4

2024

The National Labor Relations Board's Student Ambassador Workbook

THE NATIONAL LABOR RELATIONS BOARD'S
STUDENT AMBASSADOR PROGRAM | 2024

2024 NYCSAP Syllabus

Each student is permitted one absence and one lateness, but is encouraged to arrive timely for all classes as broader participation in discussions enriched everyone's experience

DATE & TIME	ACTIVITY	LOCATION & MATERIALS
Monday July 15 5-6:30 pm	• Introductions • The Student Ambassador Program • The Project • History of the National Labor Relations Act	Place: Zoom link https://www.zoomgov.com/j/1610817964?pwd=tjlGSfQaoU3rV5B7DYIAkefcAo2amc.1 Materials/Resources: The Student Ambassador Workbook Homework: Review NLRB.gov website Questions: What is the role of the Board? What is the role of the General Counsel? What is the role of the Regional Offices?
Tuesday July 16 5-6:30 pm	Introduction to Sections 7 and 8(a)(1) of the National Labor Relations Act	Place: Zoom link https://www.zoomgov.com/j/1610817964?pwd=tjlGSfQaoU3rV5B7DYIAkefcAo2amc.1 Homework: Review linked material: Parkview Lounge case
Wednesday July 17 5-6:30 pm	Introduction to Section 8(a)(3) and Section 9	Place: Zoom link https://www.zoomgov.com/j/1610817964?pwd=tjlGSfQaoU3rV5B7DYIAkefcAo2amc.1 Homework: Review the Yummy Tavern Case file.
Monday July 22 5-6:30 pm	The Yummy Tavern Case • The charge • The assignment • The evidence, what is evidence? • The *prima facie* case	Place: Zoom link https://www.zoomgov.com/j/1610817964?pwd=tjlGSfQaoU3rV5B7DYIAkefcAo2amc.1

		Materials/Resources: The Yummy Tavern Case in The Student Ambassador Workbook Homework: Review The Yummy Tavern Case
Tuesday July 23 5-6:30 pm	The Yummy Tavern Case • The prima facie case • Employer's defenses • Analysis and recommendation	Place: Zoom link https://www.zoomgov.com/j/1610817964?pwd=tjlGSfQaoU3rV5B7DYIAkefcAo2amc.1 Homework: identify evidence regarding each element, for and against, weigh the evidence against the employer's defense.
Wednesday July 24 5-6:30 pm	Preparing the argument, preparing for the mock agenda.	Place: Zoom link https://www.zoomgov.com/j/1610817964?pwd=tjlGSfQaoU3rV5B7DYIAkefcAo2amc.1 Materials/Resources: The Yummy Tavern Case in The Student Ambassador Workbook Homework: sketch out best arguments in favor of or against a violation
Thursday July 25 5-6:30 pm	MOCK AGENDA with Board Member Gwynne Wilcox Gwynne A. Wilcox | National Labor Relations Board (nlrb.gov)	Place: in person at 26 Federal Plaza, Courtroom A-238 New York, NY 10278
Thursday August 1 5-6:30 pm	Introduction to mentors and projects	Place: Zoom link – will be provided by each mentor
Thursday August 8 By noon	First draft of Project due	Email it to your mentor and to nycsap@nlrb.gov
Thursday August 15 By noon	Project due	Email it to your mentor and to nycsap@nlrb.gov
TBD	Closing celebration and distribution of Certificate of Accomplishment	TBD In person

2024

The Yummy Tavern Case:

Did the employer violate the National Labor Relation Act?

THE NATIONAL LABOR RELATIONS BOARD'S
STUDENT AMBASSADOR PROGRAM | 2024

The assignment

The Assignment

- Work together and with instructors to answer the questions and problems listed on the page titled “Analysis of the Evidence Presented in the Yummy Tavern Case”. Student Ambassadors may work with each other outside of the class time, if they choose.
- Be broken into groups to present elements of the case, make a recommendation, and answer questions at a mock agenda with the Regional Director.

Learning Objectives

- Learn to identify evidence.
- Learn to apply a legal analysis to evidence.
- Practice making a legal argument.
- Increase comprehension of the National Labor Relations Act and how it is applied in the workplace.

ANALYSIS OF THE EVIDENCE PRESENTED IN YUMMY TAVERN CASE – The *prima facie* case

- **Who are the supervisors and managers?**
- **Section 7 activity**
  - What evidence exists to support a conclusion that Frank Amore engaged in Section 7 activity?
  - Did the Employer present any evidence that suggests that Frank Amore did not engage in Section 7 activity?
- **Knowledge**
  - What evidence exists to support a conclusion that the Employer knew about Frank Amore's Section 7 activity?
  - Is there any evidence to support a conclusion that the Employer was unaware of Frank's Section 7 activity?
- **Animus**
  - What evidence exists to support a conclusion that the Employer was unhappy with Frank's protected concerted activity?
  - What evidence exists to support a conclusion that the Employer had no problems with Frank's protected concerted activity?
- **Adverse Action**
  - What evidence is there that Frank was fired because of his Section 7 activity?
- **Connection between Section 7 activity and written warning and discharge.**
  - What evidence exists that Frank received a written warning because of his Section 7 activity?
  - What evidence exists that Frank was fired because of his Section 7 activity?

The Charging Party's Evidence

FORM NLRB-501
(3-21)

UNITED STATES OF AMERICA
NATIONAL LABOR RELATIONS BOARD
CHARGE AGAINST EMPLOYER

DO NOT WRITE IN THIS SPACE	
Case 02-CA-300300	Date Filed 1-24-23

INSTRUCTIONS:
File an original with NLRB Regional Director for the region in which the alleged unfair labor practice occurred or is occurring.

1. EMPLOYER AGAINST WHOM CHARGE IS BROUGHT

a. Name of Employer
Lunchetta LLC d/b/a Yummy Tavern

b. Tel. No.
(212) 994-9821

c. Cell No.

f. Fax. No.

d. Address *(Street, city, state, and ZIP code)*
100 6th Avenue

NY New York 10002

e. Employer Representative

g. e-mail

h. Number of workers employed
40

i. Type of Establishment *(factory, mine, wholesaler, etc.)*
Restaurants

j. Identify principal product or service
Food Service

The above-named employer has engaged in and is engaging in unfair labor practices within the meaning of section 8(a), subsections (1) and (list subsections) 1 of the National Labor Relations Act, and these unfair labor practices are practices affecting commerce within the meaning of the Act, or these unfair labor practices are practices affecting commerce within the meaning of the Act and the Postal Reorganization Act.

2. Basis of the Charge *(set forth a clear and concise statement of the facts constituting the alleged unfair labor practices)*

--See additional page--

3. Full name of party filing charge *(if labor organization, give full name, including local name and number)*
Frank Amore

4a. Address *(Street and number, city, state, and ZIP code)*
5050 Queens Boulevard, Apt. 3X
Kew Gardens, NY 11425

4b. Tel. No.
(917) 666-6666

4c. Cell No.

4d. Fax No.

4e. e-mail
frankamore@hotmail.com

5. Full name of national or international labor organization of which it is an affiliate or constituent unit *(to be filled in when charge is filed by a labor organization)*

6. DECLARATION
I declare that I have read the above charge and that the statements are true to the best of my knowledge and belief.

Frank Amore, Individual

(signature of representative or person making charge)

(Print/type name and title or office, if any)

Address frank Amore

Date 01/24/2023 12:55:31 PM

Tel. No.
(917) 666-6666

Office, if any, Cell No.

Fax No.

e-mail

WILLFUL FALSE STATEMENTS ON THIS CHARGE CAN BE PUNISHED BY FINE AND IMPRISONMENT (U.S. CODE, TITLE 18, SECTION 1001)
PRIVACY ACT STATEMENT

Solicitation of the information on this form is authorized by the National Labor Relations Act (NLRA), 29 U.S.C. § 151 *et seq.* The principal use of the information is to assist the National Labor Relations Board (NLRB) in processing unfair labor practice and related proceedings or litigation. The routine uses for the information are fully set forth in the Federal Register, 71 Fed. Reg. 74942-43 (Dec. 13, 2006). The NLRB will further explain these uses upon request. Disclosure of this information to the NLRB is voluntary; however, failure to supply the information may cause the NLRB to decline to invoke its processes.

Basis of the Charge

8(a)(1)

Within the previous six months, the Employer discharged an employee(s) because the employee(s) engaged in protected concerted activities by, inter alia, discussing wages and/or other terms and conditions of employment and in order to discourage employees from engaging in protected concerted activities.

Name of employee discharged	Approximate date of discharge
Frank Amore	12/02/2022

8(a)(1)

Within the previous six months, the Employer discharged an employee(s) because the employee(s) engaged in protected concerted activities by, inter alia, protesting terms and conditions of employment and in order to discourage employees from engaging in protected concerted activities.

Name of employee discharged	Approximate date of discharge
Frank Amore	12/02/2022

8(a)(1)

Within the previous six months, the Employer disciplined or retaliated against an employee(s) because the employee(s) engaged in protected concerted activities by, inter alia, discussing wages, hours, or other terms and conditions of employment and in order to discourage employees from engaging in protected concerted activities.

Name of employee disciplined/retaliated against	Type of discipline/retaliation	Approximate date of discipline/retaliation
Frank Amore	Written Warning	11/21/2022

8(a)(1)

Within the previous six months, the Employer disciplined or retaliated against an employee(s) because the employee(s) engaged in protected concerted activities by, inter alia, protesting terms and conditions of employment and in order to discourage employees from engaging in protected concerted activities.

Name of employee disciplined/retaliated against	Type of discipline/retaliation	Approximate date of discipline/retaliation
Frank Amore	Written Warning	11/21/2022

8(a)(1)

Within the previous six-months, the Employer has interfered with, restrained, and coerced its employees in the exercise of rights protected by Section 7 of the Act by maintaining work rules that prohibit employees from discussing wages, hours, or other terms or conditions of employment.

Confidential Witness Affidavit

I, Frank Amore, under the penalty of perjury, state as follows:

I have been given assurances by an agent of the National Labor Relations Board (NLRB) that this Confidential Witness Affidavit will be considered a confidential law enforcement record by the NLRB and will not be disclosed unless it becomes necessary to produce this Confidential Witness Affidavit in connection with a formal proceeding.

I reside at 5050 Queens Boulevard, Apt. 3X, Kew Gardens, NY 11425. My cell phone number (including area code) is (917) 666-6666.

My e-mail address is frankamore@hotmail.com.

I was employed by Lunchetta LLC d/b/a Yummy Tavern ("Employer")

located at 100 6th Avenue, New York, NY 10002.

1. I started working for the Employer on about April 2021. I was a server for the Employer. I worked 4 days per week from 3:30 pm to 12:00 am, Thursday, Friday, Saturday and Sunday. On Sundays, I worked two shifts from 10:00 am to 12:00 am. I took 30 to 40 minutes of break each day. I was paid $10 per hour after the Employer subtracts $5 per hour. They include all the tips in the check. I never worked overtime. There were many managers when I worked there. At the time I was fired, the manager was Esther. I do not know Esther's last name. Before Esther, the manager was Sabrina. The owner is Kevin. I was terminated on or about December 2, 2022.

2. On or about Saturday August 27, 2022, we had a pre-shift briefing before work. It was a meeting before the shift. We did the meeting outside of the restaurant. Sabrina started the meeting, and she was talking about the things that weren't being done properly and things needed to change. Jennifer spoke up in the meeting saying that they couldn't treat the employees like

that by cursing and yelling. The chef spoke out and said if you don't like it you could leave. The chef was yelling and cursing. Jennifer said that you couldn't treat us like that. The chef responded by saying that he just did and what was she going to do about it. After he said that, everyone began their shift. Everyone was talking in a group discussing that they were upset, and we began telling each other that they couldn't talk to us like that. Employees complained about how the kitchen was very hot. Everyone decided in a group to walk out and didn't return that day. The only people who stayed behind were the managers, sous chef, one server named Ana and one food runner.

3. After walking out, all the employees went to a bar three blocks from the Employer. About an hour later, while sitting in the bar, the owner Kevin came to the bar to talk to employees. He was with another manager named Mona. He tried to get the employees to go back to work. He said that he would fire the chef and managers for treating us like that. He stated that he didn't know anything regarding the way they were treating us. Nobody wanted to speak. I explained to the owner the reason why kitchen staff didn't want to go back and, from a servers' perspective, why we in the front of the house didn't want to go back. He replied that he didn't know about these issues. I told him that I didn't believe him personally. I stated that the group of employees there also didn't believe him but didn't want to say anything. I told him with all due respect that I didn't believe it because he got a report from the managers every day. I turned to Mona who was with him and asked her if everything was okay. In the past I had spoken to Mona about issues including issues with pay. Mona turned to the owner and said that she had been telling him about the issues. The owner tried to change the subject. He said that he would fire the managers and asked for us to come back to work. Me and a bartender told him that we would go back to work on Monday after the managers were fired. He tried to get everyone to go back to work the next day, which was a Sunday, but we refused. We agreed to have a meeting on

Monday. Everyone went home shortly after.

4. On or about August 27, 2022, we started a group chat where employee talked about wanting to go to the Department of Labor regarding the working conditions. We texted about having a meeting to discuss about going to the Department of Labor. I have provided the Board Agent with copies of the group texts.

5. All the managers were fired, and everyone went back to work on Monday. About two weeks later, Esther became the new general manager.

6. Sometime in November 2022, another employee named Gina told me that she was speaking to a manager named Wilson that works at another restaurant owned by the same owner. Big Burger is the name of the other restaurant. Wilson sometimes comes to the Yummy Tavern at to manage. Wilson told Gina that in a manager meeting they discussed firing all the employees that walked out on August 27, 2022, one by one. Gina told me that Wilson told her they would start the firing with me being the first person. I think Wilson did not know that Gina was one of the employees that had also walked out. Gina asked Wilson if he would be fired also. Gina told me that they would get rid of me.

7. After returning to work the new chef and new manager treated us more respectfully and were not rude. No action was taken against me for several months, but I was afraid the restaurant would look for some reason to do something to me.

8. On or about November 21, 2022, I got called down to the office by Esther and Joseph Cooker (floor manager). They asked me to sign a final written warning. The written warning was because I had a bad review from a customer. The customer said that I didn't want to take a partial order. The restaurant's policy is that we shouldn't take partial orders. I told them they are trying to fire me because I was following the Employer's rule. I told them put yourself in my shoes, since I was following the rules and now, they were trying to fire me. These rules are

normally discussed in the pre shift brief. They don't want partial orders because it slows up the process. This was my first written warning. I don't know of any bad review that I had in the past.

9. On or about December 2, 2022, before I clocked in, Esther and Joseph called me down and said I have another bad review. Esther said that I must be terminated. I told them they are trying to fire me because of the walk out on August 27. I told them that this is retaliation. They said that they were told from above that they had to let me go before the owners comes back from vacation. I did not receive a termination letter. They just said that I could not work there anymore, and I would have to leave.

I understand that this affidavit is a confidential law enforcement record and should not be shown to any person other than my attorney or other person representing me in this proceeding.

I have read this Confidential Witness Affidavit consisting of 4 pages, including this page. I fully understand the Affidavit and I state under penalty of perjury that it is true and correct.

Date: **March 1, 2023** **Signature:** *Frank Amore*

Frank Amore

This affidavit was taken in-person at 26 Federal Plaza, New York, NY by:

Eddie Zhang

Eddie Zhang
Board Agent, National Labor Relations Board

Confidential Witness Affidavit

I, Gina Diaz, under the penalty of perjury, state as follows:

I have been given assurances by an agent of the National Labor Relations Board (NLRB) that this Confidential Witness Affidavit will be considered a confidential law enforcement record by the NLRB and will not be disclosed unless it becomes necessary to produce this Confidential Witness Affidavit in connection with a formal proceeding.

I reside at 123 11th Avenue, Brooklyn, NY 11112.

My phone number (including area code) is 333-888-9999.

My e-mail address is ginadiaz@myemail.net.

I was employed by Lunchetta, LLC d/b/a Yummy Tavern ("Employer")

located at 32211 20th Street, New York, NY 11112.

1. I worked with the Employer from June 29, 2020, until February 2023. I was a front waiter. I worked Tuesday through Saturday from 3:00 pm to 12:00 am. The managers when I last worked for Yummy Tavern were Vence ("Jesse") and Esther. I don't know Esther's last name. The General Manager is Jaime. Kevin is the owner.

2. On or about August 27, 2022, before dinner, the manager at the time, Esther and the Chef held a meeting. Esther was talking about things that we needed to do to improve the restaurant. The chef started talking to everyone and was putting employees down. He was telling employees that, "They were garbage".

3. After the meeting, everyone was upset with the way they spoke to us. Employees had complained about the kitchen being extremely hot and other work conditions in the past. Esther heard that I was upset and she tried to talk to me. I told Esther that this was not the time. Chef

also tried to talk to me, and I was upset, so I didn't want to talk to anyone. Chef followed me and told me the treatment was not for me. I started talking to other employees that I was going to leave. Other employees started saying that if I left, they would leave. Eventually almost everyone decided to walk out. About 95% of the employees walked out. The only employees that stayed were Angela (waiter) and Steve (waiter), Owen (Barback), and another waiter.

4. After we walked out, we went to a bar near the Employer's restaurant to discuss what we would do about the treatment we were receiving. The owner showed up at the bar. We call the owner Kevin. Kevin showed up with his partner Mess and a manager named Mona. Frank Amore started telling Kevin about how the employees were being treated. Kevin was saying that he didn't know anything about the way employees were being treated and the conditions in the restaurant. Frank did most of the talking for the employees. Frank told the owner that he knew about the things the managers were doing. Kevin tried to get us to come to work and told us that he was losing money. Frank said we weren't coming back work, and everyone decided we were not going. Kevin turned to me and asked, "Am I being a jerk to you?" I have in the past received bonuses from Kevin. Kevin told us that he was firing the manager and the Chef. Kevin said Mona was going to be the General Manager. Kevin pulled me to the side and said sorry and that he never saw me so mad. I told him that the reason I was mad was because the Chef was treating us like garbage. I told him that Jamie, who is a general manager, knew about all the issues going on. Kevin told me he was going to take care of it. I told him that Jamie should be fired since he was saying that no one told him anything.

