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The Role of the NLRB and the Courts in the Collective Bargaining Process: A Fresh Look at Conventional Wisdom and Unconventional Remedies

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I. INTRODUCTION

The amended National Labor Relations Act (the Act) guarantees that "employers, employees, and labor organizations each recognize under law one another's legitimate rights in their relations to each other."[1] In furtherance of this objective, the Taft-Hartley[2] and Landrum-Griffin[3] amendments substantially increased the Act's protection of individual employee rights and sharply re-

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† Portions of this article were presented in Washington, D.C., as the keynote address at the American Bar Association National Institute on Developing Labor Law, sponsored by the Section of Labor Relations Law, on March 1, 1977.

1. Labor Management Relations (Taft-Hartley) Act § 1(b), 29 U.S.C. § 141(b) (1970).
2. Labor Management Relations (Taft-Hartley) Act, ch. 120, § 101, 61 Stat. 136 (1947).
3. Lahor-Management Reporting and Disclosure (Landrum-Griffin) Act of 1959, Pub. L. No. 86-257, §§ 201(d), 701-706, 73 Stat. 525, 541-45.

strained many union activities that were deemed economically and socially undesirable. Those amendments, however, left intact the basic structure of the original Wagner Act[4] providing for establishment of collective bargaining whenever a majority of the employees in an appropriate bargaining unit designate a bargaining agent to represent them. Once a bargaining agent is designated by certification or by selection through other legal means by a majority of the employees, the National Labor Relations Board (the Board) becomes by statute the nation's chief overseer of the collective bargaining process. Thus, under the Act, union organizational activity, pre-election campaigns, and the elaborate legal proceedings ordinarily accompanying the election process are mere preludes to the main drama of collective bargaining.

This Article will examine critically recent decisions of the Board and of the courts that attempt to effectuate the bargaining process. An examination is appropriate at this time because there are winds of change in the air far stronger than the gentle breezes that periodically have drifted from congressional hearings in recent years. In the foreseeable future Congress may act to improve some of the Board's procedures and remedies.[5] Although this Article will not comment directly upon proposed legislation, its analysis of the manner in which the Act has recently been construed and enforced in the area of collective bargaining may suggest that some of the objectives, though not the precise methods, sought by legislative reformers could be achieved by the Board and approved by the courts even without additional statutory authority.

During its forty-two year history the Board has utilized only partially the authority bestowed upon it by Congress as the primary interpreter and enforcer of the Act. The language defining the Board's authority, like most of the statute's critical language, is very broad. Because of the Board's reluctance to use its plenary authority, however, the initiative for precisely interpreting this broad legislative language and for fashioning appropriate remedies has come too often from the courts rather than from the Board. Although the cases are still too few or too inconsistent to provide a definite trend, several recent Board decisions suggest a cautious but refreshing willingness by some of the present members to reexamine conven-

4. National Labor Relations (Wagner) Act, ch. 372, 49 Stat. 449 (1935).

5. Labor Reform Act of 1977, H.R. 77, 95th Cong., 1st Sess. The present discussion is not meant to imply that further legislation is unnecessary or unwise. Such proposals merely are beyond the scope of this Article. Ed. Note: On July 19, the Administration introduced the Labor Reform Act of 1977. H.R. 8410, S. 1883, 95th Cong., 1st Sess.

tional wisdom and to experiment with unconventional remedies.

Three related aspects of the bargaining obligation will be examined: (1) the duty to provide information as part of the bargaining process; (2) subjects of bargaining and related bargaining conduct in which entrepreneurial decision-making and fundamental employee interests tend to clash; (3) remedial orders providing for payment of compensation in 8(a)(5) and 8(b)(3) bargaining cases. The cases discussed, while not exhaustive of these areas, are illustrative of the problems being confronted. Furthermore, because these cases concern three areas clearly within the Board's intended expertise, they provide an opportunity to view "the relation of remedy to policy"[6] that Justice Frankfurter asserted was "peculiarly a matter for [the] administrative competence" of the Board.[7]

The Board is charged with applying its authority[8] to assist the parties in making the collective bargaining process function properly. For this purpose the Board, subject to limited judicial review, has at its disposal power to define the statutory subjects of bargaining, to articulate the nature of the conduct required to fulfill the duty to bargain, and to fashion orders remedying violations of bargaining obligations and effectuating the purposes of the Act. Because the Board's remedial authority in refusal-to-bargain cases remains a virtually untapped resource, its recent exploratory efforts to devise new compensatory bargaining remedies are worthy of close study.

II. The Duty to Furnish Information Necessary for Bargaining and for Processing Grievances and Arbitration

Intertwined with the statutory duty to negotiate is the duty of both unions and employers to supply information necessary for understanding and intelligently handling the issues confronting them

6. Phelps Dodge Corp. v. NLRB, 313 U.S. 177, 194 (1941).

7. *Id.*

8. More than thirty years ago in Republic Aviation Corp. v. NLRB, 324 U.S. 793 (1945), the Court commented on the congressional purpose embodied in the Act, and defined the Board's role with this statement:

> [Congress] left to the Board the work of applying the Act's general prohibitory language in the light of the infinite combinations of events which might be charged as violative of its terms. Thus a "rigid scheme of remedies" is avoided and administrative flexibility within appropriate statutory limitations obtained to accomplish the dominant purpose of the legislation.

Id. at 798. The Court noted that one reason such boards are created "is to have decisions based upon evidential facts under the particular statute made by experienced officials with an adequate appreciation of the complexities of the subject which is entrusted to their administration." *Id.* at 800.

at the bargaining table or in the grievance procedure. Although the American system of collective bargaining tends to emphasize conflict, a large measure of cooperation and open exchange between the bargaining parties is necessary for a conflict model to function successfully.[9] Although mutual respect should be a goal, the Board cannot order the parties to respect each other; but it can interpret the bargaining obligation and fashion orders in ways that may ultimately encourage mutual respect. Requiring reasonably full disclosure by both parties of all relevant matters would encourage healthier bargaining relations in the long run. The Board and the courts often have required this wide disclosure by employers, but essentially the same duty to disclose should be required of unions.

In *NLRB v. Truitt Manufacturing Co.*,[10] the Supreme Court framed in straightforward terms the guideline applicable to the duty to disclose:

> Good-faith bargaining necessarily requires that claims made by the bargainer be earnest claims . . . . If . . . an argument is important enough to present in the give and take of bargaining, it is important enough to require some sort of proof of its accuracy.[11]

Truitt involved an employer's claim made during formal collective negotiations. Subsequently, in *NLRB v. Acme Industrial Co.*[12] the Court affirmed the existence of a similar duty to provide information needed during the grievance and arbitration procedure.

Illustrative of the Board's application of the *Truitt* and *Acme* principles was its decision in *Union Carbide Corp.*[13] Notwithstand-

9. The West German works council system, which is a paradigm of a *cooperative model* industrial system, provides an interesting and useful basis for comparison. In many respects, the German works council performs a function similar to those of a local union or shop committee in the United States, but there are significant differences. *See* Ramm, *Codetermination and the German Works Constitution Act of 1972*, 3 INDUS. L.J. 20 (1974). Under the Works Constitution Act of Jan. 15, 1972, BGB1 at 13 (Jan. 18, 1972), communication is a key feature. The Act affirmatively requires the employer to "supply comprehensive information to the works council in good time to enable it to discharge its duties . . .," § 80(2); and specific information must be supplied relative to manpower planning, § 92(1), job vacancies, § 93, and the company's financial affairs, § 106(2), including the following items: the company's economic and financial situation, the production and marketing situation, production and investment programs, rationalization plans, production techniques and work methods, reduction of any operations, closure or transfer of all or part of establishment, merger of establishments, changes in organization or objectives, §§106(3) 1-9, and "any other circumstances and projects that may materially affect the interests of the employees of the company." § 106(3)10. For further reference to this Act, see note 68 *infra*.

