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INTRODUCTION

Where employees have been *coerced* to pay union dues, initiation fees, assessments, permit fees, referral fees, "dobies" and the like, an inequitable situation exists requiring that restitution be made by the parties whom the National Labor Relations Board determines to be legally responsible for having required that the payments be made. In an effort to restore the *status quo* in the particular situation and to deter others from entering into contracts and practices, which, in general, encourage membership in a labor organization, the Board has ordered a disgorgement remedy. An enunciation of the Board's power to fashion this remedial order was issued by the Supreme Court in *Virginia Electric & Power Co. v. NLRB*[1] in which the Court affirmed the specific dues reimbursement order as being within the scope of the statutory language which vested in the Board the power "to take such affirmative action . . . as will effectuate the policies of this Act."[2]

The typical situations in which the Board found disgorgement to be an appropriate remedy involved employer domination or assistance in violation of section 8(a)(2) of the NLRA.[3] Such was the case in *Virginia Electric,* where the Board found the dues check-off arrangement illegal because made in favor of an *employer dominated* union. Four years after that decision the Taft-Hartley amendments were enacted which made unlawful all closed-shop contracts, and accordingly, the Board no longer had to depend upon a finding of an 8(a)(2) violation preliminary to ordering the reimbursement of unlawfully exacted dues and fees.[4] The rationale flowing from the amendments appeared to have tied in with the conclusion that employees were *coerced* in the payment of dues, fees

* This article reflects the opinions of the author, and does not purport to reflect the official position of the National Labor Relations Board, with which the author is presently connected, or necessarily the opinions of any members of the Board.

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1. 319 U.S. 533 (1943).
2. Labor Management Relations Act (Taft-Hartley Act) § 10(c), 49 Stat. 1921 (1947), 29 U.S.C. § 160(c) (1958).
3. Charles W. Carter Co., 115 N.L.R.B. 251 (1956); The Englander Co., 114 N.L.R.B. 1034 (1955); The Item Co., 113 N.L.R.B. 67 (1955); Hibbard Dowel Co., 113 N.L.R.B. 28 (1955).
4. Marlin Rockwell Corp., 114 N.L.R.B. 553 (1955); The Eclipse Lumber Co., 95 N.L.R.B. 464 (1951).

and assessments in situations where compulsory unionism was present, or where fees and assessments in excess of periodic dues were exacted.

Finally, in *Brown-Olds*[5] the Board took the position that since Taft-Hartley declared closed shops to be contrary to public policy, the dues[6] required and collected under a closed shop contract (and *all* assessments under *any* contract) were coercively obtained, since such payments constituted the price the employees had to pay to retain their jobs. The *Brown-Olds* case was a significant first in two major respects: *First,* the basis for disgorgement was stated to be the existence and enforcement of a contract found to be illegal because it provided for a type of union-security which exceeded the limits expressed in the proviso to section 8(a)(3). *Second,* the Board ordered that dues be reimbursed to *all* the employees at the Brown-Olds Company. Prior to *Brown-Olds,* the only cases in which the remedy ran to the benefit of all the employees were those involving both an employer dominated, supported or "foisted" union and some form of compulsory unionism.[7] Where no union-security or closed-shop contracts were in effect, the remedy was limited to those situations where coercion was affirmatively established and directed only in favor of those employees who were specifically named. Thus, *Brown-Olds* may be taken for the proposition that, where dues are collected under a contract which is illegal because it contains a union-security provision exceeding the permissible limits set by Taft-Hartley, the mere existence of such illegal provision will be sufficient evidence of coercion to warrant the disgorgement of all monies collected pursuant thereto, to all employees covered thereby.[8] How-

5. United Ass'n of Journeymen & Apprentices of Plumbing and Pipefitting Indus., Local 231 (the *Brown-Olds* case), 115 N.L.R.B. 594 (1956).

6. The Board failed to order reimbursement of initiation fees presumably because such fees were collected "more than six months prior to the filing of the charge with the Board . . . ." Labor Management Relations Act (Taft-Hartley Act) § 10(b), 49 Stat. 1921 (1947), 29 U.S.C. § 160(b) (1958). *But cf. American Dredging Co.,* 123 N.L.R.B. 139 (1959), *modified,* 45 L.R.R.M. 2405 (3d Cir. 1960), where the court denied the Board's *Brown-Olds* remedy noting that although section 10(b) limited the respondent's liability, the Board's remedial order would have required the respondent to reimburse initiation fees which were paid more than six months prior to the filing and service of the charge.

7. Virginia Elec. & Power Co., v. NLRB, 319 U.S. 533 (1943); NLRB v. Parker Bros. & Co., 209 F.2d 278 (5th Cir. 1954); NLRB v. Baltimore Transit Co., 140 F.2d 51 (4th Cir. 1944); Hibbard Dowel Co., 113 N.L.R.B. 28 (1955). Cf. NLRB v. Shedd-Brown Mfg. Co., 213 F.2d 163 (7th Cir. 1954); NLRB v. Braswell Motor Freight, 209 F.2d 622 (5th Cir. 1954).

8. Some question may be raised as to the soundness of the last clause. If the coercion to pay dues arises from the mere existence of an illegal contract, then eradication of its unlawful effects should involve reimbursement to all employees covered by the contract, and not be confined merely to the benefit of those who were specifically shown to have been coerced at a particular job location. In *Brown-Olds* the Board issued a broad cease and desist order requiring the union to cease giving effect to its contract with

ever, the cases decided subsequent to *Brown-Olds,* up to but not including those decided in 1958, do not consistently appear to bear out this proposition. Yet, some basic ground rules are established and analysis will be enhanced if the cases intervening between *Brown-Olds* and 1958 are explored.

In one case[9] the Board found that the employer had violated section 8(a) (1), (2) and (3) of the act by executing a contract containing a union-security provision with a union which was not the majority representative of the employees concerned. Apparently following *Brown-Olds,* the Board ordered the full disgorgement of all dues deducted and all initiation fees and assessments paid by the employees, although no reference to *Brown-Olds* was made anywhere in the intermediate report or Board decision. Overlaying this case, however, are numerous decisions which either limited[10] or totally denied[11] the application of *Brown-Olds* in situations where the broad order appeared to be warranted.

Toward the end of 1957 several decisions appeared which again seemed to indicate Board approval and continued application of the unique remedy. In *Broderick Wood Products,*[12] the Board adopted the trial examiner's conclusion that the coercive element in a contract is the union shop clause which requires membership in the union as the price of employment, and that its mere existence *inevitably* coerces the payment of initiation fees and dues. The order required the employer and union, jointly and severally, to refund all fees and

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the Brown-Olds Company and *any other employers* with whom the union maintained the unlawful agreement. The reimbursement order was limited, however, to the employees at the Brown-Olds Company. The ramifications resulting from a failure to apply *Brown-Olds* in line with the logic of the rationale, which would seemingly require consistent treatment, will be discussed more fully, *infra.*

9. United Elec. Workers, Local 430 (the *Mohawk Business Machines* case), 116 N.L.R.B. 248 (1956).

10. United Bhd. of Carpenters, Local 1400 (the *Pardee Constr. Co.* case), 115 N.L.R.B. 126 (1956); United Bhd. of Carpenters, Local 983 (the *O. W. Burke Co.* case), 115 N.L.R.B. 1123 (1956). In these cases the Board limited its reimbursement order to the permit fees exacted and to the employees who were shown to have been discriminated against. In neither case was the union-security provision attacked; the violations were founded upon the illegal arrangements or illegal enforcement of the contracts.

11. In International Bhd. of Teamsters, Local 470 (the *McCloskey & Co.* case), 116 N.L.R.B. 1123 (1956), the Board found an illegal union-security provision which was actually enforced. A year later, in The Marley Co., 117 N.L.R.B. 107 (1957), the Board said: "[T]he Board, with court approval, has consistently held that maintenance of an unlawful contract, apart from its enforcement is violative of the Act." *Id.* at 110. The Board then went on to find that the closed shop contract in fact was enforced, yet its order failed to provide for any disgorgement whatsoever. See also Triboro Carting Corp., 117 N.L.R.B. 775 (1957), in which the Board found enforcement of the illegal union-security clause and cited *Brown-Olds* as the controlling precedent for its broad cease and desist order but again failed to provide for any reimbursement.

12. 118 N.L.R.B. 38 (1957), *aff'd,* 261 F.2d 548 (10th Cir. 1958).

dues paid by the employees under the unlawful agreements. Subsequently, the Board appeared to narrow the operative scope of the remedy in *Bryan Manufacturing Co.*,[13] where the Board found the union-security clause unlawful and, without referring to *Brown-Olds* or *Broderick*, ordered the respondents to refund to all the employees the dues and fees actually checked off.[14]

One further decision deserves mention in this context even though no union-security issue was involved. In *Unit Parts Co.*,[15] the union, which was the majority representative of the employees, refused to sign the bargaining agreement unless 80 per cent of the employees joined the union and signed dues check-off authorizations. The Board held that the union violated section 8(b)(1)(A) of the act and ordered it to refund to all employees all dues and monies collected pursuant to the authorization. The Board, citing *Brown-Olds* said:

> [W]e do not believe that *additional* evidence of coercion is necessary to warrant an order directing the Respondent to relinquish the fruits of its unfair labor practices. It is sufficient that the Respondent unlawfully exacted *membership and dues* check-offs as the price the employees in question had to pay to entitle them to the benefits of the contract.[16]

It would seem that, based upon the language employed by the trial examiner in *Broderick* which expressly negatived the check-off proposition as bearing on the question of coercion, the language relating to dues check-off in the above extract could be deleted without affecting the underlying rationale in the least. If we are to take *Broderick* at its word, the reimbursement order here would appear to have been warranted, with or without check-off authorizations, since the dues and fees were collected under a contractual provision which illegally required membership as a condition of employment.

It appears that the thread which unites these cases into a cohesive whole is not the domination of, or assistance rendered to, a union, or the existence of an unlawful union-security agreement standing alone

13. 119 N.L.R.B. 502 (1957), *enforced sub nom.* Local 1424, Int'l Ass'n of Machinists v. NLRB, 264 F.2d 575 (D.C. Cir. 1959), *reversed*, 362 U.S. 411 (1960). In view of the Supreme Court's reversal of the Board on other grounds, it was unnecessary for the Court to reach the remedial issue.

14. Whether this was in fact a limitation on *Brown-Olds* is not entirely free from doubt. It may very well be that in *Bryan* none of the employees involved performed their dues-paying obligations to the respondent union in any manner other than by means of the check-off provisions. If this were the case in fact, then the order in *Bryan* would appear to have been equally as broad as those directed in *Brown-Olds* and *Broderick*. *Cf.* Paul M. O'Neill Int'l Detective Agency, 124 N.L.R.B. 167 (1959); Masters-Lake Success, Inc., 124 N.L.R.B. 580 (1959).

15. General Drivers, Local 886 (the *Unit Parts Co.* case), 119 N.L.R.B. 222 (1957), *enforced*, 264 F.2d 21 (10th Cir. 1959).

16. 119 N.L.R.B. at 223. (Emphasis added.)

or as implemented by dues check-off authorizations, but rather the coercive effects which these illegal factors prompt and maintain. Thus, the commission of an unfair labor practice will warrant the imposition of a reimbursement remedy if such commission prompts the illegal flow of dues and fees payments.

Recent Decisions Involving a Disgorgement Remedy

Cases Involving Section 8(a)(2): Domination and Assistance

Before proceeding with the recent decisions, it might be advisable to refer once again to the *Virginia Electric* case where the Supreme Court was presented with an employer-domination situation which squarely raised the question of the Board's power to order a reimbursement remedy. The Court, rejecting the respondent employer's contention that Congress did not envision a reimbursement remedy when it enacted Section 10(c), held that the appropriateness of a particular remedy is "for the Board to decide according to its reasoned judgment."[17] The Court went on to say that unless "it can be shown that the [Board's] order is a patent attempt to achieve ends other than those which can fairly be said to effectuate the policies of the Act,"[18] the courts will not disturb the Board's remedial orders.[19] Thus, it would appear that the question of whether a reimbursement order is a permissible means for effectuating the policies of the act has been affirmatively settled.[20]

17. Virginia Elec. & Power Co. v. NLRB, 319 U.S. 533, 544 (1943).

18. 319 U.S. at 540.