5. After the bar we created a group chat called "Yummy Tavern" with all the employees. We discussed what we wanted to do about going to the labor department or to an attorney. I called the department of labor. The department of labor said they could close the place down because of

the extreme heat in the kitchen. We didn't want employees to lose our jobs, so we didn't move forward.

6. In November 2022, Wilson came to talk to me outside of the restaurant. I believe Wilson's last name is Greene. Wilson is a manager at Kevin's other restaurant called Best Sandwich, in the same neighborhood. He showed up and saw me outside. He asked if he could talk to me, and he began to ask me about the managers drinking at the bar. I told him that's nothing I can do about it. He then asked me what I thought about the other runners that were drinking at work. I told him they need to fix the issues in the restaurant. He then turned to me and said that they were going fire everyone that was part of the walk out. I told him so that includes me. He told me no because Jesse and Kevin love me. I told him I was part of the walk out also, so as soon as they don't need me, they will fire me also. He said not me.

7. After speaking to Wilson, I spoke to Frank. I told him that Wilson said that they were going to fire everyone that was part of the walk out. I told Frank everything Wilson and I talked about.

8. A few weeks later, I heard Jamie and Wilson speaking outside of the restaurant. They said they were going to fire Frank and were giving excuses why. I was standing about 5 feet away. I don't think they saw me.

9. The next week, I told Frank that I heard that he is going to get fired. Frank told me that other people told him the same thing.

10. The next week they fired Frank because he had a bad review. There were other waiters that worked there that got drunk at work and never got fired. I have seen many waiters with bad reviews, and no one ever got fired. In the meetings in the past, they would discuss the bad reviews. I told Frank that the reason they gave him to fire him was "bogus" because I have seen

other people do worse. Between me and Frank we said that the real reason he got fired was because of the walk out.

11. A month later, in January 2023, I quit working there because I knew they were firing everyone that was part of the walk out and eventually I would be next. Other people got fired that were part of the walk out.

I understand that this affidavit is a confidential law enforcement record and should not be shown to any person other than my attorney or other person representing me in this proceeding.

I have read this Confidential Witness Affidavit consisting of 4 pages, including this page. I fully understand the Affidavit and I state under penalty of perjury that it is true and correct.

Date: **April 1, 2023** **Signature:** *Gina Diaz*

Gina Diaz

This affidavit was taken in-person at 26 Federal Plaza, New York, NY by:

Eddie Zheng

Eddie Zhang
Board Agent, National Labor Relations Board

The Employer's Evidence

Employer Attorney letterhead

April 20, 2023

VIA E-FILING

Eddie Zheng, Field Examiner
National Labor Relations Board, Region 2
26 Federal Plz, Ste 36-130
New York, NY 10278-3699

Re: Lunchetta, LLC d/b/a Yummy Tavern

Dear Mr. Zheng:

We represent the Employer, Lunchetta, LLC d/b/a Yummy Tavern, and furnish this statement of position[1] regarding the charge that Yummy Tavern disciplined and discharged Mr. Frank Amore in violation of the National Labor Relations Act. I am providing this statement of our position and attached documents for your investigation of the charge that Mr. Frank Amore has filed.

Mr. Amore was employed from on or about March 18, 2021 until he was terminated for poor performance on or about November 30, 2022. Yummy Tavern issued progressive discipline to Mr. Amore during his employment, ultimately leading to his termination after he failed to improve the poor level of service he was providing Yummy Tavern's guests. Mr. Amore was identified *by name* in multiple negative reviews left by guests through third-party websites, and continued to receive negative reviews even after he was verbally counseled and issued progressive discipline for his performance by his supervisors.

My client operates a restaurant in Manhattan, known as Yummy Tavern. The Management team includes a General Manager, an Assistant Manager, and a Chef. These individuals are responsible for ensuring that all restaurant patrons have a top-quality experience, including first-class ambiance, excellent service, and delicious food. Yummy Tavern relies on its entire staff, including hosts, wait staff, bartenders, barbacks, and dishwashers to provide this experience. The restaurant business is highly competitive generally, and particularly in Manhattan, where Yummy Tavern is located. Patrons' reviews are critically important to a restaurant's reputation, success, and even survival. Regrettably, several of Yummy Tavern's customers received poor service from Mr. Amore while dining at the restaurant, and left negative reviews on a popular website/smartphone app. As this letter and the supporting evidence I am attaching will show, Yummy Tavern's discipline and discharge of Mr. Amore was because of the

[1] Yummy Tavern reserves the right to amend and/or supplement its position reiterated herein and/or to provide supplemental position statements, affidavits, documents and information to the National Labor Relations Board. Nothing herein constitutes an admission of any kind or a waiver of Yummy Tavern's rights, claims or defenses, all of which are expressly reserved.

poor service he provided Yummy Tavern's customers, was pursuant to Yummy Tavern's progressive disciplinary system, and was consistent with how Yummy Tavern has treated other employees who have let customers down. Yummy Tavern's actions were in no way related to a brief walkout in which many employees engaged, raising a legitimate concern that Yummy Tavern promptly remedied.

II. ALLEGATIONS OF THE CHARGE/ARGUMENT

Mr. Amore alleges that on or about November 21, 2022, Yummy Tavern disciplined or retaliated against him and later discharged him on or about December 2, 2022 because he

(1) "engaged in protected concerted activities, by inter alia, protesting terms and conditions of employment and in order to discourage employees from engaging in protected concerted activities;" and (2) "engaged in protected concerted activities, by inter alia, discussing wages and/or other terms and conditions of employment and in order to discourage employees from engaging in protected concerted activities." Mr. Amore alleges that these actions are in violation of Section 8(a)(1) of the National Labor Relations Act.

A. Relevant Factual Background

i. Mr. Amore's Employment at Yummy Tavern

Yummy Tavern employed Mr. Amore as a server beginning March 18, 2021. He earned an hourly rate plus tips. His duties included explaining specials, answering questions about menu items, making recommendations as appropriate, taking orders accurately and timely, and overall providing excellent customer service.

ii. Mr. Amore Receives Multiple Negative Reviews from Guests

Early in Mr. Amore's employment, his guest service was fine, but in 2022 the restaurant received a number of negative online reviews from guests who specifically identified Mr. Amore as the reason for their poor reviews of the restaurant.

A guest who dined at Yummy Tavern on June 26 left a review identifying Mr. Amore as their server and stating that they received "[s]urprisingly poor service." (Id.) The guest further stated that "the waiter was in general very rude throughout the night." (Id.) Another guest who dined on June 3, 2023 stated about Mr. Amore that "[t]he server seemed pissed from the start with us." (Id.) The guest complained to Mr. Amore about a bug being in their drink, instead of providing a new drink as the guest requested, Mr. Amore responded that "he can just scoop the bug out." (Id.) That guest complained that Mr. Amore "act[ed] like [he] dislike[d] us starting from the moment we sat down." (Id.)

On September 17, 2022, Yummy Tavern received another negative review from a guest about Mr. Amore. The guest complained about Mr. Amore's treatment of them during their meal, stating "[o]ur server basically ignored us when I asked for a dessert menu and then shrugged and said we don't have dessert." (A copy of an email containing this review is attached hereto as Exhibit A.) The guest rated the restaurant's service 50 out of 100. The guest answered "No" to the following questions in their review – "Did the staff answer any questions you had in a clear and confident manner?" and "If appropriate, did the server proactively recommend any specific items?" Mr. Amore again was identified by name in a negative review the restaurant received just a few weeks later. Just weeks later, on October 1, 2022 the restaurant received another from a guest who gave Yummy Tavern a score on service of 50 out of 100 and identified Mr. Amore by name as their server. (A copy of an email containing this review is attached hereto as Exhibit B.)

Yummy Tavern did not issue formal discipline to Mr. Amore as a result of these reviews. Rather, Mr. Amore's supervisor, Floor Manager Jesse Vence repeatedly spoke with and counseled Mr. Amore concerning his performance and these negative reviews in hopes that Mr. Amore would improve the service he was providing the restaurant's guest.

iii. The Restaurant's New General Manager Counsels Mr. Amore on his Poor Service

Later in October 2022, Yummy Tavern hired Esther Cooper as the restaurant's general manager. Ms. Cooper has a long history of serving as the general manager for numerous restaurants in New York City. Upon arriving at the restaurant, Ms. Cooper initially took time to observe and monitor employee performance and service provided to guests. Not long after her arrival, Mr. Amore's poor level of service came to her attention. While Ms. Cooper believed that Mr. Amore was very knowledgeable, she immediately noticed that he had a negative attitude towards any type of change, displayed a negative attitude towards guests, was not accommodating, and overall lacked the hospitality required of a server in a restaurant such as Yummy Tavern. Mr. Amore would not accept constructive criticism or counseling, refusing to make any changes to his service level and treatment of guests.

Ms. Cooper had a number of conversations with Mr. Amore about his level of service, but did not see any improvement. In particular, Ms. Cooper told Mr. Amore that if at any point he sensed that he may be at risk for receiving a bad review from a guest that he should speak to her during the shift so that she could assist him and hopefully increase the guest's satisfaction with their experience. This would also provide Ms. Cooper with the opportunity to observe the table and his service and focus on finding a solution. Unfortunately, Mr. Amore never followed Ms. Cooper's directives and did not let her know during service when a guest appeared to be having a negative experience in the restaurant. As a result, Mr. Amore continued to receive negative reviews and as these guests were not brought to Ms. Cooper's attention by Mr. Amore during their meal, Ms. Cooper could only conclude that it was Mr. Amore's poor service that led to these continued negative reviews.

iv. *Mr. Amore is Terminated after Progressive Discipline for Providing Poor Service to Guests*

Despite the repeated counseling from Ms. Cooper, Mr. Amore's service did not improve and he continued to receive negative reviews from guests. On November 11, 2022, Yummy Tavern issued Mr. Amore a formal discipline for his continued negative reviews from customers and poor service. Specifically, Mr. Amore was disciplined after two separate guests who dined at Yummy Tavern on November 6, 2022, submitted negative reviews for the restaurant that again mentioned the poor service they received from Mr. Amore.

One guest who dined on November 6 stated in their review that they "always loved" going to Yummy Tavern for brunch but were "embarrassed at the poor service" they received when they brought a friend for dinner and Mr. Amore was their server. (Ex. B.) The guest continued that the "waiter was rude" and "refused" to take their appetizer orders. (*Id.*) Another guest that identified Mr. Amore as their server rated their experience at Yummy Tavern with the overall score of 50 out of 100, stating that the "[f[ood was subpar" but the "[s]ervice [was] even worse." (Ex. C.)

As a result of these continued negative reviews following his earlier counseling on his poor service, Ms. Cooper issued Mr. Amore a final written warning and informed Mr. Amore in his final written warning that he would be terminated if any similar incidents occurred in the future. Mr. Amore was given the warning in a meeting with Ms. Cooper, but he refused to sign the discipline notice. (A copy of Mr. Amore's November 11, 2022 final written warning is included in Exhibit B.) Clearly, Mr. Amore did not understand or appreciate that a restaurant today lives and dies by the guest ratings and commentary on social media and other dining websites.

Unfortunately, Mr. Amore's performance did not improve after his final written warning. On November 27, 2022, less than three weeks after Mr. Amore was issued a final written warning, the restaurant received two new negative reviews from guests identifying Mr. Amore as their server and the reason for their poor review. One guest scored their experience at Yummy Tavern as a 0 out of 100. They identified Mr. Amore as their server, grading him a 0 and simply stating "bad at service" as their written review of the restaurant. (A copy of an email containing this review is included in Exhibit D.) Another guest gave the restaurant a score of 50 out of 100. The guest identified Mr. Amore as their server and stated that "[s]ervice leaves a lot to be desired." (Id.)

Mr. Amore's continued negative reviews and failure to improve despite multiple conversations with Ms. Cooper and his prior final written warning, Yummy Tavern decided that terminating Mr. Amore's employment was warranted. Ms. Cooper made the decision. On November 30, 2022, Ms. Cooper informed Mr. Amore of his termination and presented him with a copy of his termination notice. (Exhibit E.) Mr. Amore did not express any emotion upon being informed of his termination. He did not state that he believed the termination was in retaliation for engaging in any alleged protected concerted activity, including but not limited to, his participation in a "walk out" months earlier, discussed in more detail below.

v. *Mr. Amore and Other Employees' "Walk out"*

On a Saturday evening in early September 2022, a group of both front and back-of-house employees at Yummy Tavern left the restaurant and did not return to work following that evening's "pre-shift meeting" with the restaurant's then-Executive Chef. During the pre-shift meeting a number of employees took issue with the Executive Chef's treatment of them. The employees believed that the Executive Chef was berating the employees in a demeaning manner and unfairly criticizing their work. Two employees in particular, a bartender and a sommelier, spoke up during the pre-shift meeting and told the Executive Chef that he could not speak to employees in the manner in which he was doing so. No employee raised any concerns during this meeting concerning their pay.

Following the pre-shift meeting, the vast majority of the restaurant's employees scheduled to work that night left the restaurant instead of working their scheduled shifts. Most of these employees went to a nearby bar. A skeleton crew of managers and the few employees who did not leave the restaurant served diners who had early reservations during the evening, while the restaurant contacted diners to cancel later reservations. The restaurant's owner, Kevin Kroft, arrived at the restaurant after the employees had left and assisted with providing service to guests that evening. The restaurant closed at approximately 8:30 pm, well prior to the scheduled closing time of 11:00 p.m.

Mr. Kroft left the restaurant after closing and went to the bar where the employees who walked out were drinking. Mr. Kroft talked to the employees concerning their issues with the Executive Chef and paid for the employees' bar tab. Mr. Kroft invited the employees to the restaurant on Monday for a meeting with him where they could voice the concerns that led to their decision to walk out.

On Monday, Mr. Kroft and the restaurant's then-General Manager met with the employees. Mr. Amore attended the meeting but was no more vocal than any other employee in the meeting. To the contrary, the two most vocal employees were the bartender and sommelier who spoke up during the pre-shift meeting with the Executive Chef. These employees discussed their concerns about the Executive Chef. The employees expressed that they believed the chef was demeaning, rude, and condescending and did not treat them with the respect they deserved. No employee in this meeting, including Mr. Amore, raised any concerns about their pay or any alleged improper deductions –the meeting was entirely focused on the employees' concern that the Executive Chef showed disdain towards employees.

The restaurant took the employee complaints very seriously and shortly after the meeting Yummy Tavern terminated the Executive Chef. The restaurant's then-General Manager subsequently voluntarily resigned from the restaurant. Ms. Cooper was hired a few weeks later to fill the General Manager position. The bartender and sommelier who were most vocal at the meeting in raising concerns about the Executive Chef are still employed at Yummy Tavern today.

Yummy Tavern's current General Manager, Ms. Cooper, who disciplined and terminated Mr. Amore because of his poor service and reviews, did not work at the restaurant at the time of the walk out or subsequent meeting. She has no direct knowledge of the walk out, the reasons for the walk out, any issues raised by employees during the walk out or the subsequent meeting, or the identity of any employees who raised any such issues. Her decision to terminate Mr. Amore was focused solely on the severity of multiple guest complaints that identified Mr. Amore. Guest complaints at that frequency about a single employee are very rare and indicate a serious problem that if not corrected, could adversely affect all employees.

III. CONCLUSION

Based upon the foregoing, Mr. Amore's charge lacks merit and should be dismissed in its entirety. Nevertheless, if you require additional information to complete your investigation, please do not hesitate to contact me.

Respectfully submitted,

Employer's Attorney, Esq.

Employer's Attorney

Encl.

EXHIBIT A

Yummy Tavern
Survey Report
Sunday, September 18, 2022

Friday, Sep. 16, 2022 9:45 PM - Party of 3

Overall Score

Rachel Green
Veranda
Table 17 - Alejandro

0

Sentiment

How likely are you to recommend this restaurant to others?

0

Q, 1,2,3,4,5,6, 7,8,9, 10

Please provide feedback on your experience.

No response

0

Service

How satisfied were you with the hospitality and friendliness?

Q, 1,2, 3,4,5,6, 7,8,9, 10

Food 0

How satisfied were you with the taste of your food?

Q, 1,2, 3,4,5,6, 7,8,9, 10

Atmosphere 0

How satisfied were you with the atmosphere?

Q, 1,2, 3,4,5,6, 7, 8,9, 10

Saturday,Sep. 17,2022
5:00 PM - Party of 3

Overall Score
53

Sharon Zimmerman
Veranda
Table 17 – Frank

Sentiment 60

How likely are you to recommend this restaurant to others?

0, 1,2,3,4,5,**6**,7,8,9, 10

Please provide feedback on your experience.

The food was inconsistent. I wish I could have said different. Everything seemed like it had been sitting for a while. Esp. my chicken. Just didn't taste fresh. My salad was so overdressed that I couldn't taste the greens. 2 things that stood out were my husband's lamb - perfect and the fries. I also didn't understand why there is no dessert menu or

coffee or tea. Our server basically ignored us when I asked for a dessert menu and then shrugged and said we don't have dessert. I would have ordered a coffee or tea even if there wasn't any dessert. He lost on the bill on that one.

Service 50

Was the host/hostess warm and inviting?

Yes, No

Did the staff answer any questions you had in a clear and confident manner?

Yes,

If appropriate, did the server proactively recommend any specific items?

N/A, Yes,

Saturday, Sep. 17, 2022
5:00 PM - Party of 2

Overall Score
90

Jason Statham
Raven

Sentiment 80

How likely are you to recommend this restaurant to others?