10. 351 U.S. 149 (1956).

11. *Id.* at 152-53.

12. 385 U.S. 432 (1967).

13. 197 N.L.R.B. 717, 80 L.R.R.M. 1429 (1972).

ing the Supreme Court's holding in *Pittsburg Plate Glass Co.*[14] that retirees are not employees within the meaning of the Act and that retiree benefits are not a mandatory subject of bargaining, the Board determined in *Union Carbide* that the employer had a duty to provide the union with requested data relating to costs to and benefits for retirees under the employer's pension and insurance plans because such information was deemed "necessary to enable the Union to bargain intelligently with respect to these matters in behalf of the active employees."[15] More recently, in *B. F. Goodrich Co.*,[16] the Board required the employer to furnish information concerning financial arrangements with the catering company that provided employee cafeteria service on a subcontract basis. These cases fit easily into the ideal model of the duty to provide information as part of good faith collective bargaining.

More puzzling is the seemingly disparate treatment in two other recent cases concerning requests for information in the arbitration process. In *Kroger Co.*[17] the Board held that the employer had violated section 8(a)(5)[18] by refusing to provide information sought by the union regarding certain schedule changes, including the number of hours worked by the affected employees. The Board found a duty to furnish the information, although the union, with some inconvenience, could have assembled the information itself. The Board stated that "[t]he Union is under no obligation to utilize a burdensome procedure of obtaining desired information where the employer may have such information available in a more convenient form."[19] This decision is justifiable; collective bargaining partners ought to be open and cooperative in supplying the information necessary for their bargaining and grievance procedures to function smoothly. The same philosophy, however, was not evident among the Board's majority in *Machinists Lodge 78 (Square D Co.)*,[20] which also concerned the grievance and arbitration process. The union had filed a grievance alleging that certain bargaining unit work was being performed by employees outside the unit. At the third stage of the grievance procedure, the union's representative displayed a typewritten document, purportedly signed by a com-

14. 404 U.S. 157 (1971).
15. 197 N.L.R.B. at 717, 80 L.R.R.M. at 1429.
16. 221 N.L.R.B. 288, 90 L.R.R.M. 1595 (1975).
17. 226 N.L.R.B. No. 77, 93 L.R.R.M. 1315 (Oct. 22, 1976).
18. Labor Management Relations (Taft-Hartley) Act. § 101, 29 U.S.C. § 158(a)(5) (1970) (amending National Labor Relations Act § 8(5), ch. 372, 49 Stat. 452).
19. 226 N.L.R.B. No. 77, at 6, 93 L.R.R.M. at 1317.
20. 224 N.L.R.B. No. 18, 92 L.R.R.M. 1202 (1976).

pany executive, and boasted that the document would prove the union's case in arbitration. The company representatives, unable to locate anything in the company files fitting the union's description, requested orally and in writing that they be shown the document. The union representative steadfastly refused to produce the document, stating that he would make it available only at the arbitration level. The Board, with Chairman Murphy and Member Walther dissenting, refused to find that the union had violated its bargaining obligation under section 8(b)(3).[21] The majority did not heed the Supreme Court's reminder in *Truitt*[22] that "[g]ood-faith bargaining necessarily requires that claims made by *either* bargainer be earnest claims,"[23] saying only that they would "assume arguendo, *without deciding* that a union's duty to furnish information relevant to the bargaining process is parallel to that of the employer."[24] They found, however, "no statutory obligation on the part of either to turn over to the other evidence of an undisclosed nature that the possessor of the information believes relevant and conclusive with respect to its rights in an arbitration proceeding."[25] Without explanation, the majority concluded that "discovery of this broad nature" was neither necessary nor desirable in unfair labor practice cases. They also failed to explain their finding that the unseen document was not relevant, a difficult conclusion to reach since the union had waived any objection on grounds of relevance by insisting that the document "would win the case . . . at the arbitration hearing."[26] The Board disregarded the Supreme Court's emphasis in *Acme* that the obligation to supply information relating to arbitration was important, not only for its possible use at the arbitration hearing, but also because "[a]rbitration can function properly only if the grievance procedures leading to it can sift out unmeritorious claims."[27] As the dissenters in *Square D* noted, if the company had been shown the document, it possibly would have acquiesced in the grievance, thereby removing the necessity for arbitration.

The dissenters' position that the production of necessary information can have a prophylactic effect on the bargaining process is supported by the Board's latest decision on the duty to furnish information. In that decision, *Stamco Division, Monarch Machine*

21. 29 U.S.C. § 158(b)(3) (1970).
22. 351 U.S. 149 (1956).
23. *Id.* at 152 (emphasis added).
24. 224 N.L.R.B. No. 18, at 3, 92 L.R.R.M. at 1203.
25. *Id.* at 3-4, 92 L.R.R.M. at 1203.
26. *Id.*
27. 385 U.S. at 437.

Tool Co.,[28] the Board found that an employer who had refused to supply substantiating data to support its claim that it was unable to meet the union's bargaining demands had violated section 8(a)(5). The Board indicated,

> in view of the union's position that it would accept a 1-year contract extension with no economic improvements upon verification of the Employer's position, that, had such information been made available at the time of the Union's initial request, agreement might have been reached and [a] strike . . . averted.[29]

The foregoing cases suggest full awareness by the Board of the importance of accurate information for intelligent and expeditious collective bargaining and for proper handling of grievances. The failure of the Board to hold in *Square D* that the union had a duty to supply information suggests that the majority may not view this duty as bilateral in nature. Sound policy dictates that employers should have the same right as unions to sift out unnecessary arbitrations. No rational basis has been set forth justifying the application of a double standard regarding the duty to disclose information in connection with the processing of grievances.

III. Consultative Bargaining: A New Approach to Entrepreneurial Decision-Making and Its Effects

The second area of bargaining to be explored in this Article concerns subjects that are charged with strong elements of managerial or entrepreneurial decision-making, but which also vitally affect the employees' terms and conditions of employment. This is a grey area in which the cases, whether from the Supreme Court, from the Courts of Appeals, or from the Board, thus far have failed to supply hard and fast distinctions that could serve to separate the mandatory from the merely permissive subjects of bargaining.[30] Examination of some of the recent cases suggests a need to develop a better conceptual approach to the underlying problem, an approach that could achieve a reasonable accommodation among the diverse interests involved in these disputes.

Two elements are common to all of these cases. First, in each case the employer has a pressing business need to take action, either because third party interests are involved or because the decision calls for the exercise of business judgment and a substantial reallo-

28. 227 N.L.R.B. No. 203 (Jan. 26, 1977).

29. 227 N.L.R.B. No. 203, at 7.

