelson Lithography* (1991), the Bush Board said that when it's couched in terms of inability to compete, that is not an

inability to pay under *Truitt*. It's only when there is a claim that the ER is presently unable to pay that *Truitt* applies.

In *Lakeland Bus*, the ALJ said that this was an inability to compete case. The Board reversed says the whole import of the letter is that Lakeland's future depends on the EE taking the offer.

Confidential Information Request.

Detroit Edison v. NLRB

Facts: A new "instrument man" position is available. The ER decides to create a test to factor into the hiring process. Ten EE's take the test and all fail so ER hires from outside the company. The union files a grievance and makes an information request regarding the tests, scores by name, questions, answer sheet. ER withheld all of it claiming that it was confidential. There were two justifications for confidentiality: First, the ER says that they are protecting EE from embarrassment. Second, if we release the information, it would ruin the integrity of the tests. This is a trade secret. Board says turn over questions, answers, etc. to the Union and they can determine if they need a psychologist. Union agrees to a protective order. Went to 6th Circuit who agreed with board (with some restriction). No question it is relevant.

Issues: Is the remedy of requiring the release of the information along with requiring the union to sign a protective order acceptable?

Synopsis of Rule: There is a balancing test with regard to the scope of the remedy and the confidential interests of the employer. The **ER bears the burden of proving that there is confidential issues** or employee privacy concerns. **ER must attempt to speak to Union to work out method of how to handle it.** *Silver Brothers*

Discussion: The Board did not provide sufficient protection to the integrity of the test. The ER had established a real need for confidentiality and a protective order is not sufficient protection. **The ER is clearly allowed to establish objective standards for employment.** SCOTUS says there are at least some relevance to the scores, but only with the consent of the workers could they be released. .

Diversity Wyandotte Corp, Dekalb
302 NLRB 158 (1991)

Facts: EE was on limited duty because of injury. EE said he's ready to come back to work. Union said that EE should have reinstated the EE. ER makes a request for EE's medical records.

Synopsis of Rule: The Board says that the information is relevant. It is an 8(b)(3) ULP for the Union not to provide information, even if they don't have it, because it was the union's responsibility to tell the EE that if he doesn't provide that he might lose their grievance.

Witness Statements

In *Anheuser-Busch Companies, Inc.* 237 NLRB 982, the Board says that witness statements (signed by witness) are not required to be turned over (because of confidential concerns). However, the ER's notes and reports are not privileged and are discoverable. **Not presumptively relevant generally, but must be related to a particular grievance.**

If the union requests the names and addresses of all witnesses, the petitioned party can refuse to provide the names only if there is a **clear and present danger.**

Entrepreneurial Decisions

First National Maintenance Corp. v. NLRB
452 US 666

Facts: ER is a cleaning company, and they have the contract to Green Park Nursing Home First National had what's known

a cost plus contract where they agreed to clean a location for \$500 dollar plus wages. The nursing home is unhappy with how things are running about they've signed an agreement that says the Nursing Home can't hire any of their employees for 90 days. The new agreement between Greenpoint and First National, cuts the cost part of the cost plus part of the contract. The EE's are nervous that First National might be going under. 1199 signs up people to join there union and it's a very successful campaign. The union files a petition and win election. The union now contacts the ER to bargain, but they get no answer. A couple of weeks later ER contacts them to tell them that they are all going to be fired. ER says that it's all economics. Union files an complaint of 8(a)(1), (3), and (5). Regional director investigates and files complaint. ALJ finds an 8(a)(5) but no 8(a)(3). Board agrees without comment.

Synopsis of Rule: SCOTUS says that Sec. 8(d) is purposefully vague because it is up to the Board in its wisdom as a labor expert to flush it out. Additionally, Sec. 8(d) does not make the union an equal business partner in business decisions; there are clearly limits. The Court starts with Fiberboard which said that a decision by an ER that results in layoffs, there there was no substantial change in the business (i.e. no investment, change of position, etc.)

ER's decision to shut down business with Green Park Nursing Home (while maintaining operations elsewhere) was a mandatory subject of bargaining. There are some decisions that have direct effect, some management decisions, that have indirect, and some are exclusively an aspect of the relationship between ER and EE. This decision has a direct effect (termination) but the cause was purely economic. **Changes the scope and direction of the business**, thereof it is different from Fiberboard (affect on EE, no effect on business) Here is different (effect on EE and effect on business). There is a balancing between and unions right to represent and the ER's right to manage and in order for something to be a mandatory subject; **the benefits of bargaining must outweigh the burden on the ER.**

Fibreboard Paper Products Corp.