0, 1, 2, 3, 4, 5, 6, 7, 8, 9, 10

Please provide feedback on your experience.

No response

Atmosphere 93

How satisfied were you with the atmosphere?

0,1,2,3,4,5,6, 7,!,9,10

Were the surfaces, floor, seats, and waste areas clean and neat?

Yes,No

Were the restrooms clean, neat and stocked?

Yes, No, N/A

Friday, Sep. 16, 2022
6:30 PM - Party of 5

Overall Score
95

George Costanza
Jerry

Sentiment 90

How likely are you to recommend this restaurant to others?

0,1,2,3,4,5,6, 7,8,**9**,10

Please provide feedback on your experience.

No response

Service 100

How satisfied were you with the hospitality and friendliness?

0,1,2, 3,4,5,6, 7,8,9,10

Food 100

How satisfied were you with the taste of your food?

0,1,2, 3,4,5,6, 7,8,9, **10**

Atmosphere 90

How satisfied were you with the atmosphere?

0,1,2,3,4,5,6,7,8,9,10

Saturday, Sep. 17, 2022
6:15 PM - Party of 3

Overall Score
100

Sascha Cohen
Indoor
Table 203 – Jillian

Sentiment 100

How likely are you to recommend this restaurant to others?

0,1,2,3,4,5,6, 7,8,9,**10.**

Please provide feedback on your experience.

No response

Food 100

How satisfied were you with the taste of your food?

0, 1, 2, 3, 4, 5, 6, 7, 8, 9, **10**

Please provide any additional feedback on the food.

No response

General N/A

Is there anything we can change to make you dine with us more frequently?

No response

Thursday, Oct. 7, 2021
8:00 PM - Party of 6

Overall Score
100

Macel Marceau Outdoor
Table 47 - Bridget

Sentiment 100

How likely are you to recommend this restaurant to others?

0, 1, 2, 3, 4, 5, 6, 7, **8**, **9**, **10**

Please provide feedback on your experience.

No response

Service 100

Was the host/hostess warm and inviting?

Yes, No

Did the staff answer any questions you had in a clear and confident manner?

Yes, No

If appropriate, did the server proactively recommend any specific items?

N/A, **Yes**, No

EXHIBIT B

Saturday, Oct. 1, 2022
7:30 PM - Party of 2

Overall Score

50

Jordyn Peel
Indoor
Table 121 - Frank

Sentiment

How likely are you to recommend this restaurant to others?

0, 1,2, 3,4,5 ,6, 7,8,9, 10

50

Please provide feedback on your experience.

Food was just alright. A little overhyped. Especially for the price. The crispy eggplant was the only hero

Service

50

Was the host/hostess warm and inviting?

Yes, **No**

Did the staff answer any questions you had in a clear and confident manner?

Yes,No

If appropriate, did the server proactively recommend any specific items?

N/A, Yes, No

Saturday, Oct. 1, 2022
7:00 PM - Party of 2

Overall Score
90

Oscar Swann
Indoor
Table 103 - Greg

Sentiment 90

How likely are you to recommend this restaurant to others?

0, 1,2,3,4,5,6, 7,8,9,10

Please provide feedback on your experience.

No response

Food 90

How satisfied were you with the taste of your food?

0, 1,2,3,4,5, 6,7,8,i, 10

Please provide any additional feedback on the food.

No response

General N/A

Is there anything we can change to make you dine with us more frequently?

No response

Saturday, Oct. 1, 2022
5:00 PM - Party of 4

Overall Score
100

Pete Sampras
Indoor
Table 132,133 - Frank

Sentiment 100

How likely are you to recommend this restaurant to others?

0, 1,2, 3,4,5,6, 7, 8, **9,100.**

Please provide feedback on your experience.

No response

Food 100

How satisfied were you with the taste of your food?

0, 1,2, 3,4,5,6, 7, 8, **9,100.**

Please provide any additional feedback on the food.

No response

General N/A

Is there anything we can change to make you dine with us more frequently?

No response

Sunday, November 6, 2022

Overall Score

7:00 PM - Party of 3

n/a

Spike Nicholson
Indoor
Table 17 - Frank

Sentiment

How likely are you to recommend this restaurant to others?

0, 1,2, 3,4, 5,6, 7,8,9, 10

Please provide feedback on your experience.

Overcooked and unimaginative

Service

We always loved this restaurant so took a friend out here, but were embarrassed at the poor service. The waiter was rude and refused to take our appetizers order.

Sunday, November 6, 2022

Overall Score

8:30 PM - Party of 2

50

Giannis Guidry
Indoor
Table 21 - Frank

Sentiment

How likely are you to recommend this restaurant to others?

0, 1,2, 3,4,5 ,6, 7,8,9, 10

50

Please provide feedback on your experience.

Food was subpar

Service

50

Service was even worse

EXHIBIT C

NOTATION OF PERFORMANCE (NOP)

Employee Name: *Frank Amore* Date of Report: November 11, 2022

Position *Server* Date of Occurrence:

Store Location: Manager:

Correction Action Step:	Reason for Action:
Verbal Warning 1st Written Warning 2nd Written **Warning** Final Warning **XXX** Suspension/Leave pending investigation Termination	**Unsatisfactory Performance XXX** **Violation of Policy** **Other**

Reason for corrective action: Poor service, must have a better attitude and put customers first

Employee Remarks:

My signature below acknowledges receipt of this corrective action. I understand that an additional infraction may result in further corrective action up to and including termination of employment.

Signed: *Frank Amore*

EXHIBIT D

SURVEYS SUBMITTED ON NOV. 27, 2022

Friday, Nov. 25, 2022
9:30 PM - Party of 3

Overall Score
0

Christopher Chanticleer
Indoor
Table 203 - Frank

Sentiment 0

How likely are you to recommend this restaurant to others?

Q, 1,2,3,4,5,6, 7,8,9, 10

Please provide feedback on your experience.

bad at service

Service 0

Was the host/hostess warm and inviting?

Yes, **No**

Did the staff answer any questions you had in a *clear and confident manner?*

Yes, **No**

If appropriate, did the server proactively recommend any specific items?

N/A, Yes, **No**

Saturday, Oct. 29, 2022
7:15 PM - Party of 2

Overall Score
50

Crystal Chanticleer
Veranda
Table 33 - Frank

Sentiment 50

How likely are you to recommend this restaurant to others?

0, 1,2,3,4, ,6, 7,8,9, 10

Please provide feedback on your experience.

Service leaves a lot to be desired.

Service 50

Was the host/hostess warm and inviting?

Yes,,No

Did the staff answer any questions you had in a *clear and confident manner?*

Yes, **No**

If appropriate, did the server proactively recommend any specific items?

N/A, Yes, **No**

Saturday, Nov. 26, 2022
1:15 PM - Party of 4

Overall Score
60

Susannah Pringle
No name, Unassigned reservation
Table 12, 13

Sentiment 60

How likely are you to recommend this restaurant to others?

0, 1, 2, 3, 4, 5, **6**, 7, 8, 9, 10

Please provide feedback on your experience.

No response

Food 60

How satisfied were you with the taste of your food?

0, 1, 2, 3, 4, 5, **6**, 7, 8, 9, 10

Please provide any additional feedback on the food.

No response

General N/A

Is there anything we can change to make you dine with us more frequently?

No response

Saturday, Nov. 26, 2022 **Overall Score**

6:00 PM - Party of 2

Katrina Woodson
Indoor
Table 134 – Steph

Sentiment 40

How likely are you to recommend this restaurant to others?

0,1,2,3,!,5,6,7,8,9, 10

Please provide feedback on your experience.

No response

Service 100

Was *the host/hostess warm and inviting?*

Did the staff answer any questions you had in a clear and confident manner?

If appropriate, did the server proactively recommend any specific items?

N/A, Yes, **No**

Saturday, Nov. 26, 2022
8:30 PM - Party of 4

Overall Score
100

Marcus Klaurus

No name, Unassigned reservation

Table 130,131 - Steph

Sentiment 100

How likely are you to recommend this restaurant to others?

0,1,2, 3,4,5,6, 7,8,9, **10**

Please provide feedback on your experience.

No response

Atmosphere 100

How satisfied were you with the atmosphere?

0,1,2, 3,4,5,6, 7,8,9, **10**

Were the surfaces, floor, seats, and waste areas clean and neat?

Yes.No

Were the restrooms clean, neat and stocked?

Yes, No, N/A

EXHIBIT E

NOTATION OF PERFORMANCE (NOP)

Employee Name: *Frank Amore* Date of Report: November 30, 2022

Position *Server* Date of Occurrence:

Store Location: Manager:

Correction Action Step:	Reason for Action:
Verbal Warning 1st Written Warning 2nd Written **Warning** Final Warning Suspension/Leave pending investigation Termination **XXX**	**Unsatisfactory Performance XXX** **Violation of Policy** **Other**

Reason for corrective action: Continued poor service, despite final warning

Employee Remarks:

My signature below acknowledges receipt of this corrective action. I understand that an additional infraction may result in further corrective action up to and including termination of employment.

Signed: *Frank Amore*

2024

RESOURCES

THE NATIONAL LABOR RELATIONS BOARD'S
STUDENT AMBASSADOR PROGRAM | 2024

Your rights under the National Labor Relations Act

THE NATIONAL LABOR RELATIONS BOARD

Employees have the right to join together to improve their working conditions—with or without a union.

Group activity is protected

- Talking with one another about job-related issues like pay, hours, safety, or unfair treatment
- Complaining about work-related matters to a supervisor, government agency, the press, or any other person

Activity by an individual can be protected

- Speaking up for other employees
- Trying to convince other employees to join together to improve the workplace
- Filing a charge with the NLRB

Union activity is protected

- Expressing support for a union at the workplace
- Helping a union organize coworkers
- Refusing to support a union

If you exercise your rights under the NLRA, your employer cannot

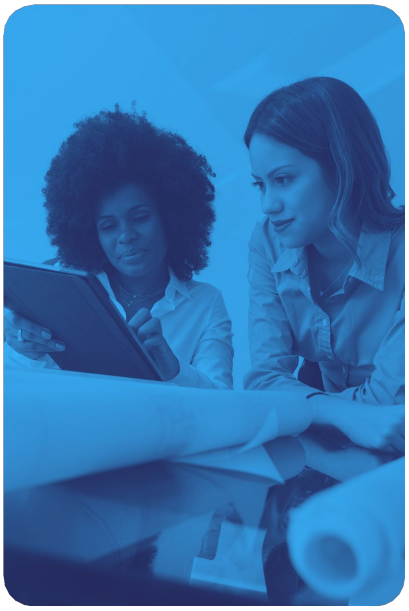
- Fire or demote you
- Reduce your pay, hours, or benefits
- Make your job more difficult or unpleasant
- Threaten you
- Question you about your concerted or union actions
- Spy on any of your concerted or union actions

If you think you have been discriminated against for exercising your NLRA rights, or want more information, contact us.

Your call is free and confidential.

National office number
1-844-762-6572

Find your local office
bit.ly/nlrboffices



Who is covered by the National Labor Relations Act?

Most private-sector employees are protected, including:

- "blue-collar workers" such as people who work in factories, construction, and maintenance.
- "white-collar workers" such as journalists, nonprofit workers, and tech workers.
- People who work in restaurants, hotels, health care, and retail.

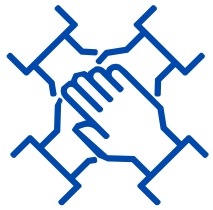
Workers are protected whether or not they have immigration papers allowing them to work in the U.S.

Scan to download our mobile app

Basic Steps to Forming a Union

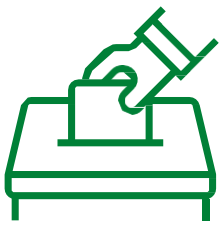
Under the National Labor Relations Act, workers have the right to form unions several ways—but voluntary recognition and NLRB union elections are the most common paths.

Basic Steps to Forming a Union Through Voluntary Recognition



1. Contact a union organizer or start your own union.
2. Have a majority of your coworkers sign union authorization cards.
3. Ask your employer for voluntary recognition.
4. If your employer recognizes the union, you can begin bargaining.
5. If your employer refuses to recognize the union, you can file a petition for an election with the NLRB or you may be able to strike for recognition.

Basic Steps to Forming a Union Through an NLRB Election



1. Contact a union organizer or start your own union.
2. Have at least 30% of coworkers sign union authorization cards.
3. File a petition for a union election with the NLRB.
4. If the union wins 50% + 1 of votes cast, your employer must bargain in good faith over working conditions.

Contact your closest NLRB Regional Office for more info: go.usa.gov/xt3MU

Employee Rights During a Union Organizing Campaign

Under the National Labor Relations Act, employees, *not their employer*, have the right to decide whether or not they want a union to represent them. In response to union organizing, an employer can't:

- Fire, demote, or transfer employees for expressing pro-union views or reward employees for expressing anti-union views.
- Impose new paperwork requirements to maintain employment.
- Contact law enforcement, including ICE.
- Reduce pay, hours, or benefits.
- Make work more difficult or less desirable—like changing work schedules, denying overtime, or separating employees.
- Tell employees that it's pointless to choose a union.

An employer also can't hire third parties to do or say the things that it is prohibited from doing and saying. Third parties hired by employers also can't misrepresent themselves as government agents or agents of the NLRB.

If an employer is interfering with your right to form, join, or assist a union, you can file an unfair labor practice charge with the NLRB. We have interpretors available.

Find your local NLRB office: go.usa.gov/xt3MU

Call us: 1-844-762-6572
Email us: publicinfo@nlrb.gov
More information at nlrb.gov

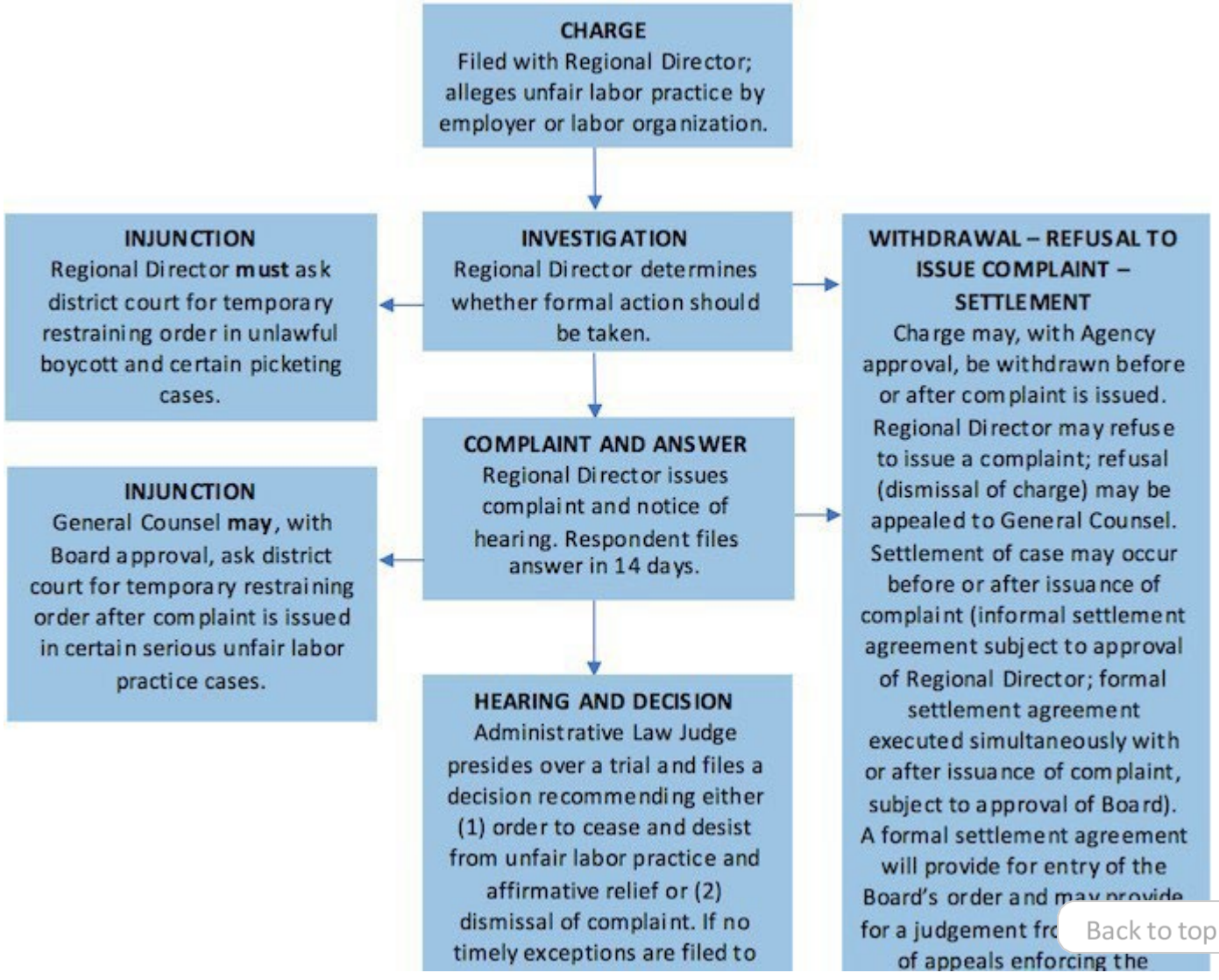
About NLRB

The NLRB Process

Traducir página al español

The National Labor Relations Board is an independent federal agency vested with the power to safeguard employees' rights to organize and to determine whether to have unions as their bargaining representative. The chart below details steps in the unfair labor practice process. The second chart outlines the steps in the representation election process.