19. This proposition has since been reaffirmed by the Supreme Court. NLRB v. Seven-Up Bottling Co., 344 U.S. 344 (1953).

20. However, it should be noted that a distinction in terminology should be drawn between a reimbursement remedy *qua* remedy and the more popular label of a *Brown-Olds* remedy. The Supreme Court upheld the application of a reimbursement remedy in an 8(a)(2) employer-domination case. In the *Brown-Olds* case, the Board applied a reimbursement remedy in a situation wherein no elements of 8(a)(2) domination, assistance or foisting existed. The rationale underlying the coercion upon which a remedial order rests is obviously more compelling in the 8(a)(2) case than in an 8(a)(3) type case, for in the former the union cannot really raise any claim or color of right to receive the payments of dues and fees since it does not possess the status of a bargaining representative *freely chosen* by a majority of the employees. In an 8(a)(3) case, however, where the union clearly is entitled to such status, it is a much more refined and often elusive type of dialectic which concludes that the employees were coerced to pay dues and fees. This is so because the essence of the 8(a)(3) violation is not coercion, but solely *discrimination* which encourages or discourages union membership. While it is arguable that every violation of sections 8(a)(2), (3), (4) and (5) will also involve "interference, restraint, or coercion" within the meaning of 8(a)(1), it is questionable whether the extension of the "coercion" in 8(a)(1) is proper where the heart of the violation rests within the framework of section 8(a)(3). The Supreme Court has approved the extension in an 8(a)(2) context in the *Virginia Electric* case; it has not yet done so where the violation involves union shop or hiring hall infirmities.

Accordingly, until (and unless) the Supreme Court affirms the application of a disgorgement remedy in an 8(a)(3) context, the term "*Brown-*

Of the many Board decisions issued in 1958, (dealing with violations of section 8(a)(2) of the act) the domination cases were conspicuous by their complete absence from the scene. All violations of this section dealt with unlawful assistance, the majority of which were predicated upon the finding that the employer executed a contract containing union-security provisions with a union which, at the time, was not the majority representative of the employees concerned.

In *Illinois Malleable Iron Co.*,[21] the employer extended a contract containing union-security provisions to a union which was not the chosen representative of the employees and required that dues *check-off* authorizations be signed as a condition of employment. The Board order required the respondent employer to refund to any employees or former employees dues or other monies which were deducted from their wages.

In *Gibbs Corp.*,[22] the contract contained seniority provisions which the Board found (without discussing the point) violated 8(a)(2) in that, although the settlement of controversies relating to seniority was delegated to a joint employer-union board, the union was assured of majority membership.[23] The Board did not order the employer to cease recognizing the union,[24] nor did it require any reimbursement.

In *Cleaver-Brooks Mfg. Corp.*,[25] the Board found that the employer

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Olds" remedy should be reserved for 8(a)(3) cases and the general term "reimbursement" remedy, for cases involving 8(a)(2) violations. In this regard, it may be significant that the Supreme Court, while granting certiorari in two cases which involve 8(a)(3) aspects and appropriately may be deemed to be *Brown-Olds* problems (NLRB v. Local 60, United Bhd. of Carpenters, and Local 357 Teamsters, both *infra*, Appendix II), recently denied a petition for certiorari in NLRB v. Revere Metal Art Co., *infra*, Appendix II, an 8(a)(2) assistance case which appears to rest upon the traditional *Virginia Electric* principle.

21. 120 N.L.R.B. 451 (1958).

22. 120 N.L.R.B. 1079 (1958).

23. Incidentally, the Board cited Pacific Intermountain Express Co., 107 N.L.R.B. 837 (1954), *enforced as modified sub nom.* NLRB v. International Bhd. of Teamsters, 225 F.2d 343 (8th Cir. 1955) for its finding of illegality. It is this identical delegation of "unfettered control" which theoretically underlies the Board's decision in Mountain Pacific Chapter of the Associated General Contractors, Inc., 119 N.L.R.B. 883 (1957), *enforcement denied*, 270 F.2d 425 (9th Cir. 1959). See, *e.g.*, Local 425, United Ass'n of Journeymen and Apprentices of the Plumbing and Pipefitting Indus. (the *Lummus Corp.* case), 125 N.L.R.B. 1161 (1959).

24. Apparently the Board was adhering to its policy of not ordering the employer to cease recognizing the union in an industry where employment relationships are relatively unstable and in consequence of which representation elections could not be held. *Cf.* Edward A. Daylor Co., 123 N.L.R.B. 1692 (1959). Although generally reserved for the building and construction industry, the Board applied it here to the maritime industry. *But see* Houston Maritime Ass'n, 121 N.L.R.B. 389 (1958); Galveston Maritime Ass'n, 122 N.L.R.B. 692 (1958).

25. 120 N.L.R.B. 1135 (1958).

had rendered illegal assistance to an independent union by entering into a collective bargaining agreement at a time when a question concerning representation was pending before the Board.[26] But, since there is no evidence that the contract contained union-security or closed shop provisions, no particular emphasis need be given to the fact that the Board failed to order any dues reimbursement.

All of the remaining assistance cases provided for reimbursement in one degree or another. Thus, in *Coast Aluminum Co.*,[27] the employer was ordered to reimburse the initiation fees and dues deducted from the employees wages and paid to, or being retained for, the union. The employer unlawfully assisted the union by executing a contract containing union-security provisions at a time when the union was not the bona fide representative of the employees. The Board noted that although the complaint did not allege that the dues were collected under unlawful check-off authorizations, such finding would be unnecessary to warrant the refund order.[28] On essentially the same set of facts however, the Board, in *Dixie Bedding Manufacturing Co.*,[29] while relying principally upon the coercive effects of the illegal union-security clause, incorporated language in its opinion which seemed to intimate that the presence of the check-off provision in the contract was a coercive element in itself.[30] Whatever force the Board seemed to give to the check-off provision there, two cases decided subsequently dispel all doubt in that they establish that check-off provisions are not integrally linked with a disgorgement order.[31]

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26. *Cf.* A. O. Smith Corp., 122 N.L.R.B. 321 (1958).
27. 120 N.L.R.B. 1326 (1958).
28. A. O. Smith Corp., *supra* note 26, in which case the Board cites *Brown-Olds* for the remedial order.
29. 121 N.L.R.B. 189 (1958).
30. Note that this proposition appears to be contrary to the rationale adopted in Broderick Wood Prods., *supra* note 12. Note also that Board Member Jenkins registered a dissent in the case, indicating that he would reserve the reimbursement remedy for a more flagrant violation, having found no elements of coercion present. The majority of the Board stated: "[W]e cannot conceive of a more wilful or flagrant example of a violation than the one herein." 121 N.L.R.B. at 197. See also Revere Metal Art Co., 123 N.L.R.B. 114, 116 (1959) where the Board's order directed the respondents, jointly and severally, to "reimburse its [the Company's] employees for any initiation fees, dues, or other moneys . . . *checked off* as a condition of employment . . . ." (Emphasis added.)
31. Lakeland Bus Lines, 122 N.L.R.B. 281 (1958); A. O. Smith Corp., *supra* note 26. In the latter case, the Board adopted the trial examiner's conclusion, *inter alia*, that check-off was not the coercive element (citing *Broderick*). In both cases the Board cited, *inter alia*, *Brown-Olds* as the controlling precedent for the remedial portion of the order. See in particular Grand Union Co., 122 N.L.R.B. 589 (1958), where the trial examiner recommended the reimbursement of all dues checked off. The facts disclosed that *all* of the employees involved had authorized collection in this manner. (*Cf. supra* note 14.) The Board adopted the trial examiner's recommendation, but extended it to include any other moneys unlawfully exacted under such agreement. See also Adley Express Co., 123 N.L.R.B. 1372 (1959). *Cf.*

In August of 1958, the Board issued its decision in *Houston Maritime Association*,[32] in which the employer was held to have violated section 8(a)(1), (2) and (3), and the union, sections 8(b)(1)(A) and (2), of the act, by the execution and maintenance of a contract which failed to comply with the criteria set forth in the *Mountain Pacific* decision.[33] In addition, the contract required that, as a condition of employment, the employees pay a percentage of their wages to the union for the hiring hall services it performed. The respondents were ordered, *jointly and severally,* to reimburse the employees who were required to pay the union a percentage, but no mention was made of any refund of initiation fees and/or dues. In December 1958, the Board, in a situation involving substantially identical facts, ordered the respondents to reimburse *all* present and former employees "who have unlawfully been required to pay a percentage of their wages, initiation fees, dues and other moneys to the Respondent [union] . . . ."[34] In distinguishing the remedial provisions in *Houston,* the Board said:

> We note that in the *Houston Maritime Association* case . . . the Board did not direct the refund of any moneys paid as the price for employment other than percentages collected, although illegal practices similar to those in the instant case were involved. However, at the time the *Houston* case was decided, the Board was still in the process of reexamining the *Brown-Olds* principle, which it did not reaffirm until after the *Houston* decision issued.[35]

Thus the Board has perhaps accounted for all of the cases decided prior to *Galveston,* where *Brown-Olds* was limited or not applied at all.[36]

Local 269, International Bhd. of Teamsters (the *A. Custen, Inc.* case), 122 N.L.R.B. 1242 (1959).

32. 121 N.L.R.B. 389 (1958), *enforced,* 268 F.2d 901 (5th Cir. 1959).

33. Mountain Pacific Chapter of the Associated General Contractors, Inc., 119 N.L.R.B. 883 (1957), *enforcement denied,* 270 F.2d 425 (9th Cir. 1959). In this decision, the Board set forth three safeguards which all agreements for an exclusive hiring hall must incorporate if the contract is to be immune from condemnation. In effect, the union, which operates as an employment agency, is to agree (1) to refer applicants for employment in a nondiscriminatory manner; (2) to permit the employer to exercise the right to reject any of the applicants so referred; and (3) that the agreement, and the pertinent provisions relating to the hiring system, are to be posted in conspicuous places (where notices to employees are customarily posted). Great numbers of cases are presently including a *Brown-Olds* remedy where the contractual infirmity is a failure to incorporate the three safeguards required by this decision. Yet, the *Mountain Pacific* decision itself failed to provide for a *Brown-Olds* remedy.

34. Galveston Maritime Ass'n, 122 N.L.R.B. 692, 705 (1958).

35. 122 N.L.R.B. at 699 n. 18.

36. See also Grand Union Co., *supra* note 31, where the trial examiner recommended *Brown-Olds* despite the existence of numerous decisions in which such remedy was not applied, distinguishing these cases on the conclusion that the Board was "going along" with the General Counsel's recommended reprieve. (This reprieve refers to the General Counsel's

DISCUSSION OF ASSISTANCE CASES

The significance of *Brown-Olds* as a distinct remedy did not necessarily require the framework of an 8(a)(2) violation to make its effects felt; yet there is persuasiveness in the fact that the vehicle which the Supreme Court chose to affirm the Board's reimbursement power was a domination case based on that section of the act. Still, subsequent decisions make it clear that where closed shop or illegal union-security conditions exist, even absent an express 8(a)(2) finding, the Board will require an appropriate disgorgement order. In fact, the only consistent treatment of the reimbursement remedy is found in the cases from *Coast Aluminum* to the present where the employer executes a contract containing union-security provisions with a union which is not the majority representative of the employees.[37]

In *Houston Maritime,* the Board limited the order to merely the percentages paid by the employees although *Mountain Pacific* had

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past policy of not recommending a *Brown-Olds* remedy in cases where, during a designated period, the parties voluntarily ceased their unlawful practices and amended their contracts to conform with the Act. This policy is discussed *infra,* p. 513). But compare Gay Eng'r Corp., 124 N.L.R.B. 451, 452 (1959), where the Board withheld application of *Brown-Olds* against the union which had entered into a settlement agreement prior to the commencement of litigation. The Board applied *Brown-Olds* to the respondent employer, stating that "the remedy to be applied for the correction of unfair labor practices lies within the exclusive discretion of the Board, and that the *Brown-Olds* remedy is required where the closed-shop prohibitions of the Act are flagrantly ignored, despite a subsequent correction of unlawful hiring practices pursuant to the General Counsel's suggested 'reprieve'." For the reverse situation where the remedy was waived as to one employer who informally settled the case, see Funeral Directors of Greater St. Louis, 125 N.L.R.B. 241 (1959).