- There was an effect on the EE's
- There was no effect on the business

First National Maintenance Corp.

- There was an effect on the EE's
- AND, there was an effect on the business

Effects Bargaining

Union asks to bargain over the decision but also over the effects of the decision. While the decision to shut down the Green Park Nursing Home division of the business was not a mandatory subject, **the ER has to negotiate over the effects of that decision** (i.e. our union members are going to lose their job, what can you do for them?). Some things that might be proposed are extension of health benefits, severance packages, retraining funds, etc.

Total Shutdown

Can the ER shut down the WHOLE business because they don't want to deal with a union? The SCOTUS in *Darlington*, says there is nothing in the statute that requires the ER to stay in business if they don't want. If they do a total shut down because of union activities, then it's lawful. If it's a partial shutdown it is unlawful. Not an 8(a)(3)

Relocation

United Food & Commerical Workers, Local 150-A v. Dubuque Packing Co.
1 F. 3d 14 (D.C. Cir. 1993)

Facts: Business was a hog kill and cut business. In 1977 this ER began losing money at it's Davenport facility. Union agreed to a one time bonus instead of wage increase. Then things get really bad and then ask a \$5 million dollar give back, but they said nothing else. CBA hadn't expired and ER comes back and says we really need new money. The union refused and the ER says alright then we have to close. ER makes last ditch effort where by if the EE's agreed to a wage freeze ER can stay in business. The EE's vote down the proposal. The union makes a Truitt petition but the ER refuses to show books. Still withing the first CBA, the ER buy a new plant and relocate 530 jobs across state lines.. Union says "Ok fine!" Union asks to keep 900 jobs in Davenport, IA and we'll agree to a wage freeze. ER investment collapses and closes both plants. Union files 8(a)(5) charges saying that the ER was required to and did not bargaining with regard to relocation.. ALJ says ER may have not bargained in good faith but there was no need to bargain. Board agrees summarily. CoA remands, Board says OK EE's entitled to back pay. Winds up in the D.C. Circuit.

Issue: Is relocation of the operation a term and condition of employment, and thus a mandatory issue?

Synopsis of Rule: NOTE, THIS IS NOT A SUPREME COURT CASE SO THEREFORE DOES NOT OVERTURN OR MODIFY FIBREBOARD. This was in fact a mandatory subject. There are some decisions that the ER makes that lie at the “core of entrepreneurial control” where the ER’s can act unilaterally. The court lays out a *prima facie* test on whether a subject is bargain able:

1. The **GC must prove** that the ER’s decision to relocate unit work was **unaccompanied by a basic change in the nature of the operation.**
2. The ER may rebut by showing one of the following exemptions that (a) the **nature of the work varies** considerably at the new location, **or** (b) there has been a **change in the scope and direction of the business, or** (c) that **labor costs were not a factor**, either direct or indirect, in the decision, **or** (d) even if the labor cost were an element in the decision that the union could not or would not offer concessions sufficient to change the decision.
3. If (d) then there is a review of futility as to the union’s bargaining concession ability.

Effects still need to be negotiated.

In the 80’s there were a lot of M&A’s so there were a lot of concerns. Unions negotiated clauses about re-locations, etc. making mandatory subjects what might not have been mandatory. *Island Creek Coal* 289 NLRB 851. Con-Edison included a clause that says ER is free to subcontract every job, but can’t fire anyone. Where the contract provides a clause permitting sub-contracting, the Board will look at a “covered by the contract” analysis, but it must be a clear and unmistakable waiver.

A **substantial breach of the contract** by the ER may be an 8(a)(5) violation.

The NLRB act does not allow for an **economic defense** to CBA breaches.

Expiration of the Contract: At the expiration of the CBA, the parties have not reached a renewal agreement, the ER is not entitled to change everything. He must maintain the status quo of wages, hours, benefits, terms and conditions of employment. However some terms die with the contract:

1. Dues Check Off (though Obama Board may change)
 2. Grievance Arbitration Provision.
 3. No Strike Provisions
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Pittsburgh Plate Glass Co. v. NLRB
313 U.S. 146 (1971)

Facts: The union represents hourly employees. One of the terms of the contract was group health insurance. Retirees could participate with contributions taken from their pensions. Pensions are mandatory subjects. In 1964 ER agrees to make partial contributions for retirees who have reached 65. Then Medicare passed and ER backs out. The ER’s write a letter to the retirees say that they will pay Medicare premiums if you agree to withdrawal from the private plan. Union files an 8(a)(1) complaints for failure to negotiate.