30. *See generally* The Developing Labor Law 410-22 (C. Morris ed. 1971); The Developing Labor Law 233-37 (1975-1976 Cum. Supp. A. Bioff, L. Cohen, K. Hanslowe eds. 1976).

cation of capital. Second, in each case the employees also have an important stake, either because their jobs are in jeopardy or because their compensation or working conditions are being affected. The problem therefore requires an accommodation among these conflicting interests, a process with which the Board and the courts have long been familiar.[31]

If the right question can be framed, the right answer might prove easy to discover. Precisely because the Board and the courts have not asked the right question, these managerial decision cases lack consistency and often fail to achieve a satisfactory accommodation. The question usually asked is whether the dispute concerns a mandatory or a permissive subject of bargaining. Putting the question in this simplistic fashion is inadequate, although it may initially seem appropriate because it faithfully applies conventional wisdom concerning the mandatory permissive dichotomy and the limited kinds of conduct in which the parties are expected to engage, depending upon whether the subject is found to be mandatory or permissive. The problem, however, is only compounded by this approach. The conventional wisdom, derived from such cases as *NLRB v. Wooster Division of Borg-Warner*[32] and *NLRB v. Highland Park Manufacturing Co.*,[33] teaches that the duty to bargain requires negotiation by both parties with a view of trying to reach an agreement. That definition is accurate enough for the negotiation of an ordinary collective bargaining contract, but in the grey area touching upon entrepreneurial decision-making it is inaccurate. For example, if an employer decides for economic reasons to close a plant and thereby eliminate a substantial portion of a bargaining unit, any negotiation relating to the underlying decision would not occur with the expectation by either party of reaching an agreement. The necessity for negotiation, however, is not eliminated. Negotiation or, more accurately, *consultation* should occur in order to allow the union to make suggestions on behalf of the employees that might improve the economic situation. For example, the union might agree to forego contractual pay raises or suggest more efficient ways of performing certain production tasks, and it would at least receive the bad news at an early date, preferably before the decision has been finally made. Although these limited bargaining results might develop from the employer's consultation with the union about the

31. *See, e.g.*, Republic Aviation Corp. v. NLRB, 324 U.S. 793 (1945); Sailors Union of the Pacific (Moore Dry Dock), 92 N.L.R.B. 547, 27 L.R.R.M. 1108 (1950).

32. 356 U.S. 342 (1958).

33. 110 F.2d 632 (4th Cir. 1940).

basic business decision, agreement on the basic decision itself is improbable. Bargaining to impasse, therefore, should be required only on those subjects for which the scheme of the Act contemplates the execution of an agreement.

Such a form of consultative bargaining has been hinted at in several decisions, but because the bargaining duty has been universally viewed in monolithic terms—either as a duty to bargain to agreement or impasse for mandatory subjects, or as no duty at all for permissive subjects—the Board and the courts continue to use the rhetoric of "bargaining to impasse." In *Fibreboard Paper Products Corp. v. NLRB,*[34] the Supreme Court came close in dictum to describing a more limited consultative form of bargaining when it quoted from the Court of Appeal's decision that "it is not necessary that it be likely or probable that the union will yield or supply a feasible solution but rather that the union be afforded an opportunity to meet management's legitimate complaints that its maintenance was unduly costly."[35] The employer in *Fibreboard* had substituted an outside contractor to perform the maintenance work that formerly had been done by bargaining unit employees. The Court characterized this subcontracting as a mandatory subject and required a roll-back of the employer's unilateral action. Justice Stewart, however, foresaw a potentially wider implication in the Court's holding, which he warned against in a strongly worded concurring opinion. He postulated a narrow definition of the phrase "conditions of employment"[36] that would exclude even "areas where decision by management may quite clearly imperil job security, or indeed terminate employment entirely,"[37] if the decision "lies at the core of entrepreneurial control."[38] He offered no simple litmus test for identifying these decisions, although he cited as examples managerial decisions to invest in labor-saving machinery or to liquidate assets and go out of business. Justice Stewart's view fails to accommodate the legitimate interests of employees whose jobs may be at stake notwithstanding the essentially entrepreneurial nature of the employer's underlying decision.

Justice Stewart's approach may seem compelling if one views the bargaining obligation as invariably requiring a good faith intent to reach an agreement. That definition of bargaining, however, does

34. 379 U.S. 203 (1964).
35. *Id.* at 214.
36. *Id.* at 221.
37. *Id.* at 223.
38. *Id.*

not appear in the language of the statute. On the contrary, the literal terms of section 8(d) require only that the parties *"confer* in good faith."[39] Execution of a written agreement is required only when an agreement has been consummated. It would thus be appropriate for the Board, with judicial approval, to redefine the bargaining obligation for those mandatory subjects upon which consultation, rather than agreement, is appropriate. This redefinition of the bargaining obligation for *consultative subjects of bargaining* would accommodate the employees' need for early consultation through their bargaining representative about decisions in which they have a vital interest. Obviously this consultation should be in good faith; therefore timely notice to the union is essential. This form of bargaining may be described as *consultative bargaining* to distinguish it from the more conventional *agreement-impasse* bargaining, but should be just as enforceable as other bargaining obligations under section 8(a)(5). Consequently, an employer would commit an unfair labor practice by acting unilaterally without giving timely notice of and providing an opportunity for consultation on a consultative subject of bargaining.

The Board also must determine what should be done about the *effects* of a major business decision. Bargaining about the effects of such a decision will in most instances prove more productive for employees than bargaining about the basic decision itself. The two subjects, however, are intimately linked; meaningful bargaining about effects is possible only when the union receives timely notice of the pending business decision. If the basic decision is presented as a *fait accompli,* the union will have lost not only most of its economic power of persuasion but also its best opportunity to present viable alternatives to mass terminations of unit employees. For example, when the employer is considering selling a business, an early opportunity to bargain about the effect of the sale on employees might lead to arrangements for the successor employer to retain all or a substantial part of the existing work force. As will be noted, recent Board decisions reveal increased sensitivity to the bargaining agent's need to receive early notice in order to engage in meaningful collective bargaining about the employee effects that flow from major business decisions.

To summarize these concepts, the bargaining problem posed by major business decisions can be rationally approached by recognizing that decisions having substantial and often direct impact on

39. 29 U.S.C. § 158(d) (1970).

conditions of employment cannot be excluded per se from mandatory bargaining, but the nature of the duty to bargain about such subjects can be adjusted to the realities of the decision-making process. Accordingly, to the extent that bargaining is required on the basic decision, only consultative bargaining should be deemed appropriate, but timely and full agreement-impasse bargaining must still be required on the employee effects of that decision.

An important by-product of this analysis is the realization that with this approach the characterization of a basic business decision as a mandatory or permissive subject may have little importance. Pragmatically, what will be important is that the employer give early notice of the decision to the union so that they can bargain meaningfully about the effects of the decision. If early notice is given, the need for the employee representative to negotiate about the basic business decision becomes of secondary importance. Regardless of whether the basic decision is characterized as a mandatory or permissive subject, the duty to give timely notice should be the same regarding the opportunity to bargain about the decision's effects on the employees. As a practical matter, if the basic decision is construed to be a nonmandatory subject, the union still could give informal advice about that decision when the parties meet to bargain on its effects. Although the employer would be under no enforceable duty to consult with the union about a basic entrepreneurial decision characterized as a permissive subject, the actual scenario probably would be similar to that required when the basic decision is characterized as a mandatory subject. The truly meaningful bargaining would focus in either case upon the effects that the basic decision would have on the employees in the bargaining unit.

This Article does not purport to provide a test for determining whether a particular business decision is mandatory or permissive. Its purpose is simply to suggest that the Board and the courts should view the main problem as one requiring accommodation of many interests. Whether a decision in the grey area is deemed mandatory or permissive, the Board should recognize the vital link between the basic decision and its effects on the employees and require timely notice, which in most cases will achieve such an accommodation. With these principles in mind, it will be instructive to examine some of the principle cases in this area decided by the Board in recent years.