37. Adley Express Co., 123 N.L.R.B. 1372 (1959); Paul M. O'Neill Int'l Detective Agency, Inc., 124 N.L.R.B. 167 (1959); Sherman Car Wash Equip. Co., 124 N.L.R.B. 207 (1959) (citing *Brown-Olds* for what should more accurately be called the "reimbursement" order); Masters-Lake Success, Inc., 124 N.L.R.B. 580 (1959); Lundy Mfg. Corp., 125 N.L.R.B. 1188 (1959); Perry Coal Co., 125 N.L.R.B. 1256 (1959); Vapor Blast Mfg. Co., 126 N.L.R.B. No. 6, 45 L.R.R.M. 1271 (1960). See Superior Derrick Corp., 126 N.L.R.B. No. 27, 45 L.R.R.M. 1298 (1960), where quite properly *no* reimbursement remedy was applied. It appeared that the 8(a)(2) followed, in part, from the employer's payment of "membership fees and dues for employees *out of its own funds.*" (Emphasis added.) *Cf.* Alco-Gravure, Div. of Publication Corp., 124 N.L.R.B. 1027 (1959), where reimbursement was not ordered despite the finding of an 8(a)(2) violation based on the execution of a pre-hire preferential hire contract at a time when the union did not represent an uncoerced majority of the employees. Board Member Rodgers would have required reimbursement whereas the majority of the Board, without explanation, failed to order such a remedy. It would appear that Member Rodgers' position is sounder than that taken by the majority insofar as it may be based on the lack of voluntariness to pay dues and fees where, as in the typical pre-hire situations, the employees come into a ready-made employment operation without being afforded the opportunity to select their bargaining representative (see note 20 *supra*). *But cf.* section 8(f) of the Labor Management Reporting & Disclosure Act of 1959 which permits pre-hire contracts in the building and construction industry.

not been complied with. This apparent oversight was explained in *Galveston Maritime,* but the specific bases for reaffirming *Brown-Olds* were not set forth. *Galveston Maritime* had no elements which brought the violations within the realm of union-security proscriptions, yet the Board found that section 8(a)(2) had been violated by the maintenance of the exclusive hiring arrangement which failed to comport with the criteria in *Mountain Pacific.* In *Houston Maritime* the reimbursement order was predicated not only on the failure to satisfy *Mountain Pacific,* but also because of the tied-in assistance. The Board did not stress the 8(a)(2) violation in *Galveston Maritime,* and in distinguishing *Houston Maritime,* indicated that full disgorgement would have been appropriate, had the Board resolved its policy regarding *Brown-Olds* at the time of decision. Except for the conjectural implications inherent in any distinguished set of decisions, it does not appear that the Board in *Galveston Maritime* required, or relied upon, the presence of an 8(a)(2) allegation, since other cases, both prior,[38] and subsequent,[39] to *Galveston Maritime,* carried a reimbursement order in the absence of a finding of assistance. However, it is to be borne in mind that most of these cases arose in the building and construction industry in which 8(a)(2) charges are rarely sought. In *Houston Maritime* and *Galveston Maritime,* presumably, employment relationships were stable enough to warrant the usual *Bowman*-type remedy,[40] and therefore the 8(a)(2) finding merely premised and supported the "cease recognition" portion of the order, but not the reimbursement portion.[41]

Further, it does not appear that whether dues are paid pursuant to check-off authorizations, or by the employees directly to a union steward or other union representative, will materially affect the

38. Grand Union Co., *supra* note 31; Millwrights', Local 2232 (the *Farnsworth Chambers, Inc.,* case), 122 N.L.R.B. 300 (1958); Local 450, Operating Eng'rs (the *Tellepsen Constr. Co.* case), 122 N.L.R.B. 564 (1958); Local 85, Sheet Metal Workers (the *Gassaway* case), 122 N.L.R.B. 631 (1958).

39. See Appendix I, for a collection of cases in which 8(a)(2) aspects are totally lacking and where the Board included the reimbursement remedy. (Henceforth, where citation to these cases is necessary, the reader will be referred to Appendix I).

40. Bowman Transp. Co., Inc., 112 N.L.R.B. 387 (1957), *enforced in part sub nom* District 50, UMWA v. NLRB, 237 F.2d 585 (D.C. Cir., 1956), *vacated and remanded,* 355 U.S. 453 (1958).

41. *Cf.* Kaiser Steel Corp., 125 N.L.R.B. 1039, (1959), where the Board found a violation of 8(a)(2) and ordered reimbursement but because the illegal contract provision was severable from the rest of the contract the Board did not apply its customary "withdrawal of recognition" order. See also Lykes Bros., 128 N.L.R.B. No. 68, 46 L.R.R.M. 1347 (1960), where a majority of the Board (Member Bean, dissenting) did not require the employer to cease recognizing the assisted union because all of the acts of assistance occurred *after* the execution of a contract which, on its face, was lawful. However, the employer and union were ordered, jointly and severally, to reimburse "all employees who were *individually* coerced to sign dues check-off cards." (Emphasis added.)

rationale underlying the Board's order. Whether there is traditional assistance to, or foisting of, a union upon the employees, a correlation between payment of dues and fees and membership *vis a vis* a section 7 right may exist; and if it does, the Board brings the general language of section 10(c) into operation. Thus, if the operative facts disclose that the employees are required to pay dues, fees, and other monies in order to secure or retain employment, even absent a finding of "assistance" by an employer in the collection of these monies, the Board orders reimbursement, in what it believes to be a proper exercise of its administrative expertise in fashioning remedial measures which effectuate the purposes of the act.

UNION-SECURITY AND MOUNTAIN PACIFIC SITUATIONS: THE CASES

Reference to the cases decided before November 1, 1958, (the date signifying the end of the *Brown-Olds* grace period) yields little in the way of enlightenment. General Counsel Fenton indicated that during the initial three month period,[42] later extended to November 1, 1958,[43] he would not recommend *Brown-Olds* where the parties voluntarily sought to correct their illegal union-security and hiring arrangements. Thus, many cases in which one might reasonably expect to find *Brown-Olds* applied, but which lack any type of disgorgement remedy, may well be accounted for on the basis of Board accession to the General Counsel's policy.[44]

After the moratorium was lifted, a few cases contained language which expressly recognized this factor as a possible explanation for the absence of the remedy.[45] Accordingly, except where retrogression is deemed warranted because of some apparent peculiarity in the nature of the case, this discussion will be confined to the decisions rendered since the moratorium.

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42. This period was to extend from April 1, 1958, to June 1, 1958. See 41 LAB. REL. REP. 359 (1958).

43. The General Counsel extended the grace period from June 1, 1958, to September 1, 1958 [42 LAB. REL. REP. 9]. In an effort to accommodate *Brown-Olds* to the inherent difficulties recognized in amending contracts and correcting practices to conform with the law, the General Counsel further extended the grace period to November 1, 1958, for those parties who had commenced changing their arrangements prior to September 1, 1958 [42 LAB. REL. REP. 473].

44. But see K. M. & M. Constr. Co., 120 N.L.R.B. 1062 (1958), where the General Counsel and Trial Examiner recommended reimbursement of all dues, fees and assessments in a situation involving an illegal union-security clause and a failure to comply with *Mountain Pacific*. The Board, without comment, did not adopt these recommendations.

45. See quoted language in text, *supra* p. 510, and *supra* note 36. And see the recent expression in Locals 24 & 75, Bricklayers and Masons (the *Booth & Flinn Co.* cases), 129 N.L.R.B. No. 89, 47 L.R.R.M. 1078 (1960).

Los Angeles[46] was the first case after the moratorium which called for disgorgement predicated upon the rationale of *Brown-Olds*, and it arose in the context of an exclusive referral arrangement which failed to satisfy the requirements of *Mountain Pacific*. Although there was no issue raised regarding union-security, the Board found that the employees were coerced into paying dues and fees, because of the illegal *hiring* provisions in the contract which encouraged employees to join the union.

At the same time the Board extended the *Brown-Olds* remedy to cover hiring situations which were violative of the act only because of a failure to satisfy *Mountain Pacific*, it also began to limit the operation of the remedy in those cases where the union-security provisions were illegal. In *Philadelphia Woodwork Co.*[47] the Board withheld application of *Brown-Olds* because the violation bordered on the "technical," as contrasted to the "substantive," provisions of the act. The violation was established by the execution of a contract containing union-security provisions at a time when the union was not in compliance with the filing requirements of the act,[48] although the contractual provisions on their face did not exceed the permissible limits set forth in the proviso to section 8(a)(3). Thus, recalling the "assistance" cases, although the execution of a union-security agreement by a union which does not represent a majority of the employees is flagrant enough to warrant *Brown-Olds*, mere noncompliance is not. Apparently, the former aspect goes to the substantive features of the act whereas the latter (procedural) violation is technical. *Philadelphia Woodwork* was reaffirmed in *Schenley Distillers*,[49] where again noncompliance was the defective element

46. Los Angeles-Seattle Motor Express, Inc., 121 N.L.R.B. 1629 (1958). The following pre-*Los Angeles* cases also involved violations of *Mountain Pacific* but failed to require a *Brown-Olds* remedy (presumably because of the General Counsel's moratorium): Carpenters' and Millwright Union (the *Charles S. Wood Co.* case), 121 N.L.R.B. 543 (1958); Hod Carriers, Local 324 (the *Roy Price, Inc.* case), 121 N.L.R.B. 508 (1958); Houston Maritime Ass'n, 121 N.L.R.B. 389 (1958); Sheet Metal Workers, Local 99 (the *Dohrmann Hotel Supply Co.* case), 120 N.L.R.B. 1366 (1958); Local 250, United Ass'n of Journeymen & Apprentices of the Plumbing & Pipefitting Indus. (the *Bechtel Corp.* case), 120 N.L.R.B. 930 (1958); Booth & Flinn Co., 120 N.L.R.B. 545 (1958). In Foundation Co., 120 N.L.R.B. 1453 (1958), the Board refused to find an employer's unilaterally instituted hiring policy as violative of *Mountain Pacific;* but it did find that the employer violated section 8(a)(3) of the Act, by executing a union-security agreement at a time when no workers were employed—yet the Board failed to order reimbursement. See also *Alco-Gravure, supra* note 37, respecting the pre-hire point.

47. 121 N.L.R.B. 1642 (1958).

48. 29 U.S.C. § 159 (f), (g), (h) (1958).

49. Local 392, United Ass'n of Journeymen & Apprentices of the Plumbing & Pipefitting Indus. (the *Schenley Distillers* case), 122 N.L.R.B. 613 (1958). A sidelight of some interest is the fact that the Board's cease and desist *order* specifically cited *Mountain Pacific* as being the outer limit upon which clearance or approval might be required by the union. In a few subsequent cases, the Board repeated this method of notifying employees of the precedent

in what would otherwise have been a lawful union-security agreement.

A few subsequent cases indicated that the Board definitely established this exception as a rule.[50] In *Union De Soldadores*,[51] the Board separated the union-security provisions (those provided for in the proviso to section 8(a)(3)) from the hiring provisions of the contract. The Board found that the union-security provisions were not illegal on their face and that the only impediment to their legality was that the union was not in compliance with the filing sections of the act. Citing *Philadelphia Woodwork*, the Board said: "For the reasons stated [therein], we would not require reimbursement of moneys paid by employees by virtue of such *contract* as recommended by the Trial Examiner."[52] However, the Board also found that pursuant to other provisions of the contract, the employer and union enforced an arrangement wherein preference in hiring was given to members of the union, and nonmembers were required to obtain clearance from the union as a condition of employment. On the basis of these illegal hiring provisions, the Board held both respondent unions[53] liable for reimbursing the affected employees.

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upon which the violations were predicated, *e.g.*, Local 1566, Int'l Longshoremen's Ass'n, Appendix I; Local 176, United Bhd. of Carpenters (the *Dimeo Constr. Co.* case), Appendix I; International Union of Operating Eng'rs, Local 150 (the *Fluor Co.* case), Appendix I. It would seem that if the Board is attempting to notify employees of their rights to be referred pursuant to objective nondiscriminatory standards, the Board should have said so in plain, simple terms instead of citing a prior decision which stands for the proposition. The Board has frequently relied upon court pronouncements condemning contractual provisions which were not written in language which an ordinary workingman would readily understand, *e.g.*, Local 1566, ILA, Appendix I, citing NLRB v. Shuck Constr. Co., 243 F.2d 519 (9th Cir. 1957) and Red Star Express Lines of Auburn, Inc. v. NLRB, 196 F.2d 78 (2d Cir. 1952). How readily would an ordinary workingman understand the significance of *Mountain Pacific*, even if he were to go to a local law library and read the decision?

50. Perry Coal Co., 125 N.L.R.B. 1256 (1959), is no exception to this exception. There, the Board found *several* bases for concluding that the employer violated section 8(a)(2), one of which being the execution of a union-security contract at a time when the union (UMW) was not in compliance. However, sufficient factors existed to warrant reimbursement apart from the noncompliance aspect.

51. Union de Soldadores, Local 1839, 122 N.L.R.B. 1603 (1959).

52. *Id.* at 1604.