Process for Unfair Labor Practices



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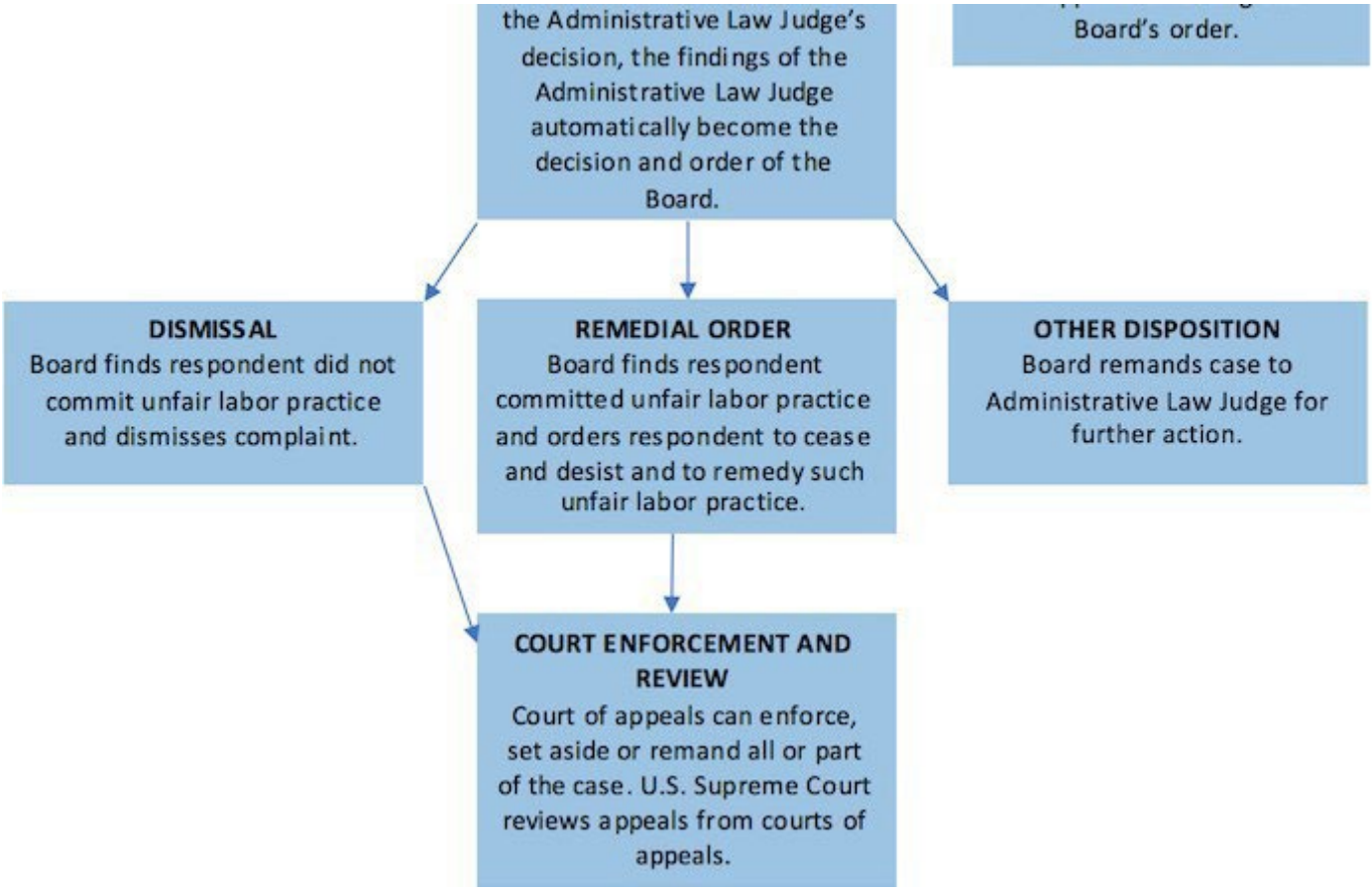

Representation Election Process

The National Labor Relations Act grants employees the right to bargain collectively through representatives of their own choosing and to refrain from such activity. A party may file an RC, RD or RM petition with the National Labor Relations Board (NLRB) to conduct a secret ballot election to determine whether a representative will represent, or continue to represent, a unit of employees. An **RC** petition is generally filed by a union that desires to be certified as the bargaining representative. An **RD** petition is filed by employees who seek to remove the currently recognized union as the bargaining representative. An **RM** petition is filed by an employer who seeks an election because one or more individuals or unions have sought recognition as the bargaining representative, or based on a reasonable belief supported by objective considerations that the currently recognized union has lost its majority status. The diagram below generally describes representation case procedures in RC, RD and RM cases, also referred to as certification and decertification cases.

Pre-Petition Steps

a) obtain showing of interest or supporting evidence;

b) get petition form, statement of position form and description of procedures from NLRB website;

c) complete petition form;

d) serve petition, blank statement of position form and description of procedures on the other parties named in the petition;

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e) prepare certificate of service of petition; and

fj file petition, showing of interest, and certificate of service with the NLRB by E-Filing, fax, regular mail, or in person at an NLRB office.

&

Petition filed with NLRB Regional Office

Petition may be withdrawnby petitioner with Regional Director approval.

Investigation and regional determination

Petition may be dismissed by Regional Director. (Dismissal may be appealed to the Board.)

CONSENT PROCEDURES

FORMAL PROCE D URES

Consent Election Agreement

Parties sign agreement waiving hearing and agreeing that the regional director'srulings on challenged ballots and election objections are final and binding.

Stipulated Election Agreement

Parties sign agreement waiving hearing and agreeing that the regional director will resolve any post-election disputes subject to discretionary Board review.

Formal Hearing conducted by HearingOfficer. Record of hearing to Regional Director.

&

Regional Director issues decision directing election (or dismissing case or reopening record).

Request for Review.
Parties may request Board to review any action of the Regional Director.Opposition to request may be filed.A party may combine a request for review of the Regional Director's decision and direction of electionwitha request for review of a Regional Director's post-election decision. (Parties may also movefor extraordinary relief, including expedited considerationof

request ora stay o f the election.)

Rule on Request.
Board issues ruling denyingor granting

request f o r review.

If request for review is granted, Board issues decision affirming, modifying, or reversingRegional Director, or ordering other appropriate action.

ELECTION CONDUCTED BY NLRB REGIONAL OFFICE

Election decided based on a majority of valid votes cast.

IF RESULTS ARE CONCLUSIVE

(challenges not determinativeand/or no objections filed)

IF RESULTS ARE NOT CONCLUSIVE

(challenges determinative and/or objectio

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Regional Director examines objections, challenges, and supporting offers of proof.

Hearing may be ordered by Regional Director to resolve factual issues.

If a hearing is ordered, Regional Director directs Hearing Officer to serve on parties a report containing recommendations to the Regional Director. (Case could also be consolidated with a ULP proceeding before an ALJ.)

Regional Director issues certification of results or representative, depending on outcome.

CONSENT ELECTION

Regional Director issues a Decision disposing of issues and directing appropriate action including certifying representative or results of election. (Decision in Consent Election is final.)

STIPULATED, REGIONAL DIRECTOR, OR BOARD DIRECTED ELECTION

Unless case consolidated with a ULP proceeding before an AU, Regional Director issues a Decision disposing of issues and directing appropriate action including certifying representative or results of election. (Decision in Stipulated or Directed Election is final unless the Board grants a Request for Review through the procedure set forth above.)

Basic Guide to the National Labor Relations Act

General Principles of Law Under the Statute and Procedures of the National Labor Relations Board

This is a revised edition of a pamphlet originally issued in 1962. It provides a basic framework for a better understanding of the National Labor Relations Act and its administration.

A special chart that arranges systematically the types of cases in which an employer or a labor organization may be involved under the Act, including both unfair labor practice cases and representation election proceedings, appears in the booklet.

Prepared in the Office of the General Counsel
NATIONAL LABOR RELATIONS BOARD

U.S. GOVERNMENT PRINTING OFFICE WASHINGTON. . 1997
For sale by the Superintendent of Documents, U.S. Government Printing Office Washington, D.C. 20402

Table of Contents

Foreword

The Regional Offices of the National Labor Relations Board have found that, more than six decades after its enactment, there is still a lack of basic information about the National Labor Relations Act. Staff members have expressed a need for a simply stated explanation of the Act to which anyone could be referred for guidance. To meet this demand, the basic law under the Act has been set forth in this pamphlet in a nontechnical way so that those who may be affected by it can better understand what their rights and obligations are.

Any effort to state basic principles of law in a simple way is a challenging and unenviable task. This is especially true about labor law, a relatively complex field of law. Anyone reading this booklet must bear in mind several cautions.

First, it must be emphasized that the Office of the General Counsel does not issue advisory opinions and this material cannot be considered as an official statement of law. It represents the view of the Office of the General Counsel as of the date of publication only. It is important to note that the law changes and advances. In fact, it is the duty of the Agency to keep its decisions abreast of changing conditions, yet within the basic statute. Accordingly, with the passage of time no one can rely on these statements as absolute until and unless a check has been made to see whether the law may have been changed substantially or specifically.

Furthermore, these are broad general principles only and countless subprinciples and detailed rules are not included. Only by evaluation of specific fact situations in the light of current principles and with the aid of expert advice would a person be in a position to know definitely where the proposed conduct may fit under the statute. No basic primer or text can constitute legal advice in particular fact situations. This effort to improve basic education about the statute should not be considered as such. Many areas of the statute remain untested. Legal advisers and other experts can find the total body of "Board law" reported in other Agency publications.

One other caution: This material does not deal with questions arising under other labor laws, but only with the National Labor Relations Act. Laws administered by other Government agencies, such as the Labor-Management Reporting and Disclosure Act of 1959, the Employee Retirement Income Security Act, the Occupational Safety and Health Act, the Railway Labor Act, the Fair Labor Standards, Walsh-Healey and Davis-Bacon Acts, Title VII of the Civil Rights Act of 1964, Americans with Disabilities Act, the Federal Mine Safety and Health Act, and the Veterans' Preference Act, are not treated herein.

Lastly, this material does not reflect the view of the National Labor Relations Board as the adjudicating agency that in the end will decide each case as it comes before it.

It is hoped that with this cautionary note this booklet may be helpful to those in need of a better basic understanding of the National Labor Relations Act.

Summary of the Act

Purpose of the Act. It is in the national interest of the United States to maintain full production in its economy. Industrial strife among employees, employers, and labor organizations interferes with full production and is contrary to our national interest. Experience has shown that labor disputes can be lessened if the parties involved recognize the legitimate rights of each in their relations with one another. To establish these rights under law, Congress enacted the National Labor Relations Act. Its purpose is to define and protect the rights of employees and employers, to encourage collective bargaining, and to eliminate certain practices on the part of labor and management that are harmful to the general welfare.

What the Act provides. The National Labor Relations Act states and defines the rights of employees to organize and to bargain collectively with their employers through representatives of their own choosing or not to do so. To ensure that employees can freely choose their own representatives for the purpose of collective bargaining, or choose not to be represented, the Act establishes a procedure by which they can exercise their choice at a secret-ballot election conducted by the National Labor Relations Board. Further, to protect the rights of employees and employers, and to prevent labor disputes that would adversely affect the rights of the public, Congress has defined certain practices of employers and unions as unfair labor practices.

How the Act is enforced. The law is administered and enforced principally by the National Labor Relations Board and the General Counsel acting through 52 regional and other field offices located in major cities in various sections of the country. The General Counsel and the

staff of the Regional Offices investigate and prosecute unfair labor practice cases and conduct elections to determine employee representatives. The five-member Board decides cases involving charges of unfair labor practices and determines representation election questions that come to it from the Regional Offices.

How this material is organized. The rights of employees, including the rights to self-organization and collective bargaining that are protected by Section 7 of the Act, are presented first in this guide. The Act's provisions concerning the requirements for union-security agreements are covered in the same section, which also includes a discussion of the right to strike and the right to picket. The obligations of collective bargaining and the Act's provisions for the selection of employee representatives are treated in the next section. Unfair labor practices of employers and of labor organizations are then presented in separate sections. The final section, entitled "How the Act Is Enforced," sets forth the organization of the NLRB; its authority and limitations; its procedures and powers in representation matters, in unfair labor practice cases, and in certain special proceedings under the Act; and the Act's provisions concerning enforcement of the Board's orders.

The Rights of Employees

The Section 7 Rights. The rights of employees are set forth principally in Section 7 of the Act, which provides as follows:

> Sec. 7. Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection, and shall also have the right to refrain from any or all of such activities except to the extent that such right may be affected by an agreement requiring membership in a labor organization as a condition of employment as authorized in section 8(a)(3).

Examples of Section 7 *rights.* Examples of the rights protected by this section are the following:

- Forming or attempting to form a union among the employees of a company.
- Joining a union whether the union is recognized by the employer or not.
- Assisting a union to organize the employees of an employer.
- Going out on strike to secure better working conditions.
- Refraining from activity on behalf of a union.

Union Security. The Act permits, under certain conditions, a union and an employer to make an agreement, called a union-security agreement, that requires employees to make certain payments to the union in order to retain their jobs. A union-security agreement cannot require that applicants for employment be members of the union in order to be hired, and such an agreement cannot require employees to join or maintain membership in the union in order to retain their jobs. Under a union-security agreement, individuals choosing to be dues-paying nonmembers may be required, as may employees who actually join the union, to pay full initiation fees and dues within a certain period of time (a "grace period") after the collective-bargaining contract takes effect or after a new employee is hired. However, the most that can be required of nonmembers who inform the union that they object to the use of their payments for nonrepresentational purposes is that they pay their share of the union's costs relating to representational activities (such as collective bargaining, contract administration, and grievance adjustment).

Union-security agreements. The grace period, after which the union-security agreement becomes effective, cannot be less than 30 days except in the building and construction industry. The Act allows a shorter grace period of 7 full days in the building and construction industry (Section 8(f). A union-security agreement that provides a shorter grace period than the law allows is invalid, and any employee discharged because he or she has not complied with such an agreement is entitled to reinstatement.

Requirements for union-security agreements. Under a union-security agreement, employees who have religious objections to becoming members of a union or to supporting a union financially may be exempt from paying union dues and initiation fees. These employees may, however, be required to make contributions to a nonreligious, nonlabor tax exempt organization instead of making payments to a union. Unions representing such employees may also charge them the reasonable cost of any grievances processed at the employees' request.

Prehire agreements in the construction industry. For a union-security agreement to be valid, it must meet all the following requirements:

1. The union must not have been assisted or controlled by the employer (see Section 8(a)(2) under "Unfair Labor Practices of Employers" on pp. 14–15).
2. The union must be the majority representative of the employees in the appropriate collective-bargaining unit covered by such agreement when made.
3. The union's authority to make such an agreement must not have been revoked within the previous 12 months by the employees in a Board election.
4. The agreement must provide for the appropriate grace period.

Section 8(f) of the Act allows an employer engaged primarily in the building and construction industry to sign a union-security agreement with a union without the union's having been designated as the representative of its employees as otherwise required by the Act. The agreement can be made before the employer has hired any employees for a project and will apply

to them when they are hired. As noted above, however, the union-security provisions of a collective-bargaining contract in the building and construction industry may become effective with respect to new employees after 7 full days. If the agreement is made while employees are on the job, it must allow existing employees the same 7-day grace period to comply. As with any other union-security agreement, the union involved must be free from employer assistance or control.

Collective-bargaining contracts in the building and construction industry can include, as stated in Section 8(f), the following additional provisions:

1. A requirement that the employer notify the union concerning job openings.
2. A provision that gives the union an opportunity to refer qualified applicants for such jobs.
3. Job qualification standards based on training or experience.
4. A provision for priority in hiring based on length of service with the employer, in the industry, or in the particular geographic area.

These four hiring provisions may lawfully be included in collective-bargaining contracts which cover employees in other industries as well.

Finally, pursuant to Section 14(b) of the Act, individual States may prohibit, and some States have prohibited, certain forms of union-security agreements.

The Right to Strike. Section 7 of the Act states in part, "Employees shall have the right. . . to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection." Strikes are included among the concerted activities protected for employees by this section. Section 13 also concerns the right to strike. It reads as follows:

> Nothing in this Act, except as specifically provided for herein, shall be construed so as either to interfere with or impede or diminish in any way the right to strike, or to affect the limitations or qualifications on that right.

It is clear from a reading of these two provisions that: the law not only guarantees the right of employees to strike, but also places limitations and qualifications on the exercise of that right. See for example, restrictions on strikes in health care institutions, page 32.

Lawful and unlawful strikes. The lawfulness of a strike may depend on the object, or purpose, of the strike, on its timing, or on the conduct of the strikers. The object, or objects, of a strike and whether the objects are lawful are matters that are not always easy to determine. Such issues often have to be decided by the National Labor Relations Board. The consequences can be severe to striking employees and struck employers, involving as they do questions of reinstatement and backpay.

It must be emphasized that the following is only a brief outline. A detailed analysis of the law concerning strikes, and application of the law to all the factual situations that can arise in connection with strikes, is beyond the scope of this material. Employees and employers who anticipate being involved in strike action should proceed cautiously and on the basis of competent advice.

Strikes for a lawful object. Employees who strike for a lawful object fall into two classes "economic strikers" and "unfair labor practice strikers." Both classes continue as employees, but unfair labor practice strikers have greater rights of reinstatement to their jobs.

Economic strikers defined. If the object of a strike is to obtain from the employer some economic concession such as higher wages, shorter hours, or better working conditions, the striking employees are called economic strikers. They retain their status as employees and cannot be discharged, but they can be replaced by their employer. If the employer has hired bona fide permanent replacements who are filling the jobs of the economic strikers when the strikers apply unconditionally to go back to work, the strikers are not entitled to reinstatement at that time. However, if the strikers do not obtain regular and substantially equivalent employment, they are entitled to be recalled to jobs for which they are qualified when openings in such jobs occur if they, or their bargaining representative, have made an unconditional request for their reinstatement.