In *General Motors Corp.*,[40] a 1971 decision involving the sale of

40. 191 N.L.R.B. 951, 77 L.R.R.M 1537 (1971).

a truck dealership by GMC Truck and Coach Division, the new employer held a franchise for the sale of GMC trucks and leased the premises from GMC. The Board found the transaction to be essentially financial and managerial in nature and, following Justice Stewart's approach in *Fibreboard,*[41] treated the subject as nonmandatory. That decision would have been more palatable to employee interests had the Board found a failure to bargain over the effects. GMC had never notified the union of the sale; the union learned of the event after the fact from the new employer. Board Members Fanning and Brown dissented on both the failure to bargain about the decision to sell and the failure to provide a timely opportunity to bargain over its effects. Quoting the Board's 1966 decision in *Ozark Trailers, Inc.,*[42] the dissenters observed that "the effects are so inextricably interwoven with the decision itself that bargaining limited to effects will not be meaningful if it must be carried on within a framework of a decision which cannot be revised."[43] They noted that there was not and could not be meaningful bargaining concerning the fate of the forty-five employees in the bargaining unit after the sale had been consummated, but that if the union had been given timely opportunity, it possibly could have persuaded GMC "to condition the transfer to the buyer on the buyer's hiring all or at least some of the [incumbent] employees or to at least attempt to convince the buyer to hire the employees."[44] Similarly, in *Triplex Oil Refining,*[45] decided a few months after *General Motors,*[46] the Board found no duty to bargain about an employer's decision to go partially out of business by eliminating the production bargaining unit. That decision was viewed as being at the "core of entrepreneurial control," but again no meaningful bargaining about effects was required. A casual telephone call to the union steward after the plant already had been closed was deemed sufficient notice. The decision made no attempt to accommodate vital employee interests.

The following year in *Summit Tooling Co.,*[47] the Board again adhered to the Stewart approach, finding no duty to bargain about a decision to close a manufacturing operation. This time, however,

41. 379 U.S. 203 (1964).
42. 161 N.L.R.B. 561, 63 L.R.R.M. 1264 (1966).
43. 191 N.L.R.B. at 954, 77 L.R.R.M. at 1541.
44. *Id.*, 77 L.R.R.M. at 1542.
45. 194 N.L.R.B. 500, 78 L.R.R.M 1711 (1971).
46. 191 N.L.R.B. 951, 77 L.R.R.M. 1537 (1971).
47. 195 N.L.R.B. 479, 79 L.R.R.M. 1396 (1972), *enforced,* 83 L.R.R.M. 2044 (7th Cir. 1973).

the majority was more sensitive to the duty to bargain about effects, stating that "by withholding all information of its intention to close down and to terminate the . . . operation, [the employer] prevented the Union from bargaining over these . . . matters."[48] In 1973 the Board found in *Arnold Graphic Industries, Inc.*[49] that an employer had violated section 8(a)(5) when it unilaterally transferred certain production equipment from one plant location to another and shut down a department in the first plant. Although the remedial order did not require a return of the equipment, the Board did order the employer to bargain about the effects of the transfer and to provide certain preferential but contingent job rights for the displaced employees.[50] *American Needle & Novelty Co.*,[51] another 1973 decision, concerned the transfer of production work from one plant to another. The Board distinguished *General Motors*[52] on the ground that in that case the Board had been "concerned with a decision which involved a siguificant investment or withdrawal of capital affecting the scope and ultimate direction of the enterprise."[53] In this case the Board required the employer to restore the work to its original location, which was still in existence, and to offer reinstatement to the affected employees. In yet another 1973 Board decision, *Sweet Lumber Co.*,[54] the Board found a duty to bargain with the incumbent union about management's decision to move a production operation to a location nineteen miles away. The union had not been notified formally of the move nor offered a reasonable opportunity to bargain about the move or its consequences. The employer's distribution of a bulletin advising the employees about the new plant and testimony that the move was "common knowledge" were deemed insufficient notice to the union.

The Board again addressed the issue in 1974 in *Royal Typewriter Co.*[55] Choosing to follow its 1966 *Ozark Trailers*[56] decision rather than *General Motors*,[57] the Board found an 8(a)(5) violation in the employer's failure to bargain with the union concerning both the decision to close one of its plants and the effects of that decision.

48. 195 N.L.R.B. at 479, 79 L.R.R.M. at 1400.
49. 206 N.L.R.B. 327, 84 L.R.R.M. 1343 (1973), *enforcement denied in part*, 505 F.2d 257 (6th Cir. 1974).
50. *Id.*
51. 206 N.L.R.B. 534, 84 L.R.R.M. 1526 (1973).
52. 191 N.L.R.B. 951, 77 L.R.R.M. 1537 (1971).
53. 206 N.L.R.B. at 535, 84 L.R.R.M. at 1529.
54. 207 N.L.R.B. 529, 85 L.R.R.M. 1073 (1973), *enforced*, 515 F.2d 785 (10th Cir. 1975).
55. 209 N.L.R.B. 1006, 85 L.R.R.M. 1501 (1974), *enforced*, 533 F.2d 1030 (8th Cir. 1976).
56. 161 N.L.R.B. 561, 63 L.R.R.M. 1264 (1966).
57. 191 N.L.R.B. 951, 77 L.R.R.M. 1537 (1971).

At a meeting with the union, the employer had refused to reveal the location to which work performed at the plant would be transferred, to supply information concerning economic factors behind the proposal to shut down the plant, and to respond to the union's request for information concerning the steps, if any, it could take to improve the economic situation. In marked contrast to the decisions in *General Motors*[58] and *Triplex*,[59] the Board held that eight-day advance notification of the decision to close the plant was insufficient to afford an opportunity for real bargaining.

Another 1974 decision, *Kingwood Mining Co.*,[60] seemed to veer again toward the *General Motors-Triplex* approach, at least regarding the nature of the duty to bargain about the effects of a managerial decision. The mining company unilaterally had shut down and contracted out the work performed at a mining operation. The Board treated this as a major decision entailing substantial withdrawal of a capital investment. Although the Board paid lip service to the employer's duty to bargain about the impact of the decision, it found the duty easily satisfied. After the mine already was closed, the employer called a meeting of the employees and informed them of the *fait accompli*.[61] Responding to a union representative's inquiry about the employees' pension benefits, the company president asked "Who invited him here to begin with?," and ordered the representative to leave. Incredibly, the Board found that because this meeting was not intended as a bargaining session, the employer's conduct at the meeting "did not reflect a purpose to foreclose bargaining negotiations regarding the consequences of the shut down," and that the union never tested the employer's willingness to bargain over the effects of the shut down. Dissenting Member Jenkins viewed the case as governed by the majority opinion in *Fibreboard*.[62] As to the failure of the union representative to ask for a meeting after he already had been ordered to leave, Member Jenkins observed that "there can be no justification for requiring the Union to perform an act which would be futile."[63]

In *Bonded Draying Service*,[64] a 1975 decision inconsistent with *Kingwood Mining*, the Board found that an employer's failure to

58. *Id.*
59. 194 N.L.R.B. 500, 78 L.R.R.M. 1711 (1971).
60. 210 N.L.R.B. 844, 86 L.R.R.M. 1203 (1974), *enforced*, 515 F.2d 1018 (D.C. Cir. 1975).
61. 210 N.L.R.B. at 845, 86 L.R.R.M. at 1205.
62. 379 U.S. 203 (1964).
63. 210 N.L.R.B. at 846, 86 L.R.R.M. at 1205.
64. 220 N.L.R.B. 1015, 90 L.R.R.M. 1556 (1975).