Synopsis of Rule: **Retirees are not EE’s** under the Act because workers are not retirees. The Board argues that applicants are EEs (which was approved by the SCOTUS.) therefore why not retirees. SCOTUS disagrees with that logic. The Board says that even if retirees are not in the unit, their benefits are still mandatory subject. SCOTUS says generally mandatory. Once a EE’s retires, a ER is not long required to bargain when they make unilateral changes (although ERISA may govern).

Successorship

NLRB v. Burns International Security Services, Inc.
406 U.S. 272 (1972)

Facts: Whackinhut has a contract to protect Lockheed Martin at the LAX airport. Their workers are represented by the UPG, Union of Professional Guards. Lockheed puts the LAX contract back up for bid and Burns Security wins the contract. Burns comes in and has a contract with a union (APG) at other locations. Burns hires 42 employees as part for the contract, 27 of the guards who used to work for Whackinhut and 15 from outside. The UPG says that Burns is a legal successor and must therefore honor the existing CBA. Burns says no, they already have an agreement with the APG.

Issue: Is there an obligation by an employer who succeeds another employer and hires a majority of the workforce from to the succeed employer, to take on existing CBAs?

Synopsis of Rule: SCOTUS says that there is an obligation to bargain with the UPG because they represent the majority of that employees workforce. **If the successor hires a majority of the predecessor's employees, there is a rebuttable (Harley Davidson) presumption of majority support status.** It's like as if Whackinhut had stayed there and the contract had expired. If there is a **complete turnover, then no presumption.** There is nothing that says they have to hire a majority. However, if but for the discriminatory hiring of the employer the union would have a majority of the EE's it is an unfair labor practice. *Love's Barbeque*, 245 N.L.R.B. 78

Burns test:

1. Is the business the same
2. Are the employees doing the same jobs under the same supervision?
3. Are the same procedures used to make essentially the same products for essentially the same customers.

Spruce Up took over a contract for cutting military hair to replace a contractor. They hire a majority status from previous employer. But before they hire they are going to set the terms of employment (new mandatory subjects). The court says that you have to negotiate but you do so from a lower level set by Spruce Up, unless your primary goal was to avoid the existing CBA and you have made clear that you're hiring a majority of the previous ER's EE's. If you've made it clear your hiring a majority, then you're bound by the previous position.

If a **small piece of a company breaks off** and goes to new management, the Board has said that Fall River and Burns apply to this situation as well.

Fall River Dyeing & Finish Corp. v. NLRB.
482 U.S. 27

Facts: Sterling operated in MA for many years. They had two types of products: (a) buy material and then dye it/finish it and send out (conversion workabout 60%). and (b) they would make a deal with a clothing maker and do commission work. They went completely out of business by 1982. They bring in a guy to terminate employees. Herb Chase, the VP of Sterling decides to buy the company and enter into a contract with one of Sterling's former customer in order to reopen. Art Friedman and Herb enter into a deal to create Fall River Dyeing. They start advertising in the paper for replacement EE's. There's a gap of a couple months between the old company and the new company. Fall River hires 8 of 10 supervisors are from Sterling. They say they will hire half the employees now and if things go well we will hire additional employees. So they go out and get 50 employees 36 of whom had worked at Sterling. Union makes a demand for bargaining and ER refuses. Three (3) months later they decide to hire a second shift. After the second hiring 53 out of 107 worked from Sterling, with there now being a lacked majority old place. Fall River is only doing commission work. ALJ says that Fall River is a successor. All the way up to circuit they agree. ER argued that the way people were hire was different from *Burns*. The ER went out and advertised. Additionally, there a seven month hiatus. Finally, the products are different (no longer doing conversion). They had purchased the assets on the open market, at auction.

Synopsis of Rule: To distinguishing this from *Burns* would create disorder. The hiatus and hiring protocols are factors, but not determinative in deciding successorship, go back to the *Burns* test. The real question then is do you make the determination after the first round of hiring or the second. You must ask what was the boards initial intent: start with the first shift and see how it goes. If ER had said we're gonna start with phase one and go to phase two, that might have altered it.