Unfair labor practice strikers defined. Employees who strike to protest an unfair labor practice committed by their employer are called unfair labor practice strikers. Such strikers can be neither discharged nor permanently replaced. When the strike ends, unfair labor practice strikers, absent serious misconduct on their part, are entitled to have their jobs back even if employees hired to do their work have to be discharged.

If the Board finds that economic strikers or unfair labor practice strikers who have made an unconditional request for reinstatement have been unlawfully denied reinstatement by their employer, the Board may award such strikers backpay starting at the time they should have been reinstated.

Strikes unlawful because of purpose. A strike may be unlawful because an object, or purpose, of the strike is unlawful. A strike in support of a union unfair labor practice, or one that would cause an employer to commit an unfair labor practice, may be a strike for an unlawful object. For example, it is an unfair labor practice for an employer to discharge an employee for failure to make certain lawful payments to the union when there is no union-security agreement in effect (Section 8(a)(3). A strike to compel an employer to do this would be a strike for an unlawful object and, therefore, an unlawful strike. Strikes of this nature will be discussed in connection with the various unfair labor practices in a later section of this guide.

Furthermore, Section 8(b)(4) of the Act prohibits strikes for certain objects even though the objects are not necessarily unlawful if achieved by other means. An example of this would be a strike to compel Employer A to cease doing business with Employer B. It is not unlawful for Employer A voluntarily to stop doing business with Employer B, nor is it unlawful for a union merely to request that it do so. It is, however, unlawful for the union to strike with an object of forcing the employer to do so. These points will be covered in more detail in the explanation of Section 8(b)(4). In any event, employees who participate in an unlawful strike may be discharged and are not entitled to reinstatement.

Strikes unlawful because of timing—Effect of no-strike contract. A strike that violates a no-strike provision of a contract is not protected by the Act, and the striking employees can be discharged or otherwise disciplined, unless the strike is called to protest certain kinds of unfair labor practices committed by the employer. It should be noted that not all refusals to work are considered strikes and thus violations of no-strike provisions. A walkout because of conditions abnormally dangerous to health, such as a defective ventilation system in a spray-painting shop, has been held not to violate a no-strike provision.

Same—Strikes at end of contract period. Section 8(d) provides that when either party desires to terminate or change an existing contract, it must comply with certain conditions. If these requirements are not met, a strike to terminate or change a contract is unlawful and participating strikers lose their status as employees of the employer engaged in the labor dispute. If the strike was caused by the unfair labor practice of the employer, however, the strikers are classified as unfair labor practice strikers and their status is not affected by failure to follow the required procedure.

Strikes unlawful because of misconduct of strikers. Strikers who engage in serious misconduct in the course of a strike may be refused reinstatement to their former jobs. This applies to both economic strikers and unfair labor practice strikers. Serious misconduct has been held to include, among other things, violence and threats of violence. The U.S. Supreme Court has ruled that a "sitdown" strike, when employees simply stay in the plant and refuse to work, thus depriving the owner of property, is not protected by the law. Examples of serious misconduct that could cause the employees involved to lose their right to reinstatement are:

- Strikers physically blocking persons from entering or leaving a struck plant.
- Strikers threatening violence against nonstriking employees.
- Strikers attacking management representatives.

The Right to Picket. Likewise the right to picket is subject to limitations and qualifications. As with the right to strike, picketing can be prohibited because of its object or its timing, or misconduct on the picket line. In addition, Section 8(b)(7) declares it to be an unfair labor practice for a union to picket for certain objects whether the picketing accompanies a strike or not. This will be covered in more detail in the section on union unfair labor practices.

Collective Bargaining and Representation of Employees

Collective bargaining is one of the keystones of the Act. Section 1 of the Act declares that the policy of the United States is to be carried out "by encouraging the practice and procedure of collective bargaining and by protecting the exercise by workers of full freedom of association, self-organization, and designation of representatives of their own choosing, for the purpose of negotiating the terms and conditions of their employment or other mutual aid or protection."

Collective bargaining. Collective bargaining is defined in the Act. Section 8(d) requires an employer and the representative of its employees to meet at reasonable times, to confer in good faith about certain matters, and to put into writing any agreement reached if requested by either party. The parties must confer in good faith with respect to wages, hours, and other terms or conditions of employment, the negotiation of an agreement, or any question arising under an agreement.

Duty to bargain imposed on both employer and union. These obligations are imposed equally on the employer and the representative of its employees. It is an unfair labor practice for either party to refuse to bargain collectively with the other. The obligation does not, however, compel either party to agree to a proposal by the other, nor does it require either party to make a concession to the other .

Section 8(d) provides further that when a collective-bargaining agreement is in effect no party to the contract shall end or change the contract unless the party wishing to end or change it takes the following steps:

Bargaining steps to end or change a contract.

1. The party must notify the other party to the contract in writing about the proposed termination or modification 60 days before the date on which the contract is scheduled to expire. If the contract is not scheduled to expire on any particular date, the notice in writing must be served 60 days before the time when it is proposed that the termination or modification take effect.
2. The party must offer to meet and confer with the other party for the purpose of negotiating a new contract or a contract containing the proposed changes.
3. The party must, within 30 days after the notice to the party, notify the Federal Mediation and Conciliation Service of the existence of a dispute if no agreement has been reached by that time. Said party must also notify at the same time any State or Territorial mediation or conciliation agency in the State or Territory where the dispute occurred.
4. The party must continue in full force and effect, without resorting to strike or lockout, all the terms and conditions of the existing contract until 60 days after the notice to the other party was given or until the date the contract is scheduled to expire, whichever is later.

(In the case of a health care institution, the requirement in paragraphs 1 and 4 is 90 days, and in paragraph 3 is 60 days. In addition, there is a 30-day notice requirement to the agencies in paragraph 3 when a dispute arises in bargaining for an initial contract.)

When the bargaining steps are not required. The requirements of paragraphs 2, 3, and 4, above, cease to apply if the NLRB issues a certificate showing that the employees' representative who is a party to the contract has been replaced by a different representative or has been voted out by the employees. Neither party is required to discuss or agree to any change of the provisions of the contract if the other party proposes that the change become effective before the provision could be reopened according to the terms of the contract.

As has been pointed out, any employee who engages in a strike within the notice period loses status as an employee of the struck employer. This loss of status ends, however, if and when that individual is reemployed by the same employer.

The Employee Representative. Section 9(a) provides that the employee representatives that have been "designated or selected for the purposes of collective bargaining by the majority of the employees in a unit appropriate for such purposes, shall be the exclusive representatives of all the employees in such unit for the purposes of collective bargaining."

What is an appropriate bargaining unit. A unit of employees is a group of two or more employees who share a community of interest and may reasonably be grouped together for purposes of collective bargaining. The determination of what is an appropriate unit for such purposes is, under the Act, left to the discretion of the NLRB. Section 9(b) states that the Board shall decide in each representation case whether, "in order to assure to employees the fullest freedom in exercising the rights guaranteed by this Act, the unit appropriate for the purposes of collective bargaining shall be the employer unit, craft unit, plant unit, or subdivision thereof."

This broad discretion is, however, limited by several other provisions of the Act. Section 9(b)(1) provides that the Board shall not approve as appropriate a unit that includes both professional and nonprofessional employees, unless a majority of the professional employees involved vote to be included in the mixed unit.

Section 9(b)(2) provides that the Board shall not hold a proposed craft unit to be inappropriate simply because a different unit was previously approved by the Board, unless a majority of the employees in the proposed craft unit vote against being represented separately.

Section 9(b)(3) prohibits the Board from including plant guards in the same unit with other employees. It also prohibits the Board from certifying a labor organization as the representative of a plant guard unit if the labor organization has members who are nonguard employees or if it is "affiliated directly or indirectly" with an organization that has members who are nonguard employees.

How the appropriateness of a unit is determined. Generally, the appropriateness of a bargaining unit is determined on the basis of a community of interest of the employees involved. Those who have the same or substantially similar interests concerning wages, hours, and working conditions are grouped together in a bargaining unit. In determining whether a proposed unit is appropriate, the following factors are also considered:

1. Any history of collective bargaining.
2. The desires of the employees concerned.
3. The extent to which the employees are organized. Section 9(c)(5) forbids the Board from giving this factor controlling weight.

Finally, with regard to units in the health care industry, the Board also is guided by Congress' concern about preventing disruptions in the delivery of health care services, and its directive to minimize the number of appropriate bargaining units.

Who can or cannot be included in a unit. A unit may cover the employees in one plant of an employer, or it may cover employees in two or more plants of the same employer. In some industries in which employers are grouped together in voluntary associations, a unit may include employees of two or more employers in any number of locations. It should be noted that a bargaining unit can include only persons who are "employees" within the meaning of the Act. The Act excludes certain individuals, such as agricultural laborers, independent contractors, supervisors, and persons in managerial positions, from the meaning of "employees." None of these individuals can be included in a bargaining unit established by the Board. In addition, the Board, as a matter of policy, excludes from bargaining units employees who act in a confidential capacity to an employer's labor relations officials.

Duties of bargaining representative and employer. Once an employee representative has been designated by a majority of the employees in an appropriate unit, the Act makes that representative the exclusive bargaining agent for all employees in the unit. As exclusive bargaining agent it has a duty to represent equally and fairly all employees in the unit without regard to their union membership or activities. Once a collective-bargaining representative has been designated or selected by its employees, it is illegal for an employer to bargain with individual employees, with a group of employees, or with another employee representative.

Section 9(a) provides that any individual employee or a group of employees shall have the right at any time to present grievances to their employer and to have such grievances adjusted without the intervention of the bargaining representative provided:

1. The adjustment is not inconsistent with the terms of any collective-bargaining agreement then in effect.
2. The bargaining representative has been given the opportunity to be present at such adjustment.

How a Bargaining Representative is Selected. The Act requires that an employer bargain with the representative selected by its employees. The most common method by which employees can select a bargaining representative is a secret-ballot representation election conducted by the Board.

Petition for certification of representatives. The NLRB can conduct such an election only when a petition has been filed requesting one. A petition for certification of representatives can be filed by an employee or a group of employees or any individual or labor organization acting on their behalf, or it can be filed by an employer. If filed by or on behalf of employees, the petition must be supported by a substantial number of employees who wish to be represented for collective bargaining and must state that their employer declines to recognize their representative. If

filed by an employer, the petition must allege that one or more individuals or organizations have made a claim for recognition as the exclusive representative of the same group of employees.

Petition for decertification election. The Act also contains a provision whereby employees or someone acting on their behalf can file a petition seeking an election to determine if the employees wish to retain the individual or labor organization currently acting as their bargaining representative, whether the representative has been certified or voluntarily recognized by the employer. This is called a decertification election.

Union-security deauthorization. Provision is also made for the Board to determine by secret ballot whether the employees covered by a union-security agreement desire to withdraw the authority of their representative to continue the agreement. This is called a union-security deauthorization election and can be brought about by the filing of a petition signed by 30 percent or more of the employees covered by the agreement.

If you will refer to the "Types of Cases" on pages 18 and 19, you may find it easier to understand the differences between the six types of petitions that can be filed under the Act.

Purpose of investigation and hearing. The same petition form is used for any kind of Board election. When the petition is filed, the NLRB must investigate the petition, hold a hearing if necessary, and direct an election if it finds that a question of representation exists. The purpose of the investigation is to determine, among other things, the following:

1. Whether the Board has jurisdiction to conduct an election.
2. Whether there is a sufficient showing of employee interest to justify an election.
3. Whether a question of representation exists.
4. Whether the election is sought in an appropriate unit of employees.
5. Whether the representative named in the petition is qualified.
6. Whether there are any barriers to an election in the form of existing contracts or prior elections.

Jurisdiction to conduct an election. The jurisdiction of the NLRB to direct and conduct an election is limited to those enterprises that affect commerce. (This is discussed in greater detail at pp. 33–36.) The other matters listed above will be discussed in turn.

Expedited elections under Section 8(b)(7)(C). First, however, It should be noted that Section 8(b)(7)(C) provides, among other things, that when a petition is filed within a reasonable period, not to exceed 30 days, after the commencement of recognitional or organizational picketing, the NLRB shall "forthwith" order an election and certify the results. This is so if the picketing is not within the protection of the second proviso to Section 8(b)(7)(C). When an election under Section (8)(b)(7)(C) is appropriate, neither a hearing nor a showing of interest is required, and the election is scheduled sooner than under the ordinary procedure.

Showing of interest required. Regarding the showing of interest, it is the policy to require that a petitioner requesting an election for either certification of representatives or decertification show that at least 30 percent of the employees favor an election. The Act also requires that a petition for a union-security deauthorization election be filed by 30 percent or more of the employees in the unit covered by the agreement for the NLRB to conduct an election for that purpose. The showing of interest must be exclusively by employees who are in the appropriate bargaining unit in which an election is sought.

Existence of question of representation. Section 9(c)(1) authorizes the NLRB to direct an election and certify the results thereof, provided the record shows that a question of representation exists. Petitions for certification of representatives present a question of representation if, among other things, they are based on a demand for recognition by the employee representative and a denial of recognition by the employer. The demand for recognition need not be made in any particular form; in fact, the filing of a petition by the representative itself is considered to be a demand for recognition. The NLRB has held that even a representative that is currently recognized by the employer can file a petition for certification and that such petition presents a question of representation provided the representative has not previously been certified.

A question of representation is also raised by a decertification petition that challenges the representative status of a bargaining agent previously certified or currently recognized by the employer. However, a decertification petition filed by a supervisor does not raise a valid question of representation and must be dismissed.

Who can qualify as bargaining representative. Section 2(4) of the Act provides that the employee representative for collective bargaining can be "any individual or labor organization." A supervisor or any other management representative may not be an employee representative. It is NLRB policy to direct an election and to issue a certification unless the proposed bargaining agent fails to qualify as a bona fide representative of the employees. In determining a union's qualifications as bargaining agent, it is the union's willingness to represent the employees rather than its constitution and bylaws that is the controlling factor. The NLRB's power to certify a labor organization as bargaining representative is limited by Section 9(b)(3) which prohibits certification of a union as the

representative of a unit of plant guards if the union "admits to membership, or is affiliated directly or indirectly with an organization which admits to membership, employees other than guards."

Bars to Election—*Existing collective-bargaining contract*. The NLRB has established the policy of not directing an election among employees presently covered by a valid collective-bargaining agreement except in accordance with certain rules. These rules, followed in determining whether or not an existing collective-bargaining contract will bar an election, are called the NLRB contract bar rules. Not every contract will bar an election. Examples of contracts that would not bar an election are:

- The contract is not in writing, or is not signed.
- The contract has not been ratified by the members or the union, if such is expressly required.
- The contract does not contain substantial terms or conditions of employment sufficient to stabilize the bargaining relationship.
- The contract can be terminated by either party at any time for any reason.
- The contract contains a clearly illegal union-security clause.
- The bargaining unit is not appropriate.
- The union that entered the contract with the employer is no longer in existence or is unable or unwilling to represent the employees.
- The contract discriminates between employees on racial grounds.
- The contract covers union members only.
- The contracting union is involved in a basic internal conflict at the highest levels with resulting unstabilizing confusion about the identity of the union.
- The employer's operations have changed substantially since the contract was executed.

Time provisions. Under the NLRB rules a valid contract for a fixed period of 3 years or less will bar an election for the period covered by the contract. A contract for a fixed period of more than 3 years will bar an election sought by a contracting party during the life of the contract, but will act as a bar to an election sought by an outside party for only 3 years following its effective date. A contract of no fixed period will not act as a bar at all.

When a petition can be filed if there is an existing contract. If there is no existing contract, a petition can bring about an election if it is filed before the day a contract is signed. If the petition is filed on the same day the contract is signed, the contract bars an election, provided the contract is effective immediately or retroactively and the employer has not been informed at the time of execution that a petition has been filed. Once the contract becomes effective as a bar to an election, no petition will be accepted until near the end of the period during which the contract is effective as a bar. Petitions filed not more than 90 days but over 60 days before the end of the contract-bar period will be accepted and can bring about an election. These time periods for filing petitions involving health care institutions are 120 and 90 days, respectively. Of course, a petition can be filed after the contract expires. However, the last 60 days of the contract-bar period is called an "insulated" period. During this time the parties to the existing contract are free to negotiate a new contract or to agree to extend the old one. If they reach agreement in this period. petitions will not be accepted until 90 days before the end of the new contract-bar period.

Effect of certification. In addition to the contract-bar rules, the NLRB has established a rule that when a representative has been certified by the Board, the certification will ordinarily be binding for at least 1 year and a petition filed before the end of the certification year will be dismissed. In cases in which the certified representative and the employer enter a valid collective-bargaining contract during the year, the contract becomes controlling, and whether a petition for an election can be filed is determined by the Board's contract-bar rules.

Effect of prior election. Section 9(c)(3) prohibits the holding of an election in any collective-bargaining unit or subdivision thereof in which a valid election has been held during the preceding 12-month period. A new election may be held, however, in a larger unit, but not in the same unit or subdivision in which the previous election was held. For example, if all the production and maintenance employees in Company A, including draftsmen in the company's engineering office, are included in a collective-bargaining unit, an election among all the employees in the unit would bar another election among all the employees in the unit for 12 months. Similarly, an election among the draftsmen only would bar another election among the draftsmen for 12 months. However, an election among the draftsmen would not bar a later election during the 12-month period among all the production and maintenance employees including the draftsmen.

When a petition can be filed if there has been a prior election. It is the Board's interpretation that Section 9(c)(3) prohibits only the holding of an election during the 12-month period, but does not prohibit the filing of a petition. Accordingly, the NLRB will accept a petition filed not more than 60 days before the end of the 12-month period. The election cannot be held, of course, until after the 12-month period. If an election is held and a representative

certified, that certification is binding for 1 year and a petition for another election in the same unit will be dismissed if it is filed during the 1-year period after the certification. If an election is held and no representative is certified, the election bars another election for 12 months. A petition for another election in the same unit can be filed not more than 60 days before the end of the 12-month period and the election can be held after the 12-month period expires.