bargain about the effect of a major loss of equipment on employees was an 8(a)(5) violation and that the union's failure specifically to request bargaining over effects did not constitute a waiver of its right to bargain. *P.B. Mutrie Motor Transportation Inc.*,[65] decided in December 1976, suggests that the Board is now more likely to find a duty to bargain about a major business decision. The employer unilaterally had closed one of its several motor freight terminals. The Board held that the closing was justified economically, but did not relieve the employer of its obligation to bargain about both the basic decision and its effects on employees. Discussions with the union representative after the decision to close the terminal was irrevocable did not satisfy the bargaining obligation. The Board described the employer's duty in terms closely approximating the concept of consultative bargaining described earlier. Noting that the unilateral action to close the terminal "drastically affected the terms and conditions of employment at the terminal—in fact, ended them entirely"[66]—the panel of Chairman Murphy and Members Fanning and Penello stated that the employer's economic justification for the action was no defense. The Board futher held that:

> [T]he employees were . . . entitled to advance notice of the intention to close and a fair opportunity to bargain with Respondent in good faith concerning the decision and the effects on the employees. *Such bargaining does not require agreement,* but does require good faith negotiations on both sides . . . .[67]

The uneven treatment of the duty to bargain exemplified by the foregoing cases might have been avoided had the Board pursued a consistent policy of viewing major business decisions primarily as problems of accommodation. The concept of consultative subjects of bargaining[68] and the duty to engage in consultative bargaining

65. 226 N.L.R.B. No. 199, 94 L.R.R.M. 1054 (Dec. 9, 1976).

66. *Id.* at 8 (opinion of Administrative Law Judge).

67. *Id.*

68. Consultative bargaining may be compared to another requirement under the 1972 Works Constitution Act of West Germany, *see* note 9, *supra.* That Act distinguishes between subjects requiring *joint decision-making* by the employer and the works council—subjects roughly comparable to a list of mandatory bargaining subjects under the National Labor Relations Act—and subjects about which only *consultation* is required. Regarding the latter, German law requires the employer to inform and consult "in time" as to any plans concerning "the construction, alteration or extension of works, offices and other premises belonging to the establishment," § 90(1), and the "technical plant," § 90(2), "the working process and operations," § 90(3) or "jobs," § 90(4). The ensuing consultation will concern "the action envisaged, taking particular account of its impact on the nature of the work and the demands made on the employees." In addition, as to contemplated changes affecting major segments of the work force in companies with more than twenty adult employees, "the employer shall inform the works council in full and in good time of any proposed alterations which may entail substantial prejudice to the staff or a large sector thereof and consult the works council

about such subjects might be a useful way to achieve a reasonable accommodation among the diverse interests which tend to conflict in these cases.[69]

IV. Remedial Orders: Some Unconventional Remedies in Refusal-to-Bargain Cases

The third area of bargaining that this Article will examine is the Board's use of remedial bargaining orders, particularly compensatory orders. Before evaluating the current Board's cautious flirtation with unconventional remedies, however, one should be reminded of the statutory parameters which Congress and the Supreme Court have staked out for this administrative agency. For too many years, the Board has refrained in bargaining cases from using both remedial devices spelled out in section 10(c)[70] of the Act. That provision authorizes the Board, upon finding an unfair labor practice, to issue an order requiring the respondent "to cease and desist from such unfair labor practice, and to take such *affirmative action* including reinstatement with or without back pay as will effectuate the policies of this Act."[71] Until recently, the usual remedy for bargaining violations was simply an order to cease and desist from failing to bargain and, upon request, to bargain collectively. The affirmative action requirements imposed on the respondent were usually minimal.

Ironically, the phrase "affirmative action" is now associated in the public mind with the tough and effective remedies imposed on

on the proposed alterations," § 111. Such alterations specifically include reduction of operations or closure of the whole or important departments, transfer of substantial portions of the establishment, mergers with other establishments, important changes in the organization, purpose or plant of the establishment, and introduction of entirely new work methods and production processes. *Id.*

69. Although this Article discusses consultative bargaining in relation to major business decisions, the same concept also could be useful in other decision-making situations in grey areas where a mixture of both strong employer business interest and important employee consequences occurs. Briefly, cases and subjects that might be appropriate for testing the concept include: Capitol Times Co., 223 N.L.R.B. 651, 91 L.R.R.M. 1481 (1976), a 1976 case involving a "code of ethics" applicable to a newspaper's employees; NLRB v. Package Mach. Co., 191 N.L.R.B. 268, 77 L.R.R.M. 1456 (1971), *enforcement denied*, 457 F.2d 936 (1st Cir. 1973), NLRB v. Ladish Co., 538 F.2d 1267 (7th Cir. 1976), *denying enforcement to* 219 N.L.R.B. 354, 89 L.R.R.M. 1653 (1975), cases both involving information and bargaining about cafeteria and vending machine food prices where the services were supplied by outside contractors; and Connecticut Light & Power Co. v. NLRB, 476 F.2d 1079 (2d Cir. 1973), *denying enforcement to* 196 N.L.R.B. 967, 80 L.R.R.M. 1145 (1972), involving the selection of an insurance carrier for a medical benefit plan in a collective bargaining agreement. The concept might also be useful in other areas such as the various aspects of decisions affecting professional educators and decisions about rule changes in professional sports.

70. 29 U.S.C. § 160(c) (1970).

71. *Id.* (emphasis added).

violators by federal courts in civil rights cases. Those remedies are based on section 706(g) of Title VII,[72] which was modeled after section 10(c) of the National Labor Relations Act.[73] In its affirmation of the bold and far-reaching remedial order in *Franks v. Bowman Transportation Co.*,[74] a Title VII case, the Supreme Court cited NLRB authority defining affirmative action as action

> redressing the wrong incurred by an unfair labor practice . . . [to] restore the economic status quo that would have obtained but for the company's wrongful [act] . . . . The task of the NLRB in applying § 10(c) is to take measures designed to recreate the conditions and relationships that would have been had there been no unfair labor practice.[75]

If this powerful remedial tool can be used so effectively to correct employment discrimination against minorities and women, the NLRB, for which it expressly was invented, certainly should use it to achieve similar results in effectuating the provisions of this much older statute.

When the Supreme Court reversed the Court of Appeals in *NLRB v. Food Store Employees Local 347 (Heck's Inc.)*,[76] requiring a remand to the Board to allow for agency determination of its remedial policy applicable to "frivolous" and "debatable" defenses, it was also sending the Board a special reminder that "the congressional scheme [invested] the Board and not the courts with broad powers to fashion remedies that will effectuate national labor policy."[77] It is sad that Congress must now consider new legislation to put teeth in the Board's remedial powers because for several decades remedial orders in bargaining cases have been relatively impotent, at least in terms of forcing recalcitrant respondents to en-

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72. Civil Rights Act of 1964 § 706(g), 42 U.S.C. § 2000e-5(g) (1970).

73. *See* Franks v. Bowman Transp. Co., 424 U.S. 747, 764 n.21 (1976); Albemarle Paper Co. v. Moody, 422 U.S. 405, 417 (1975).

74. 424 U.S. 747 (1976).

75. *Id.* at 769 (quoting in part NLRB v. Rutter-Rex Mfg. Co., 396 U.S. 258, 263 (1969)).

76. 417 U.S. 1 (1974).