53. In this case, the employer was not named as a respondent. Recalling *Broderick Wood*, the Board, with court approval, required both the employer and union to refund all dues and fees coercively obtained under the illegal union-security provision in their collective bargaining agreement. This treatment appears to be consistent with the principles of joint-tortfeasor liability flowing from the joint commission of an illegal act. Insofar as a reimbursement order directed against only one of the parties may seem harsh (particularly if the sole respondent is the employer, since it is the union which receives and retains the dues and fees collected), it is to be noted that the Board, in framing its order, is necessarily restricted to the parties-respondent named in an unfair labor practice charge. Thus, if a charge is filed naming either the employer or the union as respondent, the Board could not order the unnamed party to an illegal arrangement to comply with its reim-

Further, in *Argo Steel*,[54] the Board adverted to the presence of *Philadelphia Woodwork* factors in allowing an exception to a reimbursement order. But the Board, unfortunately, phrased its reference in language which raises, rather than clarifies, questions as to the propriety of the exception as such. The facts indicated that the contract in issue, which was executed in 1956, incorporated working rules of the union which created closed-shop conditions. The Board noted that it was over ten years since Congress had outlawed closed-shop contracts and practices, and yet the parties had so very recently enacted the proscribed type of contract. The Board then said: "This is not the result of a mere *technical oversight* to the making of an *otherwise* lawful union security contract."[55] One inference which may be drawn from the above-quoted language is that a contract which creates closed shop conditions because of the inclusion of certain of the union's working rules, does not require *Brown-Olds* if the parties are able to show that such provisions were inadvertently incorporated into the agreements. However, the Board was immunized from such a possible construction by the words "otherwise lawful," since the facts therein compelled the conclusion that working rules which are tantamount to a closed-shop arrangement could not be considered lawful. But, the clear import of the Board's phraseology, arguably, was to extend *Philadelphia Woodwork* even further. As long as a union-security agreement was lawful in all respects save compliance, the Board would not order *Brown-Olds,* on the basis (assumption) that non-compliance was an oversight. In effect, the Board was excusing the parties from liability if they failed to comply; but was the Board prepared to permit other *noncomplying* parties to avail themselves of the benefits which compliance carries with it? The act is a statute of uniform application, the provisions of which everyone is presumed to know. If a union failed to comply with the filing provisions of sections 9(f), (g) and (h), it was not entitled to be certified as the majority representative of the employees in a Board conducted election.[56] Nor was the noncomplying union afforded the right to file unfair labor practice charges.[57] Yet, why should not a union have been able to show that its failure to comply was an "oversight" which, consistent with *Philadelphia Woodwork* and *Argo Steel,* was merely technical and should therefore be discounted? Fair play dictates such a consideration; if non-

bursement orders. Accordingly, the order directed in *Union de Soldadores* was the only type possible.

54. Argo Steel Constr. Co., Appendix I.

55. 122 N.L.R.B. at 1084 (Emphasis added.)

56. Sections 9(f), (g) and (h) of the act.

57. Sections 9(g), and (h) of the act. See also Publishers Printing Co., 110 N.L.R.B. 55 (1954).

compliance is excusable in one instance, it should be excusable in another. Yet, to do so would be the same as administratively excising sections 9(f), (g) and (h) from the act. Query, did not *Philadelphia Woodwork* constitute the first step in that direction?[58] However, even though the 1959 amendment removes inadvertent noncompliance as a basis for exception to the *Brown-Olds* scheme, the concept of the "technical violation" may be regarded as part of the Board's body of precepts in determining remedial action. Thus, the conceptual basis for the rule of *Philadelphia Woodwork* may percolate down through future decisions as a basis for disallowing *Brown-Olds* in nonflagrant, technically violative situations.[59]

In *E & B Brewing Co.*,[60] the Board carved out a further exception from the *Brown-Olds* scheme. The trial examiner concluded that an exclusive hiring hall agreement, which the union agreed to operate nondiscriminatorily, was a valid defense to charges of individual discrimination in referral. The Board disagreed, relying on the absence of one of the three prerequisites to legality as expounded in *Mountain Pacific*. However, the Board chose not to order *Brown-Olds*, as contended for by the General Counsel, on the ground that he failed to allege "a substantively unlawful contract or hiring practice."

In *E & B*, the foundation upon which the Board relied for the denial of a *Brown-Olds* remedy was *Philadelphia Woodwork*, with an indirect reference to *Los Angeles*. In the former case the Board noted that despite the usual 30-day union-security language in the contract, the union had caused an employee to be discharged for nonmembership after two days of employment. The Board said that this was evidence of an illegal hiring practice but since such practice was not alleged or litigated it would not consider the violation, or the applicability of *Brown-Olds*. In *Los Angeles*, on facts nearly identical to those existing in *E & B*, the Board, in a footnote, rejected the respondent's contention that the legality of the contract was not put in issue, on the basis of the broad language in the charges[61] and

58. The second step was achieved by Congress in its enactment of section 201(d) of Title II, Labor Management Reporting and Disclosure Act of 1959, effective November 13, 1959, which repealed the requirements of sections 9(f), (g) and (h).

59. See Harbur Terminal Co., 126 N.L.R.B. No. 85, 45 L.R.R.M. 1362 (1960), where the Board did not order a *Brown-Olds* remedy where the violation was predicated solely on the employer's failure to post the exclusive hiring hall provisions. *Cf.* Local 466, IBEW (the *Moore Elec. Co.* case), 126 N.L.R.B. No. 110, 45 L.R.R.M. 1406 (1960), where the Board said: "[W]e do not, however, adopt the Trial Examiner's conclusion that an inadvertent failure to delete an unlawful provision relieves that provision of its otherwise clear illegality." *But see* Hooker Chem. Corp., 128 N.L.R.B. No. 133, 46 L.R.R.M. 1447 (1960).

60. 122 N.L.R.B. 354 (1958).

61. The charges alleged specific violations of the act and concluded with

the fact that *respondents themselves put the contract in issue by raising it as a defense to the allegations of discrimination.*[62]

The Board's reliance in *E & B* upon its prior expression in *Philadelphia Woodwork* appears well placed, and is consistent with earlier Board decisions.[63] However, *Los Angeles* may be taken to stand in a position directly opposed to *E & B* on the point for which it was presumably cited. Unquestionably there was no allegation in *E & B* attacking the contract or practices, and after reviewing the facts the Board stated: "On these facts . . . the Trial Examiner concluded that the hiring-hall contract was legal and valid, and *constitutcd a defense to the conduct of the Company and the Union.*"[64] But though the Board disagreed with the trial examiner's conclusion, namely, that the contract was legal, it did not attempt to reconcile its own conclusionary statement, that *Brown-Olds* was inapplicable because of a deficiency in pleading, with the fact that the contract's legality must have been put into issue if the trial examiner was properly in a position to conclude, albeit erroneously, that the contract was valid.[65] To put it another way, in *Los Angeles,* the Board predicated its violation of *Mountain Pacific* on the existence of a contract, which was put into issue by way of defense by the respondents. The Board then required a *Brown-Olds* reimbursement remedy. In *E & B* the Board refused to accept the trial examiner's conclusion that the contract was a valid defense, and found a violation. Yet, as stated in the remedial portion of the decision, because there was no allegation of "a substantively unlawful contract or hiring practice," the Board withheld ordering disgorgement. In the light of *Los Angeles,* the absence of *Brown-Olds* in *E & B* appears to be, on its face, in-

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the general language, "by these and *other* acts." (Emphasis added.) See Triboro Carting Corp., 117 N.L.R.B. 775 (1957).

62. Footnote 2 of the Board's decision in Los Angeles-Seattle Motor Express, *supra* note 46.

63. Local 250, United Ass'n of Journeymen & Apprentices of the Plumbing & Pipefitting Indus. (the *Bechtel Corp.* case), *supra* note 46; Hod Carriers (the *Roy Price, Inc.* case), *supra* note 46; Local 10, ILW (the *Pacific Maritime Ass'n* case), 121 N.L.R.B. 938 (1958).

64. 122 N.L.R.B. at 355. (Emphasis added.)

65. See United States Steel Corp. (the *American Bridge* case), Appendix I, where the Trial Examiner concluded that the complaint failed to allege sufficient facts to encompass a finding of an illegal exclusive hiring arrangement. The Board rejected this view on the ground that the General Counsel was proceeding on a *theory* of an implied agreement which the allegations would support. The Board said, *"Indeed, the Trial Examiner so understood the General Counsel's theory and adversely ruled on his contention."* (Emphasis added.) However, *cf.* Consolidated W. Steel Div., 122 N.L.R.B. 859 (1959), in which case the complaint alleged an illegal agreement but failed specifically to allege a failure to comply with the requirements of *Mountain Pacific.* The respondents offered the contract as a defense to the alleged illegal refusal to refer the charging party. The Board rejected the defense because the contract itself was illegal (in accord with *Los Angeles-Seattle Motor Express*), but because the Board noted that such illegality was not alleged, it issued no order with respect to the agreement.

explicable. There appears to be no basis for the Board's conclusion in *E & B,* unless the Board intended it to stand for the proposition that not only was the contract not a defense, but also that it could not be referred to for any purpose whatsoever. Yet is it not true that where the Board finds unfair labor practices, it has the power to fashion suitable remedies, guided by its own considerations so long as they tend to effectuate the policies of the act?

If reliance is placed upon the preceding argument, namely, that the contract in *E & B* was put in issue, then we have a factual situation in apposition to *Los Angeles.* Why was *Brown-Olds* applied in the latter, but not in the former? If *Los Angeles* is good law, to the extent that it stands for the proposition that *Brown-Olds* is warranted where the only inhibition to an otherwise legal contract is the absence of *Mountain Pacific* safeguards, then *E & B* is wrong. But for the recent Board pronouncement in *Nassau & Suffolk,*[66] it could well be argued that in *E & B* the Board was attempting to narrow the scope and import of *Los Angeles.*[67]

There is yet another aspect of this series of cases which casts further doubt on the vitality of the *Los Angeles* order. Recalling *Philadelphia Woodwork,* the Board there made the distinction between "substantive" and "technical" violations, and ordered *Brown-Olds* in the former but withheld it in the latter. As noted therein, the technical violation was failure to comply with one of the act's *procedural* requirements. Similarly, it may be said that in *E & B,* the failure to allege facts which constituted a substantive violation amounted to a "technical" violation. This would appear to be reasonable only if it is conceded that the existence of an exclusive hiring hall arrangement, which is violative of the act only because of a failure to comply with the requirements of *Mountain Pacific,* is not a substantive violation, *i.e.,* one requiring the application of *Brown-Olds.* Obviously, if *E & B* does not stand for such a proposition, then *Los Angeles* is implicitly overruled, or at the very least, rendered meaningless on the question of disgorgement since one of the three criteria (posting) was lacking in *Los Angeles.*

In *Philadelphia Woodwork* it was relatively easy to justify as "technical," a failure to comply with a statutory filing requirement;[68]

66. Local 138, Int'l Union of Operating Eng'rs (the *Nassau & Suffolk* case), 123 N.L.R.B. 1393 (1959), discussed *infra,* p. 528.

67. The import of *E & B* appears to be that although there may be various portions of a record established before a trial examiner which disclose substantive violations and which the Board may conclude deserve remedial action, at least insofar as *Brown-Olds* is concerned, an affirmative burden is placed on the General Counsel to allege such violation before the Board will impose its *Brown-Olds* order. Can it be that this self-imposed disdain is, in whole or in part, recognition of the intrinsic "penalty" features of *Brown-Olds?*

68. Compare discussion *supra,* p. 514.

perhaps because of the juristic predilection to characterize "procedural" matters as nonsubstantive; or perhaps because depending upon this primary characterization, the applicability of a particularly stringent remedial order was to hinge. If the Board felt that in *E & B* a legalistically sound basis for distinction was deemed necessary to justify a shift from the broad import of *Los Angeles* to something less severe, the groundwork was laid in *Philadelphia Woodwork.* Thereafter, whenever a situation like *Los Angeles* is presented, the Board need only find a procedural loop-hole and deny *Brown-Olds* on the basis of the procedural "technicality." Naturally, this is speculative and the true test would arise in a procedurally airtight case in which the violation consisted of a contractual failure to comply with *Mountain Pacific.* In such a case, the Board would have no alternative but to reaffirm *Los Angeles* or expressly overrule it.[69]

Before continuing with an examination of the *Brown-Olds* policy it is significant that all of the cases decided during the period between *Los Angeles* and *E & B,* in which reimbursement was ordered, involved union-security situations; none of the elements relating to a *Mountain Pacific* situation were present.[70] In all of these cases disgorgement was limited to the employees of the employer at whose situs the coerced payments were made. Thus, the Board seemed to be harkening back to the express holding of *Brown-Olds* where it ordered the union to cease giving effect to its illegal contract with any and all parties, but ordered disgorgement only where the evidence disclosed that the contract was actually enforced. As will be seen, however, the Board modified this policy in subsequent cases.