The Representation Election. Section 9(c)(1) provides that if a question of representation exists, the NLRB must make its determination by means of a secret-ballot election. In a representation election employees are given a choice of one or more bargaining representatives or no representative at all. To be certified as the bargaining representative, an individual or a labor organization must receive a majority of the valid votes cast.

Consent-election agreements. An election may be held by agreement between the employer and the individual or labor organization claiming to represent the employees. In such an agreement the parties would state the time and place agreed on, the choices to be included on the ballot, and a method to determine who is eligible to vote. They would also authorize the NLRB Regional Director to conduct the election.

Who determines election matters. If the parties are unable to reach an agreement, the Act authorizes the NLRB to order an election after a hearing. The Act also authorizes the Board to delegate to its Regional Directors the determination on matters concerning elections. Under this delegation of authority the Regional Directors can determine the appropriateness of the unit, direct an election, and certify the outcome. Upon the request of an interested party, the Board may review the action of a Regional Director, but such review does not stop the election process unless the Board so orders. The election details are left to the Regional Director. Such matters as who may vote, when the election will be held, and what standards of conduct will be imposed on the parties are decided in accordance with the Board's rules and its decisions.

Who may vote in a representation election. To be entitled to vote, an employee must have worked in the unit during the eligibility period set by the Board and must be employed in the unit on the date of the election. Generally, the eligibility period is the employer's payroll period just before the date on which the election was directed. This requirement does not apply, however, to employees who are ill, on vacation, or temporarily laid off, or to employees in military service who appear in person at the polls. The NLRB rules take into consideration the fact that employment is typically irregular in certain industries. In such industries eligibility to vote is determined according to formulas designed to permit all employees who have a substantial continuing interest in their employment conditions to vote. Examples of these formulas, which differ from case to case, are:

- In one case, employees of a construction company were allowed to vote if they worked for the employer at least 65 days during the year before the "eligibility date" for the election.
- In another case longshoremen who worked at least 700 hours during a specified contract year, and at least 20 hours in each full month between the end of that year and the date on which the election was directed, were allowed to vote.
- Radio and television talent employees and musicians in the television film, motion picture, and recording industries have been held eligible to vote if they worked in the unit 2 or more days during the year before the date on which the election was directed.

When strikers may be allowed to vote. Section 9(c)(3) provides that economic strikers who have been replaced by bona fide permanent employees may be entitled to vote in "any election conducted within 12 months after the commencement of the strike." The permanent replacements are also eligible to vote at the same time. As a general proposition, a striker is considered to be an economic striker unless found by the NLRB to be on strike over unfair labor practices of the employer. Whether the economic striker is eligible to vote is determined on the facts of each case.

When elections are held. Ordinarily, elections are held within 30 days after they are directed. Seasonal drops in employment or any change in operations that would prevent a normal work force from being present may cause a different election date to be set. Normally an election will not be conducted when unfair labor practice charges have been filed based on conduct of a nature which would have a tendency to interfere with the free choice of the employees in an election, except that, in certain cases, the Board may proceed to the election if the charging party so requests.

Conduct of elections. NLRB elections are conducted in accordance with strict standards designed to give the employee voters an opportunity to freely indicate whether they wish to be represented for purposes of collective bargaining. Election details, such as time, place, and notice of an election, are left largely to the Regional Director who usually obtains the agreement of the parties on these matters. Any party to an election who believes that the Board election standards were not met may, within 7 days after the tally of ballots has been furnished, file objections to the election with the Regional Director under whose supervision the election was held. In most cases, the Regional Director's rulings on these objections may be appealed to the Board for decision.

An election will be set aside if it was accompanied by conduct that the NLRB considers created an atmosphere of confusion or fear of reprisals and thus interfered with the employees' freedom of choice. In any particular case the NLRB does not attempt to determine whether the conduct actually interfered with the employees' expression of free choice, but rather asks whether the conduct tended to do so. If it is reasonable to believe that the conduct would tend to interfere with the free expression of the employees' choice, the election may be set aside. Examples of conduct the Board considers to interfere with employee free choice are:

- Threats of loss of jobs or benefits by an employer or a union to influence the votes or union activities of employees.
- A grant of benefits or promise to grant benefits to influence the votes or union activities of employees.
- An employer firing employees to discourage or encourage their union activities or a union causing an employer to take such action.
- An employer or a union making campaign speeches to assembled groups of employees on company time within the 24-hour period before the election.
- The incitement of racial or religious prejudice by inflammatory campaign appeals made by either an employer or a union.
- Threats or the use of physical force or violence against employees by an employer or a union to influence their votes.
- The occurrence of extensive violence or trouble or widespread fear of job losses which prevents the holding of a fair election, whether caused by an employer or a union.

Unfair Labor Practices of Employers

The unfair labor practices of employers are listed in Section 8(a) of the Act; those of labor organizations in Section 8(b). Section 8(e) lists an unfair labor practice that can be committed only by an employer and a labor organization acting together. The "Types of Cases" chart at pages 18–19 may be helpful in getting to know the relationship between the various unfair labor practice sections of the Act.

Section 8(a)(1)—Interference with Section 7 Rights. Section 8(a)(1) forbids an employer "to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in section 7." Any prohibited interference by an employer with the rights of employees to organize, to form, join, or assist a labor organization, to bargain collectively, to engage in other concerted activities for mutual aid or protection, or to refrain from any or all of these activities, constitutes a violation of this section. This is a broad prohibition on employer interference, and an employer violates this section whenever it commits any of the other employer unfair labor practices. In consequence, whenever a violation of Section 8(a)(2), (3), (4), or (5) is committed a violation of Section 8(a)(1) is also found. This is called a "derivative violation" of Section 8(a)(1).

Examples of violations of Section 8(a)(1). Employer conduct may, of course, independently violate Section 8(a)(1). Examples of such independent violations are:

- Threatening employees with loss of jobs or benefits if they should join or vote for a union.
- Threatening to close down the plant if a union should be organized in it.
- Questioning employees about their union activities or membership in such circumstances as will tend to restrain or coerce the employees.
- Spying on union gatherings, or pretending to spy.
- Granting wage increases deliberately timed to discourage employees from forming or joining a union.

Section 8(a)(2)—Domination or Illegal Assistance and Support of a Labor Organization. Section 8(a)(2) makes it unlawful for an employer "to dominate or interfere with the formation or administration of any labor organization or contribute financial or other support to it." This section not only outlaws "company unions" that are dominated by the employer, but also forbids an employer to contribute money to a union it favors or to give a union improper advantages that are denied to rival unions.

Domination. A labor organization is considered dominated within the meaning of this section if the employer has interfered with its formation and has assisted and supported its operation and activities to such an extent that it must be looked at as the employer's creation instead of the true bargaining representative of the employees. Such domination is the result of a combination of factors and has been found to exist where there is not only the factor of the employer getting the organization started, but also such other factors as the employer deciding how the organization will be set up and what it will do, or representatives of management actually taking part in the meetings and activities of the organization and trying to influence its actions and policies.

Illegal assistance and support. Certain lesser kinds of employer assistance to a union may constitute unlawful "interference" even if the union is not "dominated" by the employer. For example, an employer may not provide financial support to a union either by direct payments or indirect financial aid. (But an employer does not violate this prohibition by permitting employees to confer with it and/or the union regarding grievances or other union business during working hours without loss of pay.)

When rival unions are competing to organize an employer's employees, the employer is forbidden to give the union it favors privileges it denies to the other union. It is also forbidden to recognize either union once it knows that one of the unions has filed a valid petition with the Board requesting a representation election. When an employer and a union already have an established bargaining relationship, however, the employer is required to continue bargaining with the incumbent even though a rival union is attempting to organize the employees. In these circumstances, the rival's filing of a petition does not prevent continued dealing between the employer and the incumbent unless the incumbent has lost the support of a majority of the employees.

Examples of violation of Section 8(a)(2). An employer violates Section 8(a)(2) by:

- Taking an active part in organizing a union or a committee to represent employees.
- Bringing pressure on employees to support a union financially, except in the enforcement of a lawful union-security agreement.
- Allowing one of several unions, competing to represent employees, to solicit on company premises during working hours and denying other unions the same privilege.
- Soliciting and obtaining from employees and applicants for employment, during the hiring procedure, applications for union membership and signed authorizations for the check-off of union dues.

Remedy in cases of domination differs from that in cases of illegal assistance and support. In remedying such unfair labor practices, the NLRB distinguishes between domination of a labor organization and conduct which amounts to no more than illegal assistance. When a union is found to be dominated by an employer, the Board has announced it will order the organization completely disestablished as a representative of employees. But, if the organization is found only to have been supported by employer assistance amounting to less than domination, the Board usually orders the employer to stop such support and to withhold recognition from the organization until such time as it has been certified by the Board as a bona fide representative of employees.

Section 8(a)(3)—Discrimination Against Employees. Section 8(a)(3) makes it an unfair labor practice for an employer to discriminate against employees "in regard to hire or tenure of employment or any term or condition of employment" for the purpose of encouraging or discouraging membership in a labor organization. In general, the Act makes it illegal for an employer to discriminate in employment because of an employee's union or other group, activity within the protection of the Act. A banding together of employees, even in the absence of a formal organization, may constitute a labor organization for purposes of Section 8(a)(3). It also prohibits discrimination because an employee has refrained from taking part in such union or group activity except where a valid union-security agreement is in effect. Discrimination within the meaning of the Act would include such action as refusing to hire, discharging, demoting, assigning to a less desirable shift or job, or withholding benefits.

The union security exception to Section 8(a)(3). As previously noted, Section 8(a)(3) provides that an employee may be discharged for failing to make certain lawfully required payments to the exclusive bargaining representative under a lawful union-security agreement. For a fuller discussion of this issue, see pages 2–3, above.

Even when there is a valid union-security agreement in effect, an employer may not pay the union the dues and fees owed by its employees. The employer may, however, deduct these amounts from the wages of its employees and forward them to the union for each employee who has *voluntarily* signed a dues "checkoff" authorization. Such checkoff authorization may be made irrevocable for no more than a year. But employees may revoke their checkoff authorizations after a Board-conducted election in which the union's authority to maintain a union-security agreement has been withdrawn.

The Act does not limit employer's right to discharge for economic reasons. This section does not limit an employer's right to discharge, transfer, or layoff an employee for genuine economic reasons or for such good cause as disobedience or bad work. This right applies equally to employees who are active in support of a union and to those who are not.

In situations in which an employer disciplines an employee both because the employee has violated a work rule and because the employee has engaged in protected union activity, the discipline is unlawful unless the employer can show that the employee would have received the same discipline even if he or she had not engaged in the protected union activity.

An employer who is engaged in good-faith bargaining with a union may lock out the represented employees, sometimes even before impasse is reached in the negotiations, if it does so to further its position in bargaining. But a bargaining lockout may be unlawful if the employer is at that time unlawfully refusing to bargain or is bargaining in bad faith. It is also unlawful if the employer's purpose in locking out its employees is to discourage them in their union loyalties and activities, that is, if the employer is motivated by hostility toward the union. Thus, a lockout to defeat a union's efforts to organize the employer's employees would violate the Act, as would the lockout of only those of its employees who are members of the union. On the other hand, lockouts are lawful that are intended to prevent any unusual losses or safety hazards that would be caused by an anticipated "quickie" strike. And a whipsaw strike against one employer engaged in multiemployer bargaining justifies a lockout by any of the other employers who are party to the bargaining.

Examples of violations of Section 8(a)(3). Examples of illegal discrimination under Section 8(a)(3) include:

- Discharging employees because they urged other employees to join a union.
- Refusing to reinstate employees when jobs they are qualified for are open because they took part in a union's lawful strike.
- Granting of "superseniority" to those hired to replace employees engaged in a lawful strike.
- Demoting employees because they circulated a union petition among other employees asking the employer for an increase in pay.
- Discontinuing an operation at one plant and discharging the employees involved followed by opening the same operation at another plant with new employees because the employees at the first plant joined a union.

- Refusing to hire qualified applicants for jobs because they belong to a union. It would also be a violation if the qualified applicants were refused employment because they did not belong to a union, or because they belonged to one union rather than another.

Section 8(a)(4)—Discrimination for NLRB Activity. Section 8(a)(4) makes it an unfair labor practice for an employer "to discharge or otherwise discriminate against an employee because he has filed charges or given testimony under this Act." This provision guards the right of employees to seek the protection of the Act by using the processes of the NLRB. Like the previous section, it forbids an employer to discharge, layoff, or engage in other forms of discrimination in working conditions against employees who have filed charges with the NLRB, given affidavits to NLRB investigators, or testified at an NLRB hearing. Violations of this section are in most cases also violations of Section 8(a)(3).

Examples of violations of Section 8(a)(4) are:

- Refusing to reinstate employees when jobs they are otherwise qualified for are open because they filed charges with the NLRB claiming their layoffs were based on union activity.
- Demoting employees because they testified at an NLRB hearing.

Section 8(a)(5)—Refusal to Bargain in Good Faith. Section 8(a)(5) makes it illegal for an employer to refuse to bargain in good faith about wages, hours, and other conditions of employment with the representative selected by a majority of the employees in a unit appropriate for collective bargaining. A bargaining representative which seeks to enforce its right concerning an employer under this section must show that it has been designated by a majority of the employees, that the unit is appropriate, and that there has been both a demand that the employer bargain and a refusal by the employer to do so.

TYPES OF CASES

I. CHARGES OF UNFAIR LABOR PRACTICES (C Cases)

Charge Against Employer	**Charge Against Labor Organization**		
Section of the Act ***CA***	*Section of the Act* ***CB***	*Section of the Act* ***CC***	*Section of the Act* ***CD***
8(a)(1) To interfere with, restrain, or coerce employees in exercise of their rights under Section 7 (to join or assist a labor organization or to refrain). *8(a)(2)* To dominate or interfere with the formation or administration of a labor organization or contribute financial or other support to it. *8(a)(3)* By discrimination in regard to hire or tenure of employment or any term or condition of employment to encourage or discourage membership in any labor organization. *8(a)(4)* To discharge or otherwise discriminate against employees because they have given testimony under the Act. *8(a)(5)* To refuse to bargain collectively with representatives of its employees.	*8(b)(1)(A)* To restrain or coerce employees in exercise of their rights under Section 7 (to join or assist a labor organization or to refrain). *8(b)(1)(B)* To restrain or coerce an employer in the selection of its representatives for collective bargaining or adjustment of grievances. *8(b)(2)* To cause or attempt to cause an employer to discriminate against an employee. *8(b)(3)* To refuse to bargain collectively with an employer. *8(b)(5)* To require or employees the payment of excessive or discriminatory fees for membership. *8(b)(6)* To cause or attempt to cause an employer to pay or agree to pay money or other thing of value for services which are not performed or not to be performed.	*8(b)(4)(i)* To engage in, or induce or encourage any individual employed by any person engaged in commerce or in an industry affecting commerce to engage in, a strike, work stoppage, or boycott, or *(ii)* to threaten, coerce, or restrain any person engaged in commerce or in an industry affecting commerce, where in either case an object is: *(A)* To force or require any employer or self-employed person to join any labor or employer organization or to enter into any agreement prohibited by Section 8(e) *(B)* To force or require any person to cease using, selling, handling, transporting, or otherwise dealing in the products of any other producer, processor, or manufacturer, or to cease doing business with any other person, or force or require any other employer to recognize or bargain with a labor organization as the representative of its employees unless such labor organization has been so certified. *(C)* To force or require any employer to recognize or bargain with a particular labor organization as the representative of its employees if another labor organization has been certified as the representative.	*8(b)(4)(i)* To engage in, or induce or encourage any individual employed by any person engaged in commerce or in an industry affecting commerce to engage in, a strike, work stoppage, or boycott, or *(ii)* to threaten, coerce, or restrain any person engaged in commerce or in an industry affecting commerce, where in either case an object is: *(D)* To force or require any employer to assign particular work to employees in a particular labor organization or in a particular trade, craft, or class rather than to employees in another trade, craft, or class, unless such employer is failing to conform to an appropriate Board order or certification.
			Section of the Act ***CG***
			8(g) To strike, picket, or otherwise concertedly refuse to work at any health care institution without notifying the institution and the Federal Mediation and Conciliation Service in writing 10 days prior to such action.