77. *See* Fibreboard Paper Prod. Corp. v. NLRB, 379 U.S. 203, 215 (1964), in which the Supreme Court summarized and emphasized the Board's broad discretion in fashioning appropriate remedies under § 10(c) as follows:

> That section "charges the Board with the task of devising remedies to effectuate the policies of the Act." NLRB v. Seven-Up Bottling Co., 344 U.S. 344, 346 (1953). The Board's power is a broad discretionary one, subject to limited judicial review. Ibid. "[T]he relation of remedy to policy is peculiarly a matter for administrative competence. . . ." Phelps Dodge Corp. v. NLRB, 313 U.S. 177, 194 (1941). "In fashioning remedies to undo the effects of violations of the Act, the Board must draw on enlightenment gained from experience." NLRB v. Seven-Up Bottling Co., 344 U.S. 344, 346. The Board's order will not be disturbed "unless it can be shown that the order is a patent attempt to achieve ends other than those which can fairly be said to effectuate the policies of the Act." Virginia Elec. & Power Co. v. NLRB, 319 U.S. 533, 540 (1943).

gage in true collective bargaining. Several quite recent Board decisions, however, hold some promise for the development of a more effective remedial policy for bargaining cases.

The first decision relevant to this development is the 1970 decision, *Ex-Cell-O Corp.*,[78] decided shortly after the Supreme Court's decision in *H.K. Porter Co. v. NLRB.*[79] Reacting to *Porter*, the Board refused to issue a "make whole" order requiring compensation of employees for monetary losses resulting from the employer's refusal to bargain. The Board reasoned that a make-whole order would be speculative because it could be based only upon a Board finding that a contract would have resulted from bargaining. Soon thereafter, in *IUE v. NLRB (Tiidee Products)*[80] the Board, following lengthy litigation and prompting by the D.C. Circuit for stronger remedial orders, ordered the employer to reimburse the union for attorneys' fees and litigation expenses.[81] The concept of ordering reimbursement of litigation expenses for both the union and the Board was articulated in several of the *Tiidee* opinions. Conceding that it normally would not provide for recovery of litigation expenses, the Board indicated that a departure from the rule was appropriate when the litigation was "frivolous," because the "policy of the Act to insure industrial peace through collective bargaining can only be effectuated when speedy access to uncrowded Board and court dockets is available."[82]

In *Heck's Inc.*,[83] on remand following the Supreme Court's reversal of the D.C. Circuit,[84] the Board announced that it would order reimbursement of the Board's and the union's litigation expenses and the union's organizational expenses. Harmonizing its earlier decisions in *Heck's* and *Tiidee*, the Board explained that, when read

78. 185 N.L.R.B. 107, 74 L.R.R.M. 1740 (1970), *temporary relief denied but order enforced*, 449 F.2d 1046 (D.C. Cir. 1971).

79. 397 U.S. 99 (1970).

80. 426 F.2d 1243 (D.C. Cir.), *cert. denied*, 400 U.S. 950 (1970), *on remand*, 194 N.L.R.B. 1234, 79 L.R.R.M. 1175 (1972), *modified and rehearing denied*, 502 F.2d 349 (D.C. Cir.), *cert. denied*, 417 U.S. 921 (1974).

81. *Id.* The *Tiidee* order also required the respondent to mail copies of the Board's notice to all employees, permit union access to company bulletin boards and provide the union with employee names and addresses. *See* John Singer, Inc., 197 N.L.R.B. 88, 80 L.R.R.M. 1340 (1972). These non-monetary features have been used in many subsequent cases and will not be further noted here, for this Article focuses primarily on the development of unconventional compensatory remedies.

82. 194 N.L.R.B. at 1236, 79 L.R.R.M. at 1179.

83. 191 N.L.R.B. 886, 77 L.R.R.M. 1513 (1971), *enforced and remanded sub nom.*, Food Store Employees Local 347 v. NLRB, 476 F.2d 546 (D.C. Cir. 1973), *rev'd and remanded*, 417 U.S. 1 (1974).

84. 417 U.S. 1 (1974).

together, the cases indicate that this extraordinary remedy should be granted only when the respondent's defenses are "patently frivolous" rather than "debatable." Thus, "notwithstanding that the respondent may be found to have engaged in 'clearly aggravated and pervasive misconduct' or in the 'flagrant repetition of conduct previously found unlawful,' "[85] the remedy would not be available. The Board also indicated that it would award union organizational expenses when a nexus is shown between the excess costs incurred by the union and the employer's unfair labor practices, provided the employer's defenses are frivolous and not debatable.[86]

The Board's concern with confining awards of litigation and organizational expenses to cases in which the respondent's defenses are frivolous rather than debatable may be justifiable, but the restrictive manner in which the Board has construed defenses as not being "frivolous" is not. The Board apparently insists that the respondent's defenses to each separate allegation of the complaint must be frivolous, but this need not always be the case. A striking example of the Board's unduly restrictive application of this rule occurred in *Gasoline Retailers Association,*[87] a 1974 Board decision concerning a flagrant union violation of the 8(b)(3)[88] bargaining duty. The General Counsel presented eighty-two specific instances indicating a pattern of conduct toward establishments within and without the Board's jurisdictional standards. The union typically had obtained signed collective bargaining contracts by confronting newly established gasoline service station dealers and presenting them with preprinted collective agreements containing, among other provisions, union security and dues checkoff clauses. The union, which represented virtually all of the gasoline haulers servicing the area, then threatened to picket and stop all deliveries to the stations unless its contract was signed.[89] Usually the union represented no employees, or, at best, a minority of the employees at the stations in question. The Board found that the union representatives visited the stations only to collect dues and that the union consistently bypassed the employer's association by soliciting dealers to deauthorize the association as their collective bagaining representative. The Board's order in *Gasoline Retailers* contained a com-

85. 215 N.L.R.B. 765, 767, 88 L.R.R.M. 1049, 1052 (1974).

86. *Id.*

87. Truck Drivers Local 705 (Gasoline Retailers Association), 210 N.L.R.B. 210, 86 L.R.R.M. 1011 (1974).

88. 29 U.S.C. § 158(b)(3) (1970).

89. 210 N.L.R.B. at 211, 86 L.R.R.M. at 1015.

pensatory remedy providing for recovery of improper and unlawful payments that the employers had been required or had felt required to make. Nevertheless, in an incredible application of the *Heck's* rule, the Board did not allow recovery of litigation expenses because the union's defenses were not deemed frivolous "in view of the somewhat substantial legal questions involved."[90] The Board evidently looked at all of the allegations in the complaint and, upon finding any one of them debatable, concluded that the defenses were not frivolous. Its stated reason for refusing to order reimbursement of litigation expenses when defenses were debatable was to avoid discouraging respondents "from gaining access to the appropriate forum in order to fully litigate 'debatable' defenses."[91] In the supplemental *Heck's* decision following remand, the Board illustrated what it meant by a debatable defense with an example based on witness credibility.[92] Later decisions, including *Gasoline Retailers,* however, seemed to set up an almost impossible standard, one which might be satisfied only if the General Counsel were willing to forego all of his own debatable issues and rely solely upon the "lead pipe cinch" issues in the complaint.