Sufficiently Established Doctrine

Election Petition. At what point is the ER is sufficiently established for an election? Has the ER established a representational compliment of EE's; one that is **substantial** and **representative**? Must have **thirty percent (30%)** of the job classifications you're going to have and **fifty (50%) of the work force. The demand is continuing demand.**

Golden State Bottling v. NLRB
414 U.S. 168.

Facts: Mr. Baker was discharged and the Board required that he be reinstated with back pay. Successor bought the business with knowledge of the ULP. All American was a legal successor.

Issue: What happens when ER commits an ULP and then sells the business?

Synopsis of Rule: There is an obligation of a successor employer to remedy the ULPs of the predecessor. SCOTUS says the board has the power to order such relief upon a **legal successor with knowledge** of the original ULP. No violation of Due Process because they have a right to defend themselves at the compliance proceeding. Successor's can protect themselves with "hold harmless provisions."

The unions and the Board will send letters (called *Golden State Bottling* letters) alerting potential successors of all pending ULP legislation and their potential liability.

Remedies

HK Porter Co., Inc. v. NLRB
397 US. 99 (1970)

Facts: Eight years after the union wins an election the ER is still in court protesting the certification. The union finally wins and negotiations begin. The ER refused to grant dues check off provisions, claiming that "we are not here to assist the union." ER also refuses the union security clause. Court says that the ER doesn't have a philosophical resistance to check off, because they have unions at other plants that they do dues check off for. The ER is just doing this because they are not trying to reach an agreement. What the Board had done is say the delay and proposals are evidence of bad faith and it's unlawful surface bargaining. Board's remedy was to require the ER to agree to the checkoff provision. Board's **traditional remedy cease and desist or force ER to bargain** was the only thing that you can do. First time the Board attempted this remedy. CoA said this was an extraordinary remedy and the the only way to remedy, but SCOTUS says no.

Synopsis of Rule: Board can't regulate terms and conditions of employment, the Board says that it's a make whole remedy. Board can not compel the bargaining terms. Section 8(d) was passed with the express purpose of ensuring that there was "freedom of contract" and that the Board would not be involved in deciding what the contract should be.

Dissent: Justices Harlan and Douglas said that in rare circumstances, the violations might be so flagrant that there might need to extraordinary remedy.

Ex-Cell-O Corp.,
185 N.L.R.B. 107 (1970)

Facts: In 1970: UAW won the election, ER refused to bargain (This is a "**technical 8(a)(5) violation**" because you can't review the representation findings unless the Board has violated it's own statute. With a technical 8(a)(5) , the Board will issue a summary judgment, because both parties will agree that there is a refusal to bargain.) The ALJ says, "I have the authority to order the cease and desist, but I can also do a make whole remedy (presently the Board will seek with interest compounded quarterly but the **Obama board has said compounded daily.**) Had you bargained in good faith you'd have reached an agreement. The average wage increase in this area was 5% per year. So I order back pay for 2 years at 5% increase."

Synopsis of Rule: Board **can not award penalties/fines**. Only cease and desist or make whole; SCOTUS says that Board can't do this because it's too speculative.

Tidde Products: Where there is bad faith in the litigation of the case, court costs can be awarded.

Remedies. Obama board is looking for more meaningful remedies, specifically **immediate remedies**.

In *Picini Flooring* the Board now says, that electronic postings are included automatically. Bush Board used to say that this only applied where the ER normally sent out electronic notices.

In first contract cases, any ULP should be remedied with injunctive relief; the region submits case to GC's office to seek immediate order (preliminary injunction.) pending the Board's final orders. If GC agree, this goes to the Board and if two panel members agree this goes to District court for an injunction.

The board investigations can take anywhere from seven weeks ("triage system") to six months. The trial date can be set for 3 months in advance, with all kinds of procedural delays. Thirty-five (35) days after the trial ends, the briefs are due, that is without brief extensions. It can be up to two years until there is a board order, then on to the CoA and the SCOTUS!

Under *Gissel* bargaining orders, seeking to do this more assertively.

Duty of Fair Representation

Duty of Fair Representation: EE of the ER, feels that the ER hasn't lived up to their contract, and angry at the Union for not fairly representing them. Most of them are discharge grievances, because the union agrees that someone should be fired. ER normally says (racial discrimination, union dissident, etc.).

The legal standard here is so high that it is rarely hit.