The cases immediately following *E & B* contain factors which tend to smother, rather than amplify, comprehension of the scene. For example in the *Mechanical Handling Systems* Case,[71] the Board found unlawful an oral agreement between the employer and the local, which implemented a master agreement between the International and the employer, which *in toto* was equivalent to a closed

69. *But cf.* News Syndicate Co., 122 N.L.R.B. 818 (1959), where the Board did neither.

70. Millwrights Local 2232 (the *Farnsworth & Chambers, Inc.* case), 122 N.L.R.B. 300 (1958); Carpenter's Dist. Council of Rochester (the *Rochester-Davis-Fetch* case), 122 N.L.R.B. 269 (1958); Lakeland Bus Lines, 122 N.L.R.B. 281 (1958); A. O. Smith Corp., 122 N.L.R.B. 321 (1958). In *Millwrights* the contractual coupling of the delegation to foremen of authority to hire and fire, with the requirement that foremen be union members, was held to amount in effect to a closed shop. In *Carpenters,* the contract required the employer to employ only union members and the union was empowered to replace nonunion employees with union members. In *Lakeland,* the union-security provision on its face, clearly violated the proviso to 8(a)(3). In *A. O. Smith,* the contract, containing a lawful union-security clause, was executed at a time before the employer had a representative working force.

71. 122 N.L.R.B. 613, *enforced,* 273 F.2d 699 (7th Cir. 1960).

shop scheme. The Board further found that the contracts were enforced, and therefore ordered the employer and local, jointly and severally, to reimburse all the employees involved.

As previously noted, in *Schenley Distillers*[72] the union-security provisions were held to be unlawful because of union noncompliance when the contract was executed. Consistent with *Philadelphia Woodwork,* the Board held that *Brown-Olds* was not warranted. Individual discrimination was also found, but because the General Counsel did not allege the existence of an illegal understanding or arrangement, the Board was unable to find a violation predicated on *Mountain Pacific* rationale. Without citing *E & B,* the Board seems to be rendering an implicit reaffirmation of the proposition set forth therein.

In *Schenley Distillers,* the General Counsel erred by failing to allege the illegality of the contract or arrangement. The Board had been indicating that enforcement of the contract or maintenance of a practice was necessary to warrant *Brown-Olds.* Naturally, in the absence of an illegal contract or practice which would otherwise require remedial action, the Board would be without power to order reimbursement. However, the failure to allege is not equal to proof of nonexistence. It is submitted that even without an allegation, sufficient probative evidence may have been introduced to amount to proof of a practice. Furthermore, there is some indication that the Board was also aware of this argument at a time prior to its decision.[73]

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72. See note 49 *supra.*

73. In Philadelphia Woodwork, *supra* note 47, the Board noted that the union had caused the discharge of a nonmember employee after two days of employment, although a lawful (30-day) union-security agreement was in effect. The Board indicated that "this is evidence of an illegal hiring practice, and if in fact such illegality were proved, would warrant *Brown-Olds.*" The Board did not consider the violation or the applicability of *Brown-Olds* because the illegal hiring practice was neither alleged nor litigated. For a more affirmative showing, see Local 469, Int'l Bhd. of Teamsters (the *Rasmussen* case), 122 N.L.R.B. 674 (1958), where the Board noted that since a nonmember employee was discriminated against, in the face of a valid union-security agreement, the only basis must be that a preferential hiring arrangement existed, pursuant to which the union was delegated the authority to hire or clear applicants. If the union-security provisions were illegal, the fact that it exercised this authority unlawfully would seem to be an unnecessary factor in finding a violation since it is well established that the mere existence of an illegal provision in a collective bargaining agreement, *apart from its actual enforcement,* is violative of sections 8(a)(1) and (3) and 8(b)(1)(A) and (2) of the act. Gottfried Bakery, 103 N.L.R.B. 227, *aff'd as modified,* 210 F.2d 772 (2d Cir. 1954); Red Star Express, 93 N.L.R.B. 127, *aff'd,* 196 F.2d 78 (2d Cir. 1952); NLRB v. Gaynor News Co., 197 F.2d 710 (2d Cir. 1952), *aff'd,* 347 U.S. 17 (1954). Perhaps the most elucidating enunciation of the applicability of *Brown-Olds* may be found in Local 138, Int'l Union of Operating Eng'rs (the *Nassau & Suffolk* case), 123 N.L.R.B. 1393 (1959), where, *inter alia,* the Board said: "In our opinion, the existence of an *unlawful contract is sufficient in and of itself* to establish the element of coercion in the payment of monies by employees pursuant to the requirements of such

Conceding the propriety of *Brown-Olds* where a contract, on its face, illegally encourages union membership, there is merit to the view that where the evidence discloses encouragement in fact, the restitutionary considerations are even more compelling. The problem then becomes solely a matter of what weight the evidence is to receive in the establishment of the practice. Once that stage is reached, however, the Board may be guided by its own expertise in evaluating the situation at hand, and determining when to apply *Brown-Olds* on an *ad hoc* basis. Certainly one of the guides might be whether the individual discrimination was pursuant to an agreement.[74] Another might be whether the discrimination was isolated or whether, in fact, other employees were encouraged to become union members by the unlawful conduct. Finding others should not prove to be too difficult.

Portland Home Builders,[75] was replete with violations. The Board found an illegal union-security agreement, an exclusive hiring contract which failed to provide for the *Mountain Pacific* safeguards, and practices pursuant to it. Although the Board found, and relied upon, the illegal practices in providing for the remedy, the trial examiner, relying upon *Brown-Olds* specifically, refused to recommend reimbursement because there was no evidence to show that the closed shop contract was enforced. In other cases previously mentioned, the Board considered whether the contract was enforced or not to determine which employees would be entitled to reimbursement. Here, *sub silentio*, the Board is ignoring the absence of enforcement and ordering disgorgement anyway. It is of significance, however, to note that the Board did find evidence of illegal practices.[76]

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a contract. Accordingly, the [Brown-Olds] remedy is applicable to all closed shop and exclusive hiring hall agreements, which do not provide the safeguards set forth in the *Mountain Pacific* decision." *Id.* at 1409.

74. See Los Angeles-Seattle Motor Express, *supra* note 46, where the Board found that the alleged individual discrimination "was the result of the Respondent's implementation of the hiring provisions of their contract." (Emphasis added.) See also Local 369, Hod Carriers (the *Frommeyer* case), 114 N.L.R.B. 872, *enforced*, 240 F.2d 539 (3d Cir. 1956).

75. Joint Council of Teamsters (the *Portland Home Builders* case), 122 N.L.R.B. 514 (1958).

76. But *query*, is the Board equating the finding of a practice with its requirement for enforcement? "Enforcement" connotes the existence of specific acts which collectively reinforce the provisions of the contract. This is the same characterization which could be applied to a practice. However, since the Board has not distinguished between "enforcement" and "practices," it is submitted that "enforcement" should be deemed as something less flagrant than a "practice." For example, under this interpretation, the mere maintenance of an illegal agreement would be the enforcement of it, while the *wide spread acts* of actual discrimination would constitute the practices. See District 50, UMW (the *Herbert Chem. Co.* case), 122 N.L.R.B. 1627 (1959), where the Board adopted the trial examiner's conclusion that a "practice" requires a showing of more than one example of discrimination. It may be argued that in the light of the Board's recent decision in *Nassau & Suffolk*, *supra* note 66, any question respecting a showing that the illegal

For example, in *Tellepsen*,[77] the next case decided by the Board, there was evidence of individual discrimination and illegal hiring practices. The contractual provisions were apparently lawful on their face; yet on the basis of these practices alone, the Board ordered all of the employees reimbursed. The Trial Examiner preferred to leave the reimbursement of dues and fees to the compliance stage as the evidence was not clear that *all* of the employees had been coerced into making payment. The Board rejected this, saying: "Contrary to the implications in the Intermediate Report, we find that the requirement of membership in good standing as a condition of employment establishes that the Respondent Union coerced employees into paying these moneys."[78] Thus, it may be said that where the Board finds practices which indicate the existence of a closed shop, the Board will find that all of the employees were coerced, and order them reimbursed. How much different is *Tellepsen* from *Brown-Olds, Los Angeles, Lakeland,* or the myriad others which base reimbursement on the coercive effects of an illegal contract? As previously submitted, the proof of a practice would seem to be stronger evidence that the employees are actually encouraged to become union members, than, for example, the existence of a contract failing to provide the *Mountain Pacific* criteria which merely raise an inference of unlawful encouragement.[79]

Similarly, in *Galveston Maritime*,[80] the Board found that although the contractual provisions which created the exclusive hiring arrangement were deleted, the respondents continued to carry on a practice as if these provisions were still in effect. Again the Board found

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contract was enforced is rendered moot. There, the Board said that "proof was actual exaction of monies from employees under an unlawful contract is [no longer required] to warrant the remedy of reimbursement." However, the Board expressly found that the "closed shop conditions of employment" were *enforced*. Apparently, *Nassau & Suffolk* does not squarely overrule the body of cases which seem to stand for the proposition that enforcement of the contract or practices pursuant thereto are elements prerequisite to the imposition of a reimbursement remedy. However, this case does clearly establish the legal principle that in seeking such remedy, proof of actual payments of monies is not required; the mere existence of the unlawful contract is a sufficient showing of coercion to justify reimbursement.

77. Local 450, Operating Eng'rs (the *Tellepsen Constr. Co.* case), 122 N.L.R.B. 564 (1958).

78. *Id.* at 569.

79. Joint Council of Teamsters, *supra* note 75. It is elementary that the question of remedy only arises after a violation is found. And to say in any particular situation that a violation does in fact exist is to recognize that the question of selecting an appropriate remedy depends upon the exercise of discretion. Where the violation is predicated upon facts which juridically are self-sustaining, the choice of remedy would appear to be free from censure if the remedy is directly related to these operative facts. Where, however, the remedy flows not directly from the operative facts, but rather from an inference (coercion) which is drawn from the facts, the more stringent the remedy, the less acceptable is the exercise of discretion.

80. 122 N.L.R.B. 692 (1958).

adequate justification for *Brown-Olds* based upon the existence of a practice which failed to satisfy *Mountain Pacific*. It is significant to note that in *Galveston Maritime*, the Board, while holding the union and the employer association liable, jointly and severally, expressly limited reimbursement to the employees of each individual employer member, so that one employer-member would not be liable to the employees of another. Most of the prior cases dealt with only one employer, and the reimbursement was limited to the employees discriminated against at the employer's locus of operations. This was true even where the employer's operations extended to many different geographic positions.[81] But in *Galveston Maritime* we have the first clear enunciation of what appears to be an equitable division of reimbursement liability, as well as an express statement that the Board has been aware of the complications which *Brown-Olds* had wrought.[82]

Finally, in *I.T.U.*[83] the Board continued to follow this equitable distinction it made in *Galveston Maritime*. The Board held, *first*, that the contract provisions were unlawful as written, without reference to the hiring practices; *second*, that *Brown-Olds* was warranted because of the unlawful contract (unlawful because it failed to include the *Mountain Pacific* safeguards); *third*, that the respondents would be jointly and severally liable for reimbursing all of the employees at the respondent employer's mail room, but that the respondent union alone would be liable for reimbursing employees at the mail room of an employer who was a party to the contract, but who was not a named respondent. On the surface, this appears to be a reaffirmation of *Los Angeles*, in that the existence of a contract, illegal because it fails to comply with *Mountain Pacific*, and apart from practices performed in pursuance of its terms, will be sufficient justification for *Brown-Olds* application. However, despite the rather clear language which emphasizes the contract and softens the effects of the practices, the Board did devote considerable attention to the operation of the apprentice system and preferential hiring practices. The existence of these practices may have influenced the Board, but in the face of such clear and unconditional language, how reasonable would it be

81. Sheetmetal Workers, Local 85, *supra* note 38, where the trial examiner recommended limiting *Brown-Olds* to all of the employees on the project where the individual discrimination occurred. The Board, (citing *Tellepsen, supra* note 77) extended the remedy to all of the employees at all of the business locations of the employer within the territorial jurisdiction of the respondent union.

82. See *supra* note 8. See the explication in *Nassau & Suffolk, supra* note 66.

83. International Typographical Union (the *News Syndicate Co.* case), 122 N.L.R.B. 818, *enforcement denied sub nom.* NLRB v. News Syndicate Co., 279 F.2d 323 (2d Cir.), *cert. granted*, 81 Sup. Ct. 166 (1960).

to attach significance to a factor which the Board considered and, presumably after due deliberation, rejected?[84]

Several recent decisions of the Board deserve special consideration because of their rather sudden departure from the previously mentioned scheme. In *Harbur Terminal Co.*,[85] the Board adopted the trial examiner's recommendation to waive application of the *Brown-Olds* remedy against the employer, the only respondent involved. The violation was predicated upon the employer's failure to post the notices relating to the operation of the hiring hall, as required by safeguard three of the *Mountain Pacific* decision. The trial examiner concluded that such failure was but a technical violation and based his recommendation upon the *Philadelphia Woodwork* precedent. The Board adopted the recommendation on the grounds that it was not clear whether, in fact, an agreement for the establishment of an exclusive hiring hall existed between the employer and the union, and in any event, the union operated a nondiscriminatory hiring hall.