Another example of this restrictive application of the standard was *Winn-Dixie Stores, Inc.*,[93] in which the Board found Winn-Dixie guilty of thirteen specific unfair labor practices, but declined to order payment of litigation expenses because the employer's defenses were not deemed frivolous. The Board apparently arrived at this conclusion by a type of numbers game, for "the Administrative Law Judge found merit in the Respondent's positions as to eight of [the twenty-two specific violations alleged]. . . . In addition . . . [the Board found] merit in the General Counsel's and Charging Party's exceptions with regard to [one other issue]."[94] The Board ignored, as it apparently had done with the union's unfair labor practices in *Gasoline Retailers,* the total absence of debatable defenses to the major unfair labor practices. The most critical 8(a)(5) violations committed by Winn-Dixie involved flagrant and repeated bypassing of the union representative through unilateral promulgation of important changes in wages and benefits. In 1969 the employer had granted increases in basic hospital and surgical insurance without notice to or consultation with the union. Furthermore,

90. *Id.* at 212, 86 L.R.R.M. at 1017.
91. *Id.*
92. Heck's Inc., 215 N.L.R.B. No. 765, 88 L.R.R.M. 1049 (1974).
93. 224 N.L.R.B. No. 190, 92 L.R.R.M. 1625 (1976).
94. *Id.* at 10, 92 L.R.R.M. at 1630.

a few days after the union had won a majority vote in a decertification election, the employer again acted unilaterally by granting an across-the-board twenty-five cent wage increase to all employees in the bargaining unit. After the expiration of the one-year contract executed in 1971, the employer again unilaterally granted a general increase to all employees ranging from twenty-three cents to forty-one cents an hour. The Board affirmed the administrative law judge's conclusion that with these increases, the company had "unilaterally stripped what it wanted from bargaining at the very outset of negotiations, leaving the remaining negotiations to a consideration of union objectives only."[95] Under the familiar doctrine of *NLRB v. Katz*,[96] this unilateral action is a violation of section 8(a)(5) for which even good faith, which was not present here, is no defense. Both the employer-respondent in *Winn-Dixie* and the union-respondent in *Gasoline Retailers* should have been held liable for the cost of litigation, because the defenses to the major unfair labor practices in both cases were not debatable.

The Board's narrow application of its "frivolous defense" rule may discourage the General Counsel from including debatable issues in a complaint containing major allegations to which respondent's defenses would be frivolous, a consequence certainly not in the public interest. If a respondent wishes to litigate debatable issues in a case also involving major nondebatable issues, he should settle or concede the nondebatable issues before putting the government and the charging party to the expense of litigation. That approach would make the *Heck's* doctrine a more effective weapon in the Board's arsenal of remedies. The current practice renders the rule virtually meaningless except in the rarest of cases.

A second compensatory bargaining remedy, which also could be added to the Board's remedial arsenal, is the reimbursement of bargaining expenses advocated by former General Counsel Nash and by present General Counsel Irving. General Counsel Irving recently announced that "in cases involving bad faith or surface bargaining, it is appropriate to seek a remedy requiring the employer to reimburse the union for the bargaining expenses."[97] He also stated that he would be inclined to seek similar remedies against a

95. *Id.* at 41 (opinion of Administrative Law Judge).

96. 369 U.S. 736 (1962).

97. Remedies and Compliance—Putting More Teeth Into the Act, Address by General Counsel Irving, 23d Institute Southwestern Legal Foundation Labor Law Developments; *Memorandum of General Counsel to NLRB Regional Officials* (Jan. 22, 1975), *reprinted in* 4 LAB. REL. REP. (BNA) ¶ 9059 (Feb. 13, 1976).

union for section 8(b)(3) surface bargaining violations. This proposed reimbursement remedy is welcome evidence of further efforts to make section 10(c) more effective in bargaining cases.

A third and potentially highly effective compensatory bargaining remedy is the use of a back pay remedy for reimbursement of overdue and omitted wage increases. The remedy seems to have originated in an almost forgotten 1969 case, *Petrolane Franklin Gas Services,*[98] in which the Board required the employer to reimburse bargaining unit employees for overdue salary increases that, based on increases granted at two other facilities of the same employer, unit employees would reasonably have been expected to receive had they not selected the union as their bargaining representative. A similar order was issued in *Chevron Oil Co.,*[99] although the Fifth Circuit denied enforcement because it found no section 8(a)(5) violation. This type of remedy was not revived until the recent *Winn-Dixie* case.[100] The Winn-Dixie warehouse unit in question was one of several operated by the employer, but was the only one that was unionized. The administrative law judge observed that:

> by virtue of their opting for collective bargaining and Respondent's manipulation of that process to achieve employee rejection of the Union, these employees may well have been prejudiced with respect to wage levels in relation to nonrepresented employees otherwise similarly situated . . . A specific nonspeculative standard exists against which any such losses may be measured.[101]

In accordance with that conclusion, the Board adopted the administrative law judge's recommendation:

> that a comparable warehouse of Respondent be selected and a comparison and determination be made with respect to benefits the unit employees may have lost because of Respondent's unfair labor practices and, in the event it is shown that unit employees have in fact suffered loss of benefits, that Respondent make the unit employees whole for such losses.[102]

Before examining the far-reaching implications of that order, compensatory orders in four other recent cases should be reviewed. In *Amsterdam Printing and Litho Corp.,*[103] the Board provided the usual remedy for unilateral action violating section 8(a)(5) by requiring that benefits which had unilaterally been curtailed—a Christmas bonus, some wage changes, and a change in the work

98. 174 N.L.R.B. 594, 70 L.R.R.M. 1342 (1969).

99. 182 N.L.R.B. 445, 74 L.R.R.M. 1343 (1970), *enforcement denied,* 442 F.2d 1067 (5th Cir. 1971).

100. 224 N.L.R.B. No. 190, 92 L.R.R.M. 1625 (1976).

101. *Id.* at 94 (opinion of Administrative Law Judge).

102. *Id.* at 14 (opinion of NLRB).

103. 223 N.L.R.B. 370, 92 L.R.R.M. 1243 (1976).

week—be restored to the individual employees in the bargaining unit. In *Atlas Tack Corp.*,[104] which involved the unilateral substitution of an unpaid thirty-minute lunch break for a twenty-minute paid break, the Board panel majority, with Member Walther dissenting, ordered the same type of conventional make-whole remedy for individual employees. In the most recent case concerning back pay as a remedy for unilateral changes, *Jimmy Dean Meat Co.*,[105] the Board's 8(a)(5) bargaining order restored unilaterally withdrawn benefits consisting of a Christmas bonus and a twice-a-year general wage increase, which had been replaced with an incentive plan. The fourth case, *Florida State Steel Corp.*,[106] was an 8(a)(3) case with obvious 8(a)(5) overtones, although the 8(a)(3) aspects of the case had developed before the union achieved its majority. In a supplemental decision clarifying the compensatory remedial order, the full Board, acting unanimously, required not only payment to employees of past benefits withheld pursuant to a company-wide plan for wage increases and fringe benefits, but also institution in the bargaining unit of a "corporate-wide wage review policy and wages [thereunder], and [granting of] the fringe benefits normally applied to all facilities."[107] Specifically, the order required the employer to give the union notice of the imminent implementation of the scheduled corporate-wide benefits and to offer them as an ongoing mandate to unit employees unless the union objected. The Board stressed that it was not substituting its judgment for the judgment of the parties because the policy could be varied by agreement reached through good-faith bargaining.

The foregoing cases, beginning with *Petrolane*,[108] suggest that the Board may be moving toward the development of meaningful compensatory remedies in refusal-to-bargain cases. If so, the Board majority should reconsider Member Walther's dissenting views in *Atlas Tack*. His proposed remedy would be to treat the back pay to which the employees were entitled as a result of the unilateral cancellation of their paid lunch break as a fund over which the parties could negotiate at the bargaining table. Noting that the employer's unilateral conduct had struck at the heart of the collective bargaining process and had tended to undermine the employees' respect for the union, he stated that:

104. 226 N.L.R.B. No. 38, 93 L.R.R.M. 1236 (1976).
105. 2 LAB. REL. REP. (BNA) (94 L.R.R.M.) 1414 (Jan. 25, 1977).
106. 226 N.L.R.B. No. 25, 93 L.R.R.M. 1443 (1976).
107. *Id.* at 4, 93 L.R.R.M. at 1445.
108. 174 N.L.R.B. 594, 70 L.R.R.M. 1342 (1969).