TYPES OF CASES—Continued

<table>
<tr><th colspan="2">1. CHARGES OF UNFAIR LABOR
PRACTICES
(C CASES)</th><th>2. PETITIONS FOR CERTIFICATION OR DECERTIFICATION OF REPRESENTATIVES
(R CASES)</th><th>3. OTHER PETITIONS</th></tr>
<tr><th>Charge Against Labor Organization</th><th>Charge Against Labor Organization and Employer</th><th>By or on Behalf of Employees</th><th>By or on Behalf of Employees</th></tr>
<tr><td>Section of the Act
CP</td><td>Section of the Act
CE</td><td>Section of the Act
RC</td><td>Section of the Act
UD</td></tr>
<tr><td rowspan="6">8(b)(7) To picket, or cause or threaten the picketing of, any employer where an object is to force or require an employer to recognize or bargain with a labor organization as the representative of its employees, or to force or require the employees of an employer to select such labor organization as their collective-bargaining representative, unless such labor organization is currently certified as the representative of such employees:
(A) where the employer has lawfully recognized any other labor organization and a question concerning representation may not appropriately be raised under Section 9(c).
(B) where within the preceding 12 months a valid election under Section 9(c) has been conducted, or
(C) where picketing has been conducted without a petition under Section 9(c) being filed within a reasonable period of time not to exceed 30 days from the commencement of the picketing; except where the picketing is for the purpose of truthfully advising the public (including consumers) that an employer does not employ members of, or have a contract with, a labor organization, and it does not have an effect of interference with deliveries or services.</td><td rowspan="6">8(e) To enter into any contract or agreement (any labor organization and any employer) whereby such employer ceases or refrains or agrees to cease or refrain from handling or dealing in any product of any other employer, or to cease doing business with any other person.</td><td>9(c)(1)(A)(i) Alleging that a substantial number of employees wish to be represented for collective bargaining and their employer declines to recognize their representative.*</td><td rowspan="2">9(e)(1) Alleging the employees (30 percent or more of an appropriate unit) wish to rescind an existing union security agreement.</td></tr>
<tr><td>Section of the Act
RD</td><td>By a Labor Organization or an Employer</td></tr>
<tr><td>9(c)(1)(A)(ii) Alleging that a substantial number of employees assert that the certified or currently recognized bargaining representative is no longer their representative.*</td><td>Board Rules
UC</td></tr>
<tr><td>By an Employer</td><td>Subpart C Seeking clarification of an existing bargaining unit.</td></tr>
<tr><td>Section of the Act
RM</td><td>Board Rules
AC</td></tr>
<tr><td>9(c)(1)(B) Alleging that one or more claims for recognition as exclusive bargaining representative have been received by the employer.*

*If an 8(b)(7) charge has been filed involving the same employer, these statements in RC, RD, and RM petitions are not required.</td><td>Subpart C Seeking amendment of an outstanding certification of bargaining representative.</td></tr>
</table>

Charges filed with the National Labor Relations Board are letter-coded and numbered. Unfair labor practice charges are classified as "C" cases and petitions for certification or decertification or representatives as "R" cases. This chart indicates the letter codes used for "C" cases, at left, and "R" cases, above, and also presents a summary of each section involved.

Required subjects of bargaining. The duty to bargain covers all matters concerning rates of pay, wages, hours of employment, or other conditions of employment. These are called "mandatory" subjects of bargaining about which the employer, as well as the employees' representative, must bargain in good faith, although the law does not require "either party to agree to a proposal or require the making of a concession." In addition to wages and hours of work, these mandatory subjects of bargaining include but are not limited to such matters as pensions for present employees, bonuses, group insurance, grievance procedures, safety practices, seniority, procedures for discharge, layoff, recall, or discipline, and union security. Certain managerial decisions such as subcontracting, relocation, and other operational changes may not be mandatory subjects of bargaining, even though they affect employees' job security and working conditions. The issue of whether these decisions are mandatory subjects of bargaining depends on the employer's reasons for taking action. Even if the employer is not required to bargain about the decision itself, it must bargain about the decision's effects on unit employees. On "nonmandatory" subjects, that is, matters that are lawful but not related to "wages, hours, and other conditions of employment," the parties are free to bargain and to agree, but neither party may insist on bargaining on such subjects over the objection of the other party.

Duty to bargain defined. An employer who is required to bargain under this section must, as stated in Section 8(d), "meet at reasonable times and confer in good faith with respect to wages, hours, and other terms and conditions of employment, or the negotiation of an agreement or any question arising thereunder, and the execution of a written contract incorporating any agreement reached if requested by either party."

What constitutes a violation of Section 8(a)(5). An employer, therefore, will be found to have violated Section 8(a)(5) if its conduct in bargaining, viewed in its entirety, indicates that the employer did not negotiate with a good faith intention to reach agreement. However, the employer's good faith is not at issue when its conduct constitutes an out-and-out refusal to bargain on a mandatory subject. For example, it is a violation for an employer, regardless of good faith, to refuse to bargain about a subject that it believes is not a mandatory subject of bargaining, when in fact it is.

Duty to meet and confer. The duty of an employer to meet and confer with the representative of its employees includes the duty to deal with whoever is designated by the employees' representative to carry on negotiations. An employer may not dictate to a union its selection of agents or representatives and the employer must, in general, recognize the designated agent.

Duty to supply information. The employer's duty to bargain includes the duty to supply, on request, information that is "relevant and necessary" to allow the employees' representative to bargain intelligently and effectively with respect to wages, hours, and other conditions of employment.

Multiemployer bargaining. When there is a history of bargaining between a union and a number of employers acting jointly, the employees who are thus represented constitute a multiemployer bargaining unit. Once such a unit has been established, any of the participating employers—or the union—may retire from this multiemployer bargaining relationship only by mutual assent or by a timely submitted withdrawal. Withdrawal is considered timely if unequivocal notice of the withdrawal is given near the termination of a collective-bargaining agreement but before bargaining begins on the next agreement.

Duty to refrain from unilateral action. Finally, the duty of an employer to bargain includes the duty to refrain from unilateral action, that is, taking action on its own with respect to matters concerning which it is required to bargain, and from making changes in terms and conditions of employment without consulting the employees' representative.

Duty of successor employers. An employer who purchases or otherwise acquires the operations of another may be obligated to recognize and bargain with the union that represented the employees before the business was transferred. In general, these bargaining obligations exist—and the purchaser is termed a successor employer—when there is a substantial continuity in the employing enterprise despite the sale and transfer of the business. Whether the purchaser is a successor employer is dependent on several factors, including the number of employees taken over by the purchasing employer, the similarity in operations and product of the two employers, the manner in which the purchaser integrates the purchased operations into its other operations, and the character of the bargaining relationship and agreement between the union and the original employer .

Examples of violations of Section 8(a)(5) are as follows:

- Refusing to meet with the employees' representative because the employees are out on strike.
- Insisting, until bargaining negotiations break down, on a contract provision that all employees will be polled by secret ballot before the union calls a strike.
- Refusing to supply the employees' representative with cost and other data concerning a group insurance plan covering the employees.
- Announcing a wage increase without consulting the employees' representative.

- Failing to bargain about the effects of a decision to close one of the employer's plants.

Section 8(e)—Entering a Hot Cargo Agreement. Section 8(e), added to the Act in 1959, makes it an unfair labor practice for any labor organization and any employer to enter into what is commonly called a "hot cargo" or "hot goods" agreement. It may also limit the restrictions that can be placed on the subcontracting of work by an employer. The typical hot cargo or hot goods clause in use before the 1959 amendment to the Act provided that employees would not be required by their employer to handle or work on goods or materials going to, or coming from, an employer designated by the union as "unfair." Such goods were said to be "hot cargo" thereby giving Section 8(e) its popular name. These clauses were most common in the construction and trucking industries.

What is prohibited. Section 8(e) forbids an employer and a labor organization to make an agreement whereby the employer agrees to stop doing business with any other employer and declares void and unenforceable any such agreement that is made. It should be noted that a strike or picketing, or any other union action, or the threat of it, to force an employer to agree to a hot cargo provision, or to force it to act in accordance with such a clause, has been held by the Board to be a violation of Section 8(b)(4). Exceptions are allowed in the construction and garment industries, and a union may seek, by contract, to keep within a bargaining unit work that is being done by the employees in the unit or to secure work that is "fairly claimable" in that unit.

Exceptions for construction and garment industries. In the construction industry a union and an employer in the industry may agree to a provision that restricts the contracting or subcontracting of work to be done at the construction site. Such a clause contained in the agreement between the employer and the union typically provides that if work is subcontracted by the employer it must go to an employer who has an agreement with the union. A union in the construction industry may engage in a strike and picketing to obtain, but not to enforce, contractual restrictions of this nature. Similarly, in the garment industry an employer and a union can agree that work to be done on the goods or on the premises of a jobber or manufacturer, or work that is part of "an integrated process of production in the apparel and closing industry," can be subcontracted only to an employer who has an agreement with the union. This exception, unlike the previous one concerning the construction industry, allows a labor organization in the garment industry, not only to seek to obtain, but also to enforce, such a restriction on subcontracting by striking, picketing, or other lawful actions.

Unfair Labor Practices of Labor Organizations

Section 8(b)(1)(A)—Restraint and Coercion of Employees. Section 8(b)(1)(A) forbids a labor organization or its agents "to restrain or coerce employees in the exercise of the rights guaranteed in section 7." The section also provides that it is not intended to "impair the rights of a labor organization to prescribe its own rules" concerning membership in the labor organization.

Section 8(b)(1)(A) compared with Section 8(a)(1). Like Section 8(a)(1) , Section 8(b)(1)(A) is violated by conduct that independently restrains or coerces employees in the exercise of their Section 7 rights regardless of whether the conduct also violates other provisions of Section 8(b). But whereas employer violations of Section 8(a)(2), (3), (4), and (5) are held to be violations of Section 8(a)(1) too, the Board has held, based on the intent of Congress when Section 8(b)(1)(A) was written, that violation of Section 8(b)(2) through (7) do not also "derivatively" violate Section 8(b)(1)(A). The Board does hold, however, that making or enforcing illegal union-security agreements or hiring agreements that condition employment on union membership not only violates Section 8(b)(2) but also Section 8(b)(1)(A), because such action restrains or coerces employees in their Section 7 rights.

Union conduct that is reasonably calculated to restrain or coerce employees in their Section 7 rights violates Section 8(b)(1)(A) whether it succeeds in actually restraining or coercing employees.

A union may violate Section 8(b)(1)(A) by coercive conduct of its officers or agents, of pickets on a picket line endorsed by the union, or of strikers who engage in coercion in the presence of union representatives who do not repudiate the conduct.

What violates Section 8(b)(1)(A). Unlawful coercion may consist of acts specifically directed at an employee such as physical assaults, threats of violence, and threats to affect an employee's job status. Coercion also includes other forms of pressure against employees such as acts of a union while representing employees as their exclusive bargaining agent (see Section 9(a), p. 8). A union that is a statutory bargaining representative owes a duty of fair representation to all the employees it represents. It may exercise a wide range of reasonable discretion in carrying out the representative function, but it violates Section 8(b)(1)(A) if, while acting as the employees' statutory bargaining representative, it takes or withholds action in connection with their employment because of their union activities or for any irrelevant or arbitrary reason such as an employee's race or sex.

Section 8(b)(1)(A) recognizes the right of unions to establish and enforce rules of membership and to control their internal affairs. This right is limited to union rules and discipline that affect the rights of employees as union members and that are not enforced by action affecting an employee's employment. Also, rules to be protected must be aimed at matters of legitimate concern to unions such as the encouragement of members to support a lawful strike or participation in union meetings. Rules that conflict with public policy, such as rules that limit a member's right to file unfair labor practice charges, are not protected. And a union may not fine a member for filing a decertification petition although it may expel that individual for doing so. A rule that prohibits a member from resigning from the union is unlawful. The union may not fine a former member for any protected conduct engaged in after he or she resigns.

Examples of violations of Section 8(b)(1)(A). Examples of restraint or coercion that violate Section 8(b)(1)(A) when done by a union or its agents include the following:

- Mass picketing in such numbers that nonstriking employees are physically barred from entering the plant.
- Acts of force or violence on the picket line, or in connection with a strike.
- Threats to do bodily injury to nonstriking employees.
- Threats to employees that they will lose their jobs unless they support the union's activities.
- Statement to employees who oppose the union that the employees will lose their jobs if the union wins a majority in the plant.
- Entering into an agreement with an employer that recognizes the union as exclusive bargaining representative when it has not been chosen by a majority of the employees.
- Fining or expelling members for crossing a picket line that is unlawful under the Act or that violates a no-strike agreement.
- Fining employees for crossing a picket line after they resigned from the union.
- Fining or expelling members for filing unfair labor practice charges with the Board or for participating in an investigation conducted by the Board.

The following are examples of restraint or coercion that violate Section 8(b)(1)(A) when done by a union that is the exclusive bargaining representative:

- - Refusing to process a grievance in retaliation against an employee's criticism of union officers.

- Maintaining a seniority arrangement with an employer under which seniority is based on the employee's prior representation by the union elsewhere.
- Rejecting an application for referral to a job in a unit represented by the union based on the applicant's race or union activities.

Section 8(b)(1)(B)—Restraint and Coercion of Employers. Section 8(b)(1)(B) prohibits a labor organization from restraining or coercing an employer in the selection of a bargaining representative. The prohibition applies regardless of whether the labor organization is the majority representative of the employees in the bargaining unit. The prohibition extends to coercion applied by a union to a union member who is a representative of the employer in the adjustment of grievances. This section is violated by such conduct as the following:

Examples of violations of Section 8(b)(1)(B).

- Insisting on meeting only with a company's owners and refusing to meet with the attorney the company has engaged to represent the company in contract negotiations, and threatening to strike to force the company to accept its demands.
- Striking members of an employer association that bargains with the union as the representative of the employers to compel the struck employers to sign individual contracts with the union.
- Insisting during contract negotiations that the employer agree to accept working conditions that will be established by a bargaining group to which it does not belong.
- Fining or expelling supervisors for the way they apply the bargaining contract while carrying out their supervisory functions or for crossing a picket line during a strike to perform their supervisory duties.

Section 8(b)(2)—Causing or Attempting to Cause Discrimination. Section 8(b)(2) makes it an unfair labor practice for a labor organization to cause an employer to discriminate against an employee in violation of Section 8(a)(3). As discussed earlier, Section 8(a)(3) prohibits an employer from discriminating against an employee in regard to wages, hours, and other conditions of employment for the purpose of encouraging or discouraging membership in a labor organization. It does allow, however, the making of union-security agreements under certain specified conditions. (See pp. 2–3, above.)

What violates Section 8(b)(2). A union violates Section 8(b)(2), for example, by demanding that an employer discriminate against employees because of their failure to make certain otherwise lawful payments to the union when there is no valid union-security agreement in effect. (See pp. 2–3, above.) The section can also be violated by agreements or arrangements with employers that unlawfully condition employment or job benefits on union membership, on the performance of union membership obligations, or on arbitrary grounds. Union conduct affecting an employee's employment in a way that is contrary to provisions of the bargaining contract may likewise be violative of the section. But union action that causes detriment to an individual employee in that individual's employment does not violate Section 8(b)(2) if it is consistent with nondiscriminatory provisions of a bargaining contract negotiated for the benefit of the total bargaining unit or if it is for some other legitimate purpose.

To find that a union caused an employer to discriminate, it is not necessary to show that any express demand was spoken. A union's conduct, accompanied by statements advising or suggesting that action is expected of an employer, may be enough to find a violation of this section if the union's action can be shown to be a causal factor in the employer's discrimination.

Illegal hiring hall agreements and practices. Contracts or informal arrangements with a union under which an employer gives preferential treatment to union members are violations of Section 8(b)(2). It is not unlawful for an employer and a union to enter into an agreement whereby the employer agrees to hire new employees exclusively through the union hiring hall so long as there is neither a provision in the agreement nor a practice in effect that discriminates against nonunion members in favor of union members or otherwise discriminates on the basis of union membership obligations. Both the agreement and the actual operation of the hiring hall must be nondiscriminatory: referrals must be made without reference to union membership or irrelevant or arbitrary considerations such as race. Referral standards or procedures, even if nondiscriminatory on their face, are unlawful when they continue previously discriminatory conditions of referral. However, a union may, in setting referral standards, consider legitimate aims such as sharing available work and easing the impact of local unemployment. It may also charge referral fees if the amount of the fee is reasonably related to the cost of operating the referral service.

Illegal union-security agreements. Union-security agreements that require employees to make certain lawfully required payments to the union after they are hired are permitted by this section as previously discussed. Union-security agreements that do not meet all the requirements listed on page 2 will not support a discharge. A union that attempts to force an employer to enter into an illegal union-security agreement, or that enters into and keeps in effect such an agreement, violates Section 8(b)(2), as does a union that attempts to enforce such an illegal agreement by

bringing about an employee's discharge. Even when a union-security provision of a bargaining contract meets all statutory requirements so that it is permitted by Section 8(a)(3), a union may not lawfully require the discharge of employees under the provision unless the employees had been informed of the union-security agreement and of their specific obligation under it. And a union violates Section 8(b)(2) if it tries to use the union-security provisions of a contract to collect payments other than those that lawfully may be required. (See pp. 2–3, above.) Assessments, fines, and penalties may not be enforced by application of a union-security agreement.

Examples of violations of Section 8(b)(2) are:

- Causing an employer to discharge employees because they circulated a petition urging a change in the union's method of selecting shop stewards.
- Causing an employer to discharge employees because they made speeches against a contract proposed by the union.
- Making a contract that requires an employer to hire only members of the union or employees "satisfactory" to the union.
- Causing an employer to reduce employees' seniority because they engaged in antiunion acts.
- Refusing referral or giving preference on the basis of race or union activities in making job referrals to units represented by the union.
- Seeking the discharge of an employee under a union-security agreement for failure to pay a fine levied by the union.

Section 8(b)(3)—Refusal to Bargain in Good Faith. Section 8(b)(3) makes it illegal for a labor organization to refuse to bargain in good faith with an employer about wages, hours, and other conditions of employment if it is the representative of that employer's employees. This section imposes on labor organizations the same duty to bargain in good faith that is imposed on employers by Section 8(a)(5). Both the labor organization and the employer are required to follow the procedure set out in Section 8(d) before terminating or changing an existing contract (see p. 6).

A labor organization that is the employees' representative must meet at reasonable times with the employer or his designated representative, must confer in good faith on matters pertaining to wages, hours, or other conditions of employment, or the negotiation of an agreement, or any question arising under an agreement, and must sign a written agreement if requested and if one is reached. The obligation does not require the labor organization or the employer to agree to a proposal by the other party or make a concession to the other party, but it does require bargaining with an open mind in an attempt to reach agreement. So, while a union may try in contract negotiations to establish wages and benefits comparable to those contained in other bargaining agreements in the area, it may not insist on such terms without giving the employer an opportunity to bargain about the terms. Likewise, a union may seek *voluntary* bargaining on nonmandatory subjects of bargaining (p. 20), such as a provision for an industry promotion fund, but may not *insist* on bargaining about such subjects or condition execution of a contract on the reaching of agreement on a nonmandatory subject.

When a union has been bargaining with a group of employers in a multiemployer bargaining unit, it may withdraw at any time from bargaining on that basis and bargain with one of the employers individually if the individual employer and the multiemployer group agree to the union's withdrawal. And even in the absence of employer consent, a union may withdraw from multiemployer bargaining by giving the employers unequivocal notice of its withdrawal near the expiration of the agreement but before bargaining on a new contract has begun.

Section 8(b)(3) not only requires that a union representative bargain in good faith with employers, but also requires that the union carry out its bargaining duty fairly with respect to the employees it represents. A union, therefore, violates Section 8(b)(3) if it negotiates a contract that conflicts with that duty, such as a contract with racially discriminatory provisions, or if it refuses to handle grievances under the contract for irrelevant or arbitrary reasons.

Examples of violations of Section 8(b)(3). Section 8(b)(3) is violated by any of the following:

- Insisting on the inclusion of illegal provisions in a contract, such as a closed shop or a discriminatory hiring hall.
- Refusing to negotiate on a proposal for a written contract.
- Striking against an employer who has bargained, and continues to bargain, on a multiemployer basis to compel it to bargain separately.
- Refusing to meet with the attorney designated by the employer as its representative in negotiations.
- Terminating an existing contract and striking for a new one without notifying the employer, the Federal Mediation and Conciliation Service, and the state mediation service, if any.

- Conditioning the execution of an agreement on inclusion of a nonmandatory provision such as a performance bond.
- Refusing to process a grievance because of the race, sex, or union activities of an employee for whom the union is the statutory bargaining representative.

Section 8(b)(4)—Prohibited Strikes and Boycotts. Section 8(b)(4) prohibits a labor organization from engaging in strikes or boycotts or taking other specified actions to accomplish certain purposes or "objects" as they are called in the Act. The proscribed action is listed in clauses (i) and (ii), the objects are described in subparagraphs (A) through (D). A union commits an unfair labor practice if it takes any of the kinds of action listed in clauses (i) and (ii) as a means of accomplishing any of the objects listed in the four subparagraphs.

Proscribed action: Inducing or encouraging a strike work stoppage or boycott. Clause (i) forbids a union to engage in a strike, or to induce or encourage a strike, work stoppage, or a refusal to perform services by "any individual employed by any person engaged in commerce or in an industry affecting commerce" for one of the objects listed in subparagraphs (A) through (D). The words "induce and encourage" are considered by the U. S. Supreme Court to be broad enough to include every form of influence or persuasion. For example, it has been held by the NLRB that a work stoppage on a picketed construction project was "induced" by a union through its business agents who, when they learned about the picketing, told the job stewards that they (the business agents) would not work behind the picket line. It was considered that this advice not only induced the stewards to leave the job, but caused them to pass the information on to their fellow employees, and that such conduct informed the other employees that they were expected not to work behind the picket line. The world "person" is defined in Section 2(1) as including "one or more individuals, labor organizations, partnerships, associations, corporations," and other legal persons. As so defined, the word "person" is broader than the word "employer." For example, a railroad company, although covered by the Railway Labor Act, is excluded from the definition of "employer" in the National Labor Relations Act and, therefore, neither the railroad company nor its employees are covered by the National Labor Relations Act. But a railroad company is a "person engaged in commerce" as defined above and, therefore, a labor organization is forbidden to "induce or encourage" individuals employed by a railroad company to engage in a strike, work stoppage, or boycott for any of the objects in subparagraphs (A) through (D).

Proscribed action: Threats, coercion, and restraint. Clause (ii) makes it an unfair labor practice for a union to "threaten, coerce, or restrain any person engaged in commerce or in an industry affecting commerce" for any of the proscribed objects. Even though no direct threat is voiced by the union, there may nevertheless be coercion and restraint that violates this clause. For example, when a union picketed a construction job to bring about the removal of a nonunion subcontractor in violation of Section 8(b)(4)(B), the picketing induced employees of several other subcontractors to stop work. When the general contractor asked what could be done to stop the picketing, the union's business agent replied that the picketing would stop only if the nonunion subcontractor were removed from the job. The NLRB held this to be "coercion and restraint" within the meaning of clause (ii).

Subparagraph (A)—Prohibited object: Compelling membership in an employer or labor organization or compelling a hot cargo agreement. Section 8(b)(4)(A) prohibits unions from engaging in clause (i) or (ii) action to compel an employer or self-employed person to join any labor or employer organization or to force an employer to enter a hot cargo agreement prohibited by Section 8(e). Examples of violations of this section are:

Examples of violations of Section 8(b)(4)(A).

- In an attempt to compel a beer distributor to join a union, the union prevents the distributor from obtaining beer at a brewery by inducing the brewery's employees to refuse to fill the distributor's orders.
- In an attempt to secure for its members certain stevedoring work required at an employer's unloading operation, the union pickets to force the employer to join an employer association with which the union has a contract.
- A union pickets an employer (one not in the construction and garment industries), or threatens to picket it, to compel that employer to enter into an agreement whereby the employer will only do business with persons who have an agreement with a union.

Subparagraph (B)—Prohibited object: Compelling recognition of an uncertified union. Section 8(b)(4)(B) contains the Act's secondary boycott provision. A secondary boycott occurs if a union has a dispute with Company A and, in furtherance of that dispute, causes the employees of Company B to stop handling the products of Company A, or otherwise forces Company B to stop doing business with Company A. The dispute is with Company A, called the "primary" employer, the union's action is against Company B, called the "secondary" employer, hence the term "secondary boycott." In many cases the secondary employer is a customer or supplier of the primary employer with

whom the union has the dispute. In general, the Act prohibits both the secondary boycott and the threat of it. Examples of prohibited secondary boycotts are:

Examples of violations of Section 8(b)(4)(B).

- Picketing an employer to force it to stop doing business with another employer who has refused to recognize the union.
- Asking the employees of a plumbing contractor not to work on connecting up airconditioning equipment manufactured by a nonunion employer whom the union is attempting to organize.
- Urging employees of a building contractor not to install doors that were made by a manufacturer that is nonunion or that employs members of a rival union.
- Telling an employer that its plant will be picketed if that employer continues to do business with an employer the union has designated as "unfair."

The prohibitions of Section 8(b)(4)(B) do not protect a secondary employer from the incidental effects of union action that is taken directly against the primary employer. Thus, it is lawful for a union to urge employees of a secondary supplier at the primary employer's plant not to cross a picket line there. Section 8(b)(4)(B) also does not proscribe union action to prevent an employer from contracting out work customarily performed by its employees, even though an incidental effect of such conduct might be to compel that employer to cease doing business with the subcontractor.

When an employer is not protected from secondary strikes and boycotts. In order to be protected against the union action that is prohibited under this subparagraph, the secondary employer has to be a neutral as concerns the dispute between the union and the primary employer. For secondary boycott purposes an employer is considered an "ally" of the primary employer and, therefore, not protected from union action in certain situations. One is based on the ownership and operational relationship between the primary and secondary employers. Here, a number of factors are considered, particularly the following: Are the primary and secondary employers owned and controlled by the same person or persons? Are they engaged in "closely integrated operations?" May they be treated as a single employer under the Act? Another test of the "ally" relationship is based on the conduct of the secondary employer. If an employer, despite its claim of neutrality in the dispute, acts in a way that indicates that it has abandoned its "neutral" position, the employer opens itself up to primary action by the union. An example of this would be an employer who, claiming to be a neutral, enters into an arrangement with a struck employer whereby it accepts and performs farmed. out work of that employer who would normally do the work itself, but who cannot perform the work because its plant is closed by a strike.

When a union may picket an employer who shares a site with another employer. When employees of a primary employer and those of a secondary employer work on the same premises, a special situation is involved and the usual rules do not apply. A typical example of the shared site or "common situs" situation is when a subcontractor with whom a union has a dispute is engaged at work on a construction site alongside other subcontractors with whom the union has no dispute. Picketing at a common situs is permissible if directed solely against the primary employer. But it is prohibited if directed against secondary employers regularly engaged at that site. To assist in determining whether picketing at a common situs is restricted to the primary employer and therefore permissible, or directed at a secondary employer and therefore violative of the statute, the NLRB and the courts have suggested various guidelines for evaluating the object of the picketing, including the following.

Subject to the qualification noted below, the picketing would appear to be primary picketing if the picketing is:

1. Limited to times when the employees of the primary employer are working on the premises.
2. Limited to times when the primary employer is carrying on its normal business there.
3. Confined to places reasonably close to where the employees of the primary employer are working.
4. Conducted so that the picket signs, the banners, and the conduct of the pickets indicate clearly that the dispute is with the primary employer and not with the secondary employer.

These guidelines are known as the *Moore Dry Dock* standards from the case in which they were first formulated by the NLRB. However, the NLRB has held that picketing at a common situs may be unlawful notwithstanding compliance with the *Moore Dry Dock* standards if a union's statements or actions otherwise indicate that the picketing has an unlawful objective.

Picketing contractors' gates. In some situations a company may set aside, or reserve, a certain plant gate, or entrance to its premises, for the exclusive use of a contractor. If a union has a labor dispute with the company and pickets the company's premises, including the gate so reserved, the union may be held to have violated Section 8(b)(4)(B). The U.S. Supreme Court has stated the circumstances under which such a violation may be found as follows:

There must be a separate gate, marked and set apart from other gates; the work done by the employees who use the gate must be unrelated to the normal operations of the employer, and the work must be of a kind that would not, if done when the plant were engaged in its regular operations, necessitate curtailing those operations.

However, if the reserved gate is used by employees of both the company and the contractor, the picketing would be considered primary and not a violation of Section 8(b)(4)(B).

Subparagraph (B)—Prohibited object: Compelling recognition of an uncertified union. Section 8(b)(4)(B) also prohibits secondary action to compel an employer to recognize or bargain with a union that is not the certified representative of its employees. If a union takes action described in clause (i) or (ii) against a secondary employer, and the union's object is recognition by the primary employer, the union commits an unfair labor practice under this section. To establish that the union has an object of recognition, a specific demand by the union for recognition need not be shown; a demand for a contract, which implies recognition or at least bargaining, is enough to establish an 8(b)(4)(B) object.

Subparagraph (C)—Prohibited object: Compelling recognition of a union if another union has been certified. Section 8(b)(4)(C) forbids a labor organization from using clause (i) or (ii) conduct to force an employer to recognize or bargain with a labor organization other than the one that is currently certified as the representative of its employees. Section 8(b)(4)(C) has been held not to apply when the picketing union is merely protesting working conditions that are substandard for the area.

Subparagraph (D)—Prohibited object: Compelling assignment of certain work to certain employees. Section 8(b)(4)(D) forbids a labor organization from engaging in action described in clauses (i) and (ii) for the purpose of forcing any employer to assign certain work to "employees in a particular labor organization or in a particular trade, craft, or class rather than to employees in another labor organization or in another trade, craft, or class." The Act sets up a special procedure for handling disputes over work assignments that will be discussed later in this material (see p. 38).

Publicity such as handbilling allowed by Section 8(b)(4). The final provision in Section 8(b)(4) provides that nothing in Section 8(b)(4) shall be construed "to prohibit publicity, other than picketing, for the purpose of truthfully advising the public, including consumers and members of a labor organization, that a product or products are produced by an employer with whom the labor organization has a primary dispute and are distributed by another employer." Such publicity is not protected if it has "an effect of inducing any individual employed by any persons other than the primary employer" to refuse to handle any goods or not to perform services. The Supreme Court has held that this provision permitted a union to distribute handbills at the stores of neutral food chains asking the public not to buy certain items distributed by a wholesaler with whom the union had a primary dispute. Moreover, it has also held that peaceful picketing at the stores of a neutral food chain to persuade customers not to buy the products of a struck employer when they traded in these stores was not prohibited by Section 8(b)(4).

Section 8(b)(5)—Excessive or Discriminatory Membership Fees. Section 8(b)(5) makes it illegal for a union to charge employees who are covered by an authorized union-security agreement a membership fee "in an amount which the Board finds excessive or discriminatory under all the circumstances." The section also provides that the Board in making its finding must consider among other factors "the practices and customs of labor organizations in the particular industry, and the wages currently paid to the employees affected."

Examples of violations of Section 8(b)(5). Examples of violations of this section include:

- Charging old employees who do not join the union until after a union-security agreement goes into effect an initiation fee of $15 while charging new employees only $5.
- Increasing the initiation fee from $75 to $250 and thus charging new members an amount equal to about 4 weeks' wages when other unions in the area charge a fee equal to about one-half the employee's first week's pay.

Section 8(b)(6)—"Featherbedding." Section 8(b)(6) forbids a labor organization "to cause or attempt to cause an employer to pay or deliver or agree to pay or deliver any money or other thing of value, in the nature of an exaction, for services which are not performed or not to be performed."

Section 8(b)(7)—Organizational and Recognitional Picketing by Noncertified Unions. Section 8(b)(7) prohibits a labor organization that is not currently certified as the employees' representative from picketing or threatening to picket with an object of obtaining recognition by the employer (recognitional picketing) or acceptance by his employees as their representative (organizational picketing). The object of picketing is ascertained from all the surrounding facts including the message on the picket signs and any communications between the union and the employer. "Recognitional" picketing as used in Section 8(b)(7) refers to picketing to obtain an employer's initial recognition of the union as bargaining representative of its employees or to force the employer, without formal

recognition of the union, to maintain a specific and detailed set of working conditions. It does not include picketing by an incumbent union for continued recognition or for a new contract. Neither does it include picketing that seeks to prevent the employer from undermining area standards of working conditions by operating at less than the labor costs which prevail under bargaining contracts in the area.

Recognitional and organizational picketing are prohibited in three specific instances.

A. A. When the employer has lawfully recognized another union and a representation election would be barred by either the provisions of the Act or the Board's Rules, as in the case of a valid contract between the employer and the other union (8(b)(7)(A). (A union is considered lawfully recognized when the employer's recognition of the union cannot be attacked under the unfair labor practice provisions of Section 8 of the Act.)

B. B. When a valid NLRB representation election has been held within the previous 12 months (8(b)(7)(8)).

C. C. When a representation petition is not filed "within a reasonable period of time not to exceed thirty days from the commencement of such picketing" (8(b)(7)(C)).

Publicity picketing. Subparagraph (C) is subject to an exception, called a proviso, which permits picketing "for the purpose of truthfully advising the public (including consumers)" that an employer does not employ union members or have a contract with a labor organization. However, such picketing loses the protection of this proviso if it has a substantial effect on the employer's business because it induces "any individual employed by any other person" to refuse to pick up or deliver goods or to perform other services.

Expedited elections under Section 8(b)(7)(C). If an 8(b)(7)(C) charge is filed against the picketing union and a representation petition is filed within a reasonable time after the picketing starts, subparagraph (C) provides for an election to be held forthwith. This election requires neither a hearing nor a showing of interest among the employees. As a consequence the election can be held and the results obtained faster than in a regular election under Section 9(c), and for this reason it is called an "expedited" election. Petitions filed more than a reasonable time after picketing begins and petitions filed during picketing protected by the 8(b)(7)(C) proviso, discussed above, are processed under normal election procedures and the election will not be expedited. The reasonable period in which to file a petition cannot exceed 30 days and may be shorter, when, for instance, picketing is accompanied by violence.

Examples of violations of Section 8(b)(7) are as follows:

- Picketing by a union for organizational purposes shortly after the employer has entered a lawful contract with another union (8(b)(7)(A)).
- Picketing by a union for organizational purposes within 12 months after a valid NLRB election in which a majority of the employees in the unit voted to have no union (8(b)(7)(B)).
- Picketing by a union for recognition continuing for more than 30 days without the filing of a representation petition wherein the picketing stops all deliveries by employees of an other employer (8(b)(7)(C)).

Section 8(e)—Entering a Hot Cargo Agreement. Section 8(e) makes it an unfair labor practice for an employer or a labor organization to enter a hot cargo agreement. This section applies equally to unions and to employers. The discussion of this section as an unfair labor practice of employers has been treated as a discussion of an unfair labor practice of unions as well. (See pp. 21 and 22.)

Section 8(g)—Striking or Picketing a Health Care Institution Without Notice. Section 8(g) prohibits a labor organization from engaging in a strike, picketing, or other concerted refusal to work at any health care institution without first giving at least 10 days' notice in writing to the institution and the Federal Mediation and Conciliation Service.

How the Act Is Enforced

The rights of employees declared by Congress in the National Labor Relations Act are not self-enforcing. To ensure that employees may exercise these rights, and to protect them and the public from unfair labor practices, Congress established the NLRB to administer and enforce the Act.

Organization of the NLRB—*The Board, the General Counsel, the Regional Offices.* The NLRB includes the Board, which is composed of five members with their respective staffs, the General Counsel and staff, and the Regional, Subregional, and Resident Offices. The General Counsel has final and independent authority on behalf of the Board, in respect to the investigation of charges and issuance of complaints. Members of the Board are appointed by the President, with consent of the Senate, for 5-year terms. The General Counsel is also appointed by the President, with consent of the Senate, for a 4-year term. Offices of the Board and the General Counsel are in Washington, D.C. To assist in administering and enforcing the law, the NLRB has established 33 regional and a number of other field offices. These offices, located in major cities in various States and Puerto Rico, are under the general supervision of the General Counsel.

Functions of the NLRB. The Agency has two main functions: to conduct representation elections and certify the results, and to prevent employers and unions from engaging in unfair labor practices. In both kinds of cases the processes of the NLRB are begun only when requested. Requests for such action must be made in writing on forms provided by the NLRB and filed with the proper Regional Office. The form used to request an election is called a "petition," and the form for unfair labor practices is called a "charge." The filing of a petition or a charge sets in motion the machinery of the NLRB under the Act. Before discussing the machinery established by the Act, it would be well to understand the nature and extent of the authority of the NLRB.

Authority of the NLRB—*Enterprises whose operations affect commerce.