In *Nordberg-Selah Fruit, Inc.*[86] the Board found illegal on its face a union-security provision of the respondents' contract which would have required employees, who had made application for membership in the union prior to the execution of the contract, to pay the back dues and fees which had accrued before the contract became effective. The Board did not, however, include a *Brown-Olds* remedy in its order. Improperly relying on *Philadelphia Woodwork*, the Board said,

> In the *Brown-Olds* precedent, there was a bald closed-shop contract that conditioned employment of *all* employees upon union membership without the benefit of the 30-day grace period. . . . It thus constituted a flagrant violation in open defiance of statutory policy. On the other hand . . . the union-security clauses involved herein affect only a *limited class* of employees and are illegal only because some employees are by the terms thereof not afforded the full 30-day grace period required by the proviso to 8(a)(3); *these clauses did not, however, in any way grant to the Union control over the hiring of employees.*[87]

If the italicized language is to be given its literal significance, the Board is indicating that *Brown-Olds* is reserved solely for illegal hiring situations where all of the employees constituting the working force are coerced through closed shop or *Mountain Pacific* violative arrangements.

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84. Particularly in the light of *Nassau & Suffolk, supra* note 66, where the Board not only explicated the scope of *Brown-Olds* applicability but also set forth the language definitively establishing certain basic ground rules which appear to reject any argument premised upon a consideration of contractual enforcement or "practices." See also Funeral Directors of Greater St. Louis, 125 N.L.R.B. 241 (1959).

85. 126 N.L.R.B. No. 85, 45 L.R.R.M. 1362 (1960).

86. Nordberg-Selah Fruit, Inc., 126 N.L.R.B. No. 89, 45 L.R.R.M. 1381 (1960).

87. 45 L.R.R.M. at 1384. (Emphasis added.)

Chun King Sales Co.[88] is another case in which the Board found a union-security clause to be illegal on its face because it failed to provide the requisite grace period for old and new employees. In addition, the Board found the contractual provision to have been enforced. The Board refused to apply *Brown-Olds* on reasoning substantially identical to that employed in *Nordberg-Selah.* However, Board members Bean and Rodgers would have adopted the trial examiner's recommendation and incorporated the *Brown-Olds* remedy in the affirmative provisions of the Board's order.

Finally, in *Jaworski Sausage Co.*,[89] the Board withheld application of the remedy, citing *Chun King,* where the union-security provisions of the contract provided a mere five days after initial employment for employees to become members of the union. As previously noted, members Bean and Rodgers dissented in *Chun King;* however, the instant case was decided by a three member panel consisting of Chairman Leedom and Board members Bean and Jenkins. Member Bean agreed with the majority and distinguished his present position from that taken in *Chun King* solely on the ground that whereas the illegal union-security provision was illegally enforced in *Chun King,* the instant "unlawful clause was enforced only in a lawful manner" (in other words, it was not enforced at all since employees were given the full 30-day grace period).[90]

DISCUSSION OF UNION-SECURITY AND MOUNTAIN PACIFIC SITUATIONS INCLUDING COURT DECISIONS

Aside from the 8(a)(2) situations, *Brown-Olds* has been applied in two other situations: (1) where the union-security provisions exceed the limits of the proviso to 8(a)(3), and (2) where the exclusive hiring arrangement does not provide for the safeguards set forth in *Mountain Pacific.* Although both violations find their origin in the statute, the former is derived from terms specifically set forth in section 8(a)(3) of the statute, while the latter is a creation of the Board, founded upon general language and policies arising in the course of decision-making. This does not render the latter any less valid, but on the other hand, it does permit greater weight to be given to countervailing arguments regarding the efficacy of remedial

88. 126 N.L.R.B. No. 98, 45 L.R.R.M. 1392 (1960).
89. Local 569, Packinghouse Workers (the *Frank Jaworski Sausage* case), 126 N.L.R.B. No. 100, 45 L.R.R.M. 1394 (1960).
90. Despite *Nassau & Suffolk, supra* note 66, it would appear that a forceful argument could still be made that "enforcement" is a vital element for justifying imposition of the remedy. See Shear's Pharmacy, Inc., 128 N.L.R.B. No. 124, 46 L.R.R.M. 1464 (1960), and particularly Member Jenkins' dissent at 1464. Compare this dissent with his dissent in Southeastern Plate Glass Co., 129 N.L.R.B. No. 50, 46 L.R.R.M. 1562 (1960).

orders based upon inferences of illegality, which inferences may be overcome only by the inclusion of three reasonable, yet arbitrary safeguards.

It requires no stretch of the imagination to see how the Board found a violation in the *Mountain Pacific* situation in the light of the objectives of the act. Clearly, the act would be circumvented if the union was the exclusive source of labor and it was permitted to discriminate against nonmembers in performing its hiring function. Conditioning employment upon such an arrangement would clearly be a return to the closed shop, which the Taft-Hartley amendments sought to eliminate. In *Mountain Pacific,* the Board indicated that it would no longer permit such statutory evasion; but in framing its order, it failed to provide for any reimbursement. There was no question as to the Board's power and discretion in fashioning remedies for unfair labor practices; *Virginia Electric* and *Brown-Olds* attested to this. Yet, with an express finding that the contract encouraged membership in the union, (and as *Broderick Wood Products*[91] indicated, this inevitably coerced employees to pay dues), the Board withheld the disgorgement remedy.

The absence of *Brown-Olds* in *Mountain Pacific* may have been intentional or merely an oversight. But in either event, the Board is certainly empowered to effect a change in its remedial policy.[92] The Board may have felt that having evaluated the problems and advantages inherent in applying *Brown-Olds* in exclusive hiring hall situations, that *Los Angeles* was an appropriate vehicle for expressing its policy. As the Board noted in *Galveston Maritime,* it has been in the process of reappraising *Brown-Olds,* which process may have commenced immediately after *Brown-Olds* issued and which was not ready for reaffirmation until *Los Angeles.*

However, even assuming that *Los Angeles* did have as its purpose the establishment of *Brown-Olds* where only a contract exists as evidence of unlawful encouragement, there is language in many of the later cases which indicates a limitation of the remedy. The remedy appears to be reserved for those situations in which the contract or arrangement was enforced illegally with respect to the

91. NLRB v. Broderick Wood Prods., 118 N.L.R.B. 38, *enforced,* 261 F.2d 548 (10th Cir. 1958).

92. There is nothing, either in law or reason (if the two be mutually exclusive), which binds a decision-making body to remain fettered by *stare decisis* to the extent that it may never depart from precedent. As time and conditions require modifications of present policy, such changes should occur without demanding justification by legalistic circumlocutions. Indeed, one may well ask why the Board waited ten years to depart from its *ad hoc* basis of handling hiring hall problems. Yet, few would condemn the Board for its delay (or abrupt departure, depending on the viewpoint taken) merely because it has not given a satisfactory explanation, so long as the results achieved are "just" and warranted.

acquisition of employment, *i.e.*, where the evidence indicates that the employees who will benefit from the order were in fact encouraged to become members and were thereby coerced to pay dues as a condition of obtaining employment. It is to be noted that in those cases in which enforcement of the contract or arrangement was stressed, the facts disclosed illegality in the union-security provisions of the contract, and no *Mountain Pacific* infirmities. Further, in accordance with established Board reasoning, its broad cease and desist orders were based on the mere existence of the illegal contract and not on proof of actual discrimination or "enforcement"; however, in fashioning its remedial orders, reimbursement was limited only to those employees who were shown to have been coerced to pay dues as a result of the enforcement of the contract. Thus it appears that regardless of how effective an illegal contract may be in encouraging membership, absent its enforcement, the evil is not great enough to warrant a *Brown-Olds* remedy coextensive with the cease and desist order.

And, as borne out by the later cases, a majority of the Board would further restrict the remedy so that where the illegality arises from an 8(a)(3) violative "union shop" provision, even if enforcement is present, the remedy will not obtain. While the distinction between union-security and hiring hall cases has a degree of surface appeal, insofar as the encouragement to become a union member arises at the threshold of employment in the latter, it would seem that if any justification exists for the imposition of a reimbursement remedy, such justification should not be predicated on the basis of when the employees were coerced to pay dues and fees but whether they were required to pay at all. Whether an employee must pay dues and fees to be referred to a job, or whether after the first week of employment he must pay dues and fees to keep his job is immaterial; both exactions condition employment upon the payments and both situations are therefore illegal. If any distinction is to possess merit, it should be made along the lines of the quantum of evidence necessary to support the finding of coercion in the first place. And where the coercion is traceable to an illegal contract, the most convenient guide might well be the extent to which the illegal contractual provisions were enforced.

It is to be noted, however, that in *Nassau & Suffolk*[93] the Board said:

> [T]he existence of an unlawful contract is sufficient in and of itself to establish the element of coercion in the payment of monies by em-

93. Local 138, Int'l Union of Operating Eng'rs (the *Nassau & Suffolk* case), 123 N.L.R.B. 1393 (1959).

> ployees *pursuant* to the requirements of such a contract. Accordingly, the [Brown-Olds] remedy is applicable to all closed shop and exclusive hiring hall agreements, which do not provide the safeguards set forth in the *Mountain Pacific* decision.[94]

It can be seen that unquestionably the Board has taken what appears to be a firm position—at least as regards the payment of dues and fees to obtain employment—which requires only the showing of an illegal contract. However, in view of the existence of the elements of enforcement or practices in virtually all prior cases, plus the fact that the Board expressly found that the contract was "enforced" in the very same case in which the above language appeared, a persuasive argument could be advanced that in the absence of proof of contract enforcement *Brown-Olds* would be inappropriate.[95]

This matter of "enforcement" is equally troublesome in determining the scope or coverage which the Board has given to the remedy. It would seem that even where the unlawful encouragement to union membership is predicated solely upon the existence of an unlawful contract, the Board would order disgorgement to *all employees* covered by the agreement. However, until *Nassau & Suffolk,* the Board was limiting *Brown-Olds* only to the situs of employment where the evidence disclosed that the contract was *enforced.*[96] Thus only those employees who might be deemed directly to have been encouraged by an unlawful contract which was enforced benefited from a *Brown-Olds* order.

The Board's decision in *Nassau & Suffolk* has not definitely put to rest those situations in which enforcement of the contract has not been demonstrated. It is fairly clear that at the present time the Board will not consider an illegal union-security clause, which is severable from lawful provisions or which is not enforced, as being the type of infirmity which warrants imposition of a *Brown-Olds* remedy.[97] But the Board has yet to face another situation similar to that encountered in *Los Angeles-Seattle Motor Express,* where the illegality flows from a failure to conform a contract with the requirements of *Mountain Pacific.* In *Nassau & Suffolk* it may well be that the Board was not considering the specific question of what weight, if any, to accord to the evidence of enforcement in selecting an appropriate remedial measure. Consequently, if the Board was presented with a case in which the violation derives only from an

94. *Id.* at 1409.
95. See particularly the Board's decision in *Frank Jaworski Sausage, supra* note 89, and the inescapable inference to be drawn from Harbur Terminal Co., 126 N.L.R.B. No. 85, 45 L.R.R.M. 1362 (1960).
96. See, *e.g., Tellepsen Constr. Co.,* 122 N.L.R.B. 564 (1958).
97. Nordberg-Selah Fruit, Inc., *supra* note 86, and *Frank Jaworski Sausage, supra* note 89.

unenforced contract containing preferential or exclusive hire infirmities, the Board may well decide to create a third exception to the *Brown-Olds* scheme. (The other two, it will be recalled, are premised on the "technical" violation and the failure of "substantive allegation" as expressed in *Philadelphia Woodwork* and *E & B Brewing,* respectively.)

If the underlying consideration behind *Brown-Olds* is deterring respondents from conduct violative of the act, then wholesale application may best achieve the Board's desired ends.[98] No doubt the Board is aware of the impact and financial burden which *Brown-Olds* places on respondents. This may well have been the underlying consideration in *Philadelphia Woodwork* and *E & B.* It may also account for the narrowing of *Los Angeles,* as the cases requiring "enforcement" illustrate. And, if a contract illegal on its face is not enforced (or as member Bean would say, "enforced only in a lawful manner"), what material harm is done? Of course, if employees are prejudiced by illegal provisions, a remedy is appropriate. But such prejudice should be proved not inferred.

Despite the fact that *Nassau & Suffolk* did not resolve "enforcement" problems, it did clarify the area within which liability would attach. While the Board has necessarily been limiting the respondent's liability for reimbursement to a period beginning six months prior to the filing and service of the original charge,[99] it has extended the coverage of the remedy so as to make a respondent's liability coextensive with its degree of participation in the administration of the illegal contract. The Board has indicated that where the union alone is named respondent, it will be liable for reimbursing *all* employees of *all* employers for monies which the employees paid pursuant to the unlawful agreement. When an employer alone is named respondent, his liability will be limited to reimbursing *all* of *his* employees for monies which they were coerced to pay to the union. Where both an employer and union are named respondents, their liability will be joint and several; but, while the union's liability will extend to *all* employees of *all* employers who are covered by the contract, the respondent employer's liability will be limited to reimbursing only *his* own employees. The rationale underlying this apparently disparate treatment is that "an employer participates in a contract only to the extent [his] own employees are involved,"

98. See United Ass'n of Journeymen & Apprentices of the Plumbing & Pipefitting Indus. (the *Lummus* case), 125 N.L.R.B. 1161 (1959), where the Board said: "[W]e believe that a mere cease and desist order will have little impact on an industry where illegal hiring practices are widespread. The reimbursement remedy more properly effectuates the purposes of the Act because it provides not only a deterrent to future violations but an incentive to future compliance." *Id.* at 1164.

99. Stanley Warner Corp., 126 N.L.R.B. No. 46, 45 L.R.R.M. 1318 (1960).

whereas "a union which maintains contractual relations with one or more employers participates to the full extent of the contract's coverage."[100]

There is always a lag between administrative policy making and its manifestation in administrative decision. Similarly, until an aggrieved party or the administrative agency decides to take the matter to the courts, substantial periods of time may elapse during which periods the newly established policy often becomes firmly embedded in administrative precedent. This is precisely the situation in which the Board's handling of *Brown-Olds* has become enmeshed. Yet, however firm the Board's views may be, the Board may be forced to give way to the van of forceful judicial opinion. Of course, until the Supreme Court speaks on the issue, the Board may disregard the opinion of any particular circuit and continue to adhere to its conceptual role as a creator of labor law. But, the cases have reached that critical stage where the courts of appeals are taking their swings and the decisions are being issued at a fast and furious rate.

As of July 12, 1960 (see Appendix II), the Courts of Appeals for the Second, Third, Fifth, Seventh, Ninth and District of Columbia Circuits have expressed opinion as to the appropriateness of *Brown-Olds*. The First and Seventh Circuits are the only judicial bodies which have expressly approved of the Board's choice of remedy; all of the remaining circuit courts have denied enforcement of the *Brown-Olds* remedial order.

The first decision to issue was a *per curiam* opinion of the Court of Appeals for the District of Columbia.[101] The court set aside the entire order of the Board on the ground that the record lacked substantial evidence to show that there existed an "exclusive" hiring arrangement or that "the Union coerced Fluor's employees to join [the union]."

In a subsequent *per curiam* opinion the court enforced the Board's order modifying it only to the extent that the *Brown-Olds* order "goes too far in directing reimbursement of the dues and fees paid to the union by all casual employees."[102] The court noted the divergent opinions which, in the interim, had been expressed by the Third and Seventh Circuits and was "constrained to the view that the Third Circuit opinion more aptly applie[d]. . . ." The decision is noteworthy from an aspect other than *Brown-Olds;* this was the first

100. *Nassau & Suffolk, supra* note 93 at 1409. See also *News Syndicate, supra* note 83, and Local 363, Int'l Bhd. of Boilermakers (the *Fluor* case), 123 N.L.R.B. 1877 (1959).

101. International Union of Operating Eng'rs v. NLRB, 273 F.2d 833 (D.C. Cir. 1959).

102. Local 357, Int'l Bhd. of Teamsters (the *Los Angeles-Seattle Motor Express* case), 275 F.2d 646 (D.C. Cir. 1960).

opinion which "appears to hold that an exclusive hiring-hall agreement is necessarily unlawful."[103] It is to be recalled that the Board's *Mountain Pacific* decision, which set forth the three requirements for the operation of an exclusive hiring hall arrangement, met a literally stronger "mountain" in the ninth circuit.[104]

The majority of the courts denying *Brown-Olds* enforcement in one degree or another considered the order more penal than remedial. Although recognizing their own limitations with respect to setting aside or modifying Board orders when there is no showing "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 . . .",[105] the courts almost unanimously indicated an unwillingness to enforce *Brown-Olds* in the absence of evidence that employees were, in fact, coerced to pay dues and fees. As the Court of Appeals for the Fifth Circuit said:

> To say, as we have said, that there was discrimination tending "to encourage union membership" is not to say that the union members on the job became members or retained their membership in the Union in order to secure or retain employment. . . . In the absence of some proof that dues would have been paid but for the requirement, the Board's order becomes punitive rather than compensatory.[106]

This expression clearly sets upon the Board's General Counsel the burden of coming forward with evidence of the specific individuals who were compelled to pay dues and fees in order to obtain and/or retain employment. Thus, the courts are registering disapproval of the Board's broad blanketing *Brown-Olds* order rather than disapproval of the basic restitutionary principle implicit therein.

Further evidence that the courts are not loath to enforce *Brown-Olds* orders are the several recent decisions where the courts enforced "reimbursement" orders to the specific individual discriminatees in whose behalf proof of coercion had been introduced at the trial stage and where such proof became part of the record which came before the courts.[107] Even in the two circuits (first and seventh[108])

103. *Id.* at 651 (Edgerton, C. J., dissenting). He would not have found the contract or individual discrimination violative of *Mountain Pacific*. The clear inference from his opinion is the rejection of the *per se* illegality upon which *Mountain Pacific* is premised.

104. Mountain Pacific Chapter of Associated General Contractors, 119 N.L.R.B. 883, *enforcement denied*, 270 F.2d 425 (9th Cir. 1959).

105. NLRB v. Seven-Up Bottling Co., 344 U.S. 344, 346 (1953).

106. NLRB v. Local 85, Sheet Metal Workers (the *Mahon Constr. Co.* case), 274 F.2d 344 (5th Cir. 1960).

107. Teamsters, Local 357 (the *Los Angeles-Seattle Motor Express* case), *supra* note 102. In Morrison-Knudsen Co. v. NLRB, 276 F.2d 63 (9th Cir. 1960), the court, while denying enforcement of the broad disgorgement order to all of the employees, enforced the trial examiner's recommended order to limit reimbursement solely to the five student football players who were denied summer employment because they were not members of the union.

which have upheld application of the *Brown-Olds* remedy, "there was some evidence . . . that the contract had prevented the employment of nonmembers."[109]

The Seventh Circuit's decision enforcing the broad *Brown-Olds* order proceeded upon the ground that the contracts illegally conditioned employment upon union membership and that the burden of coming forward rested on the respondents to show that the union member-employees would have continued to maintain their membership in the union even without the unlawful provisions. The respondents contended that when the contract was executed all of the affected employees were already members of the union and could not, as a consequence of the illegal contract, have been coerced to pay dues and fees as a condition of employment. The court rejected this contention on the theory that although the agreements did not require the employees to join the union, "they were, however, deprived of their right to resign." Then, so as not to be construed as dealing in abstrusities, the court reverted to time-proved doctrine by stating: "The complex problem presented is broader than the interests of the named litigants. The rights of an indeterminate number of employees and of the public are involved."[110]

The Second Circuit was not impressed with the Seventh Circuit's theory;[111] nor were the other circuits which subsequently rendered decision.[112] The courts were more concerned with the fact that in many cases the evidence disclosed that the employees had been members of the union for many years prior to the execution of the illegal contracts and that to require the respondent employer and union to reimburse all dues and fees for the six month period would be "but a windfall to the employees and an unjust penalty to the employer."[113]

One further penal aspect of the *Brown-Olds* remedy which was recognized early in its genesis was the apparently inequitable burden it placed upon employers who never retained any of the "tainted" monies but, at most, served only as conduits between the employees'

108. NLRB v. International Bhd. of Carpenters, (the *Clemenzi Constr. Co.* case), 278 F.2d 823 (1st Cir. 1960); NLRB v. Local 60, United Bhd. of Carpenters (the *Mechanical Handling Systems* case), 273 F.2d 699 (7th Cir. 1960).

109. Building Materials Teamsters, Local 282 (the *Crawford Clothes* case), 275 F.2d 909, 912 (2d Cir. 1960).

110. 273 F.2d at 703.

111. 275 F.2d at 912.

112. See Appendix II. In *Clemenzi Constr. Co., supra* note 108, the first circuit relied upon the seventh circuit's decision, but only in support of the proposition that a reimbursement order is not, under *all* circumstances, improper.

113. NLRB v. American Dredging Co., 276 F.2d 286 (3d Cir. 1960), quoted approvingly in *Morrison-Knudsen, supra* note 107.

purses and the unions' coffers.[114] In its first decision dealing with the matter, the Court of Appeals for the Second Circuit stated:

> This remedy would require the employers to pay back not only the permit fees paid by nonunion workers and members of other locals, but to reimburse long standing members . . . for dues paid by them. . . . Reimbursement of these employees represents a windfall to them at the expense of their employers.
>
> . . .
>
> Furthermore, even as applied to the members of other locals and those men not members of any union, we think the remedy is unfair. The order requires the employers, who at most received *indirect financial benefit from the unlawful practices,* to pay back all of the dues, permit fees, and initiation fees collected by the union local. At the same time the *primary beneficiary of the unlawful conduct and undeniably the most culpable of the parties,* Local 545, *has been permitted to retain in its treasury the funds unlawfully exacted by it.*[115]

The italicized language would lead even the most circumspect critic to the conclusion that if the union had been a party-respondent in the case the court might very well have enforced the disgorgement order against it. But speculation is unnecessary for on the very same day, the court issued its decision in *Crawford Clothes*[116] where a union was named as party respondent and the court denied enforcement. The case involved, *inter alia,* a contractual provision which failed to accord the 30-day grace period required by the proviso to section 8(a)(3) of the act. The court said:

> We recognize also that requiring reimbursement by the union is less oppressive than demanding it of the employer, since the union has at least received the dues—although it has also rendered the services for which the dues were paid. However, *there is not a syllable of evidence that in this case the omission of the 30-day clause in fact had any coercive effect.*[117]

Thus the Second Circuit, in line with the decided majority of courts of appeals, has adopted the "evidence of coercion" test before any respondent, employer or union, will be held liable for "reimbursing the fruits of their unfair labor practices."

Perhaps the best summation of why the courts are inclined not to enforce *Brown-Olds* orders appears in a recent Fifth Circuit opinion. Although the alleged violation there involved section 8(b)(4) of the act, the language is apposite to the instant discussion:

> There is nothing in the record to justify any such broad coverage. . . .
>
> . . .

114. See note 53 *supra.*
115. Morrison-Knudsen Co. v. NLRB, 275 F.2d 914 (2d Cir. 1960).
116. Note 109 *supra.*
117. 275 F.2d at 912. (Emphasis added.)

> We are aware of the considerations supporting a broad grant of discretion to the Board in determining the proper remedy for a violation of the Act. We consider more important, and basic to a fair administration of the Act, the hard-won principle of Anglo-American law that a judgment or order must find adequate support in the record. An order of a court or federal agency that goes beyond the record to penalize the offender smacks too much of attainder to be acceptable to this court. We are committed to a narrower view of the proper scope of orders that may furnish the basis for contempt proceedings.[118]

With this failure of agreement among many judicial authorities as to what shape the law should assume, it is fair to say that no clearly predictable resolution of the *Mountain Pacific* and *Brown-Olds* problems is apparent. Each particular authority has marshalled its own following and, in such matters, it is for the final arbiter to say which viewpoint rests on the sounder base.[119]

Conclusion

The Board is finding unlawful assistance when the employer executes, maintains or enforces a contract which contains unlawful union security provisions or which is unlawful because executed at an inappropriate time. The Board is also finding unlawful assistance when pursuant to a contract or practice the employees are coerced to pay dues and various fees, under either an exclusive hiring arrangement which fails to conform to *Mountain Pacific,* or which, though not exclusive, in one way or another, requires the employees to pay these monies as the price to obtain employment. In such circumstances, the Board will order the respondents, jointly and severally, to refund all dues, fees, and other monies unlawfully exacted to all affected employees, whether or not an 8(a)(2) violation is alleged. In addition, whether the dues were collected pursuant to a check-off provision or paid to the union directly by the employees will not affect the order.

As regards union security and *Mountain Pacific* situations, a few basic situations remain clear amid the glaze of interpretive language. Where the union security provisions of a bargaining agreement were violative merely because of a failure to comply with the filing requirements of sections 9(f), (g) and (h) of the act, *Brown-Olds* was not ordered. The Board contemplated a violation more flagrant than that to warrant *Brown-Olds.* Perhaps this general view will find expression in other contexts. Similarly, the Board insists upon an

118. NLRB v. Local 926, Operating Eng'rs (the *Armco Drainage* case), 267 F.2d 418, 421 (5th Cir. 1959).

119. On June 27, 1960, the Supreme Court agreed to review two cases involving the *Brown-Olds* remedy: NLRB v. Local 60, United Bhd. of Carpenters and Local 357, Int'l Bhd. of Teamsters, both cited in Appendix II.

allegation of a contract or hiring practice which is substantively unlawful. Whether this means a contract or practice which violates one of the sections which defines unfair labor practices, or a practice which is a more "flagrant" violation than that which is created by only a contractual failure to conform to the criteria of *Mountain Pacific,* is not entirely clear.

Apart from the above conditional applications, *Brown-Olds* will be ordered where there exists an agreement which encourages membership in a union at the point where an employee seeks initial employment, and such agreement is enforced by virtue of practices pursuant to it. Even apart from a formal written contract, the enforcement of an oral agreement or the existence of practices pursuant to some mutual arrangement between the employer and union, will be sufficient justification for disgorgement. Further, under the Board's *Nassau & Suffolk* decision, it would seem that even in the absence of evidence of contract enforcement, *Brown-Olds* will be applied where a contract provides for closed shop or preferential hiring conditions.

It would seem that where the unlawful encouragement to union membership is predicated solely upon the existence of an unlawful contract, the Board would order all employees covered by the contract reimbursed. However, until the *Nassau & Suffolk* decision, the Board was limiting *Brown-Olds* only to the situs of employment where the evidence disclosed that the contract was enforced. Thus, only those employees who were actually shown to have been encouraged to become union members, and thereby coerced to pay dues as a condition of employment, benefited from the reimbursement order. Whether the absence of enforcement will affect the application of *Brown-Olds* in future cases remains to be seen. The Board consistently has been extending the remedy to cover all employees at all locations of a particular employer, however, where the facts indicate that the employer and union maintained unlawful hiring conditions throughout the union's jurisdiction. At the same time, the Board has been limiting the individual liability of the employer who is a member of an employer association. While the employers and union are held jointly and severally liable, each employer's liability is limited to the reimbursement of monies paid by its employees to the union.

The courts of appeals, however, are indicating that wholesale application of the *Brown-Olds* remedy will not be countenanced. The First and Seventh Circuits have enforced the disgorgement order but only upon facts which disclosed that some of the employees were coerced. Even the Courts of Appeals for the District of Columbia

and Ninth Circuits upheld a limited "reimbursement" remedy for those employees shown to have been coerced. Conceivably, the General Counsel might investigate the cases more fully to determine the exact dates when union membership was acquired and conduct polls among employees to see if they would give up union affiliation and the payment of dues if such "free choice" were permitted without impairing their opportunities for continued employment.[120] However, the Board has candidly stated that:

> The Board has considered numerous cases involving contracts containing exclusive hiring clauses and has held that the existence of such a contract . . . inevitably coerces employees to become or remain members and to make payments to the union. We do not believe that testimony by union members as to their motives for joining or remaining members of the union is, in a context such as this, sufficiently persuasive to warrant a different result here.[121]

In view of this expressed position, it is difficult indeed to imagine in what other context employee motive, or any other evidence, would be "sufficiently persuasive to warrant a different result."

APPENDIX I

Cases Lacking 8(a)(2) Aspects Which Incorporate *Brown-Olds* Orders

T. C. Wagster, 122 N.L.R.B. 944 (1959).
Local 1566, Int'l Longshoremen's Ass'n, 122 N.L.R.B. 967 (1959).
Local 176, United Bhd. of Carpenters (the *Dimeo Constr. Co.* case), 122 N.L.R.B. 980 (1959).
Argo Steel Constr. Co., 122 N.L.R.B. 1077 (1959).
Morrison-Knudsen Co., 122 N.L.R.B. 1147 (1959).
International Union of Operating Eng'rs, Local 150 (the *Fluor Co.* case), 122 N.L.R.B. 1374 (1959).
United States Steel Corp. (the *American Bridge* case), 122 N.L.R.B. 1324 (1959).
American Dredging Co., 123 N.L.R.B. 139 (1959).
Honolulu Star-Bulletin, Ltd., 123 N.L.R.B. 395 (1959).
Local 469, Int'l Bhd. of Teamsters (the *Rasmussen* case), 122 N.L.R.B. 674 (1958).
News Syndicate Co., 122 N.L.R.B. 818 (1959).
Saltsman Constr. Co., 123 N.L.R.B. 1176 (1959).
Local 138, Int'l Union of Operating Eng'rs (the *Nassau & Suffolk* case), 123 N.L.R.B. 1393 (1959).

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120. *But cf.* Lakeland Bus Lines v. NLRB, 278 F.2d 888 (3d Cir. 1960), where the court said: "It is claimed at argument that the union has never collected any dues. Argument, of course, is not proof. But it does seem to us that an inquiry into this situation might well have been made before the very powerful *Brown-Olds* remedy was administered." *Id.* at 892.

121. United Ass'n of Journeymen & Apprentices of the Plumbing & Pipefitting Indus. (the *Lummus Corp.* case), 125 N.L.R.B. 1161 (1959).

International Union of Operating Eng'rs (the *Armco Drainage* case), 123 N.L.R.B. 1833 (1959).
Local 363, Int'l Bhd. of Boilermakers (the *Fluor Corp.* case), 123 N.L.R.B. 1877 (1959).
Gay Eng'r Corp., 124 N.L.R.B. 451 (1959).
United Bhd. of Carpenters (the *H. K. Ferguson Co.* case), 124 N.L.R.B. 544 (1959).
Bricklayers Union (the *G. L. Rugo & Sons* case), 124 N.L.R.B. 691 (1959).
Helben Chemical Co., 124 N.L.R.B. 872 (1959).
International Hod Carriers Union (the *Consolidated Constr. Co.* case), 124 N.L.R.B. 1131 (1959).
Local 215, United Bhd. of Carpenters (the *Association Bldg. Contractors* case), 125 N.L.R.B. 94 (1959).
Funeral Directors of Greater St. Louis, Inc., 125 N.L.R.B. 241 (1959).
International Hod Carriers Union (the *Knowlton Constr.* case), 125 N.L.R.B. 704 (1959).
United Ass'n of Journeymen & Apprentices of the Plumbing & Pipefitting Indus. (the *Lummus Corp.* case), 125 N.L.R.B. 1161 (1959).
Bordas & Co., 125 N.L.R.B. 1365 (1959).
Local 1445, Int'l Hod Carriers (the *Fenix & Scisson, Inc.* case), 126 N.L.R.B. No. 34, 45 L.R.R.M. 1301 (1960).
Local 244, The Motion Picture Operators Union (the *Stanley Warner Corp.* case), 125 N.L.R.B. No. 46, 45 L.R.R.M. 1318 (1960).
Ingalls Steel Constr. Co., 126 N.L.R.B. No. 60, 45 L.R.R.M. 1353 (1960).
Local 401, Int'l Bhd. of Boilermakers, 126 N.L.R.B. No. 91, 45 L.R.R.M. 1388 (1960).
Anderson Express, Ltd., 126 N.L.R.B. No. 97, 45 L.R.R.M. 1388 (1960).
Local 466, Int'l Bhd. of Electrical Workers (the *Moore Electric Co.* case), 126 N.L.R.B. No. 110, 45 L.R.R.M. 1406 (1960).

But see the following cases in which the *Brown-Olds* remedy was considered inappropriate:

Harbur Terminal Co., 126 N.L.R.B. No. 85, 45 L.R.R.M. 1362 (1960).
Nordberg-Selah Fruit, Inc., 126 N.L.R.B. No. 89, 45 L.R.R.M. 1381 (1960).
Chun King Sales Co., 126 N.L.R.B. No. 98, 45 L.R.R.M. 1392 (1960).
Local 569, United Packinghouse Workers (the *Frank Jaworski Sausage* case), 126 N.L.R.B. No. 100, 45 L.R.R.M. 1394 (1960).

APPENDIX II

Court Decisions Involving *Brown-Olds* Orders (Arranged Chronologically)

International Union of Operating Eng'rs (the *Fluor Co.* case), 273 F.2d 833 (D.C. Cir. 1959).
N.L.R.B. v. American Dredging Co., 276 F.2d 286 (3d Cir. 1960).
* N.L.R.B. v. Local 60, United Bhd. of Carpenters (the *Mechanical*

* This case and N.L.R.B. v. International Bhd. of Carpenters, *infra*, are the only cases to date (June 30, 1960) in which the Board's *Brown-Olds* orders have been enforced. However, as noted in the accompanying text, in Local 60, there was some evidence of enforcement of the illegal contract; this was also true with respect to Local 111. Therefore, the Board has thus far been able to muster support for its remedy in only two circuits, the 1st and 7th.

Handling Systems case), 273 F.2d 699 (7th Cir.), *cert. granted,* 363 U.S. 837 (1960).

N.L.R.B. v. Local 85, Sheet Metal Workers (the *Mahon Constr. Co.* case), 274 F.2d 344 (5th Cir. 1960).

Local 357, Int'l Bhd. of Teamsters (the *Los Angeles-Seattle Motor Express* case), 275 F.2d 646 (D.C. Cir. 1960), *cert. granted,* 363 U.S. 837.

Morrison-Knudsen Co. v. N.L.R.B., 276 F.2d 63 (9th Cir. 1960).

Morrison-Knudsen Co. v. N.L.R.B. 275 F.2d 914 (2d Cir. 1960).

Building Materials Teamsters (the *Crawford Clothes, Inc.* case), 275 F.2d 909 (2d Cir. 1960).

N.L.R.B. v. Local 176, Int'l Bhd. of Carpenters (the *Dimeo Constr. Co.* case), 276 F.2d 583 (1st Cir. 1960).

** N.L.R.B. v. Local 294 Int'l Bhd. of Teamsters (the *Grand Union Co.* case), 279 F.2d 83 (2d Cir. 1960).

N.L.R.B. v. Millwrights' Local 2232 (the *Farnsworth & Chambers* case), 277 F.2d 217 (5th Cir. 1960).

N.L.R.B. v. United States Steel Corp. (the *American Bridge* case), 278 F.2d 896 (3d Cir. 1960).

Lakeland Bus. Lines v. N.L.R.B., 278 F.2d 888 (3d Cir. 1960).

N.L.R.B. v. Local 1566, Int'l Longshoreman's Ass'n (the *Maritime Ship Cleaning Co.* case), 278 F.2d 883 (3d Cir. 1960).

*** N.L.R.B. v. Revere Metal Art Co., 280 F.2d 96 (2d Cir. 1960), *petition for rehearing denied per curiam.*

N.L.R.B. v. Halben Chemical Co., 279 F.2d 189 (2d Cir. 1960).

* N.L.R.B. v. International Bhd. of Carpenters, Local 111 (the *Clemenzi Constr. Co.* case), 278 F.2d 823 (1st Cir. 1960).

*** Paul M. O'Neill Int'l Detective Agency, Inc. v. N.L.R.B., 280 F.2d 936 (3d Cir. 1960).

Puerto Rico S.S. Ass'n v. N.L.R.B., 281 F.2d 615 (D.C. Cir. 1960).

N.L.R.B. v. International Union of Operating Eng'rs (the *Armco Drainage* case), 279 F.2d 951 (8th Cir. 1960).

N.L.R.B. v. Local 450, Int'l Union of Operating Eng'rs (the *Tellepsen Constr. Co.* case), 281 F.2d 313 (5th Cir. 1960).

** On petition for rehearing, the court, on June 17, 1960 (46 LRRM 2492) reversed its previous holding respecting the inappropriateness of the Board's reimbursement order and granted enforcement in full. The thrust of the decision, however, was not the presence of closed shop or illegal hiring provisions but rather that the union represented only a minority of the employees while it was receiving the check-off dues. This, the court felt, was clear coercion. While this smacks of a typical 8(a)(2) rationale, and the court upheld the Board's 8(a)(2) finding, the court did say that for company domination, while it "may be an additional factor to support a reimbursement order[:] . . . [it] is not, however, a necessary element."

*** Both the *Revere Metal Art* and *O'Neill* cases are typical reimbursement order cases applicable to 8(a)(2) violations which found support in the record; both unions were company assisted and dues were collected under their contracts.