> In circumstances such as these, the highest possible priority must be given to restoring the union to its pre-unlawful conduct strength. A refusal to bargain violation . . . is not properly remedied when the union is forced to return to the bargaining table in the posture of a toothless tiger . . . . [E]very effort must be made to provide such unions with economic clout, and to create an environment in which it is economically advantageous for the employer to engage in meaningful collective bargaining.[109]

Walther stressed that the remedy pertained to an 8(a)(5) violation, not to an 8(a)(3) violation. It was a collective violation, not a violation applicable to individual employees, and therefore "the remedy should be tailored to restore the collective status quo ante rather than the individual status quo ante of each affected employee."[110] The traditional individual make-whole remedy, his dissent maintained, was not in most cases an accurate measure of actual loss suffered by individual employees because, had the employer negotiated, "the employees would most likely have ended up with an economic package different from the one reflected in their back pay award."[111] Walther's solution would have treated the back pay as belonging to the union for use on behalf of all employees at the bargaining table. He would have made the back pay award "subject to the union's right to bargain it down or even away,"[112] thereby giving the union

> some economic muscle to carry back to the bargaining table. With the union free to bargain away the back pay award in exchange for other concessions by the employer, the employer would then have a genuine economic motive for bargaining in good faith. This is exactly what should have and undoubtedly would have occurred had the bargaining taken place as the law requires—a trade off to a compromise solution.[113]

Walther's colleagues on the panel, Chairman Murphy and Member Jenkins, were not impressed. Their "assumption [was] . . . that the union has been strengthened by the favorable termination of the Board proceeding,"[114] even though two years had elapsed since the employer's unilateral action. Inexplicably, the majority would have required "empirical data"[115] supporting a different conclusion before they would abandon the traditional back-pay remedy. This position is a curious one because the traditional back-pay remedy certainly has no support in empirical data. More impor-

109. 226 N.L.R.B. No. 38, at 6, 93 L.R.R.M. 1236, 1238.
110. *Id.* at 7-8, 93 L.R.R.M. at 1239.
111. *Id.*
112. *Id.* at 7, 93 L.R.R.M. at 1238.
113. *Id.*
114. *Id.* at 2-3, 93 L.R.R.M. at 1237.
115. *Id.* at 3, 93 L.R.R.M. at 1237.

tantly, the Board's own experience and expertise should provide, as Congress intended, sufficient basis for the fashioning of new and appropriate remedies. In any event, probably the only valid empirical evidence to support a new remedy would be the actual use of such a remedy with subsequent studies to determine its efficacy.

The Board should be as innovative in fashioning affirmative action remedies as the United States district courts have been in applying similar statutory language to remedy employment discrimination violations under Title VII. The sources of an innovative and effective remedy can be found by reexamining the conventional remedy applied in *Amsterdam Printing* and *Jimmy Dean Meat* and combining it with the compensatory remedies used in *Petrolane, Winn-Dixie, Florida Steel,* and Walther's *Atlas Tack* dissent. In combination these remedies reveal their inherent potential as the basis for developing a coherent approach to the fashioning of a compensatory make-whole award that could be coupled with a realistic affirmative bargaining requirement.

The projected model for this combined compensatory remedy would be an order that could require various funds, either separately or in combination depending upon the evidence and the Board's finding of appropriateness. Two types of funds could be involved. The first would be in the nature of back pay, but would be subject to allocation through bargaining by the employer and the union. This fund would be based on a computation of *past due* sums derived from two possible sources: (a) the total amount of employee economic *losses* attributable to employer unilateral actions; and (b) the total amount of economic *benefits withheld* from the employees as a result of their selection of the union (benefits which unit employees would have received had they remained unorganized). Both of these past due sums certainly would have to be computed on the basis of sufficient evidence, such as proof of regular corporate policy applicable to a wider group of employees than those in the bargaining unit, as in *Florida Steel,* or evidence of treatment of comparable establishments of the same employer, as in *Petrolane* and *Winn-Dixie.* These two sources of back pay—and they would consitute a section 10(c) form of back pay—then would be available as a fund to be used as the union and the employer might agree pursuant to the good faith bargaining that affirmatively would be required in the Board's order.

The second type of fund also would be the subject of an affirmative order to bargain. The order would require bargaining over *contingent sums,* which would not require the Board to make com-

putations for back pay purposes. This fund would arise from two possible sources: (a) The first source would be any and all unilateral benefits previously but unlawfully granted by the employer, with the total amount of these benefits remaining open for negotiation and possible reallocation if the parties decide by good faith bargaining to distribute them differently than the employer unilaterally had distributed them. If no agreement is reached, the benefits would continue in the fashion originally established by the employer's unilateral action. (b) The second source of the contingent fund would be additional future benefits, such as those referred to in *Florida Steel,* that the employees would have continued to receive had they not selected the union to represent them. These amounts also would be available as a continuing and renewable fund for bargaining purposes. As the Board stated in *Florida Steel,* the employer would be required to notify the union of the imminent implementation of such scheduled benefits and to offer them to unit employees unless the union objected. The parties in any event could "recast their relationship with respect to such matters through good-faith collective bargaining."[116]

The model described above does not contain the vice of speculation or the imposition of an agreement that the Board feared in *Ex-Cell-O*[117] and *Tiidee.*[118] The computation of the back pay fund that would be subject to bargaining would not be based on what the parties either would have or should have agreed upon. Rather, that fund as well as the contingent sums that also might be bargainable under this formula, would be those amounts that the employer either has unlawfully denied, is unlawfully denying, or is unlawfully allocating as a consequence of his 8(a)(5) violations. Remedial orders based on these computations would, in large measure, restore a realistic status quo, one that would take into account the passage of time and the movement of events between the initial refusal to bargain and the time when bargaining is ultimately required by the Board's remedial order, usually a period of several years. The sums due under the suggested formula also would be enriched by the addition of interest. When the Board abandons the six percent *Isis*

116. 226 N.L.R.B. No. 25, at 6 n. 10, 93 L.R.R.M. at 1445 n.10.

117. 185 N.L.R.B. 107, 74 L.R.R.M 1740 (1970), *enforced,* 449 F.2d 1058 (D.C. Cir. 1971).

118. 174 N.L.R.B. 705, 70 L.R.R.M. 1346 (1969), *enforced and remanded,* 426 F.2d 1243 (D.C. Cir.), *cert. denied,* 400 U.S. 950 (1970), *on remand,* 194 N.L.R.B. 1234, 79 L.R.R.M. 1175 (1972), *modified and rehearing denied,* 502 F.2d 349 (D.C. Cir.), *cert. denied,* 417 U.S. 921 (1974).

Plumbing & Heating Co.[119] formula in favor of a more realistic figure, perhaps measured by the cost to employees of borrowing money, many potential respondents might think twice before risking a violation of the Act's bargaining obligation. Of equal importance, however, is that an order following the suggested model would provide an incentive for both the employer and the union to compromise their differences in the form of a collective agreement. Such an outcome would indeed be the mark of a successful bargaining order.

V. CONCLUSION

The National Labor Relations Act may be viewed as a living organism, one which still has great potential for growth and development. The three aspects of the Board's role in the collective bargaining process that this Article has examined—the duty to furnish necessary information, the duty to bargain realistically about business changes affecting employees, and remedial orders in refusal-to-bargain cases—illustrate that the Board has yet to realize its full potential.

119. 138 N.L.R.B. 716, 720-21, 51 L.R.R.M. 1122, 1125 (1962), *rev'd on other grounds*, 322 F.2d 913 (9th Cir. 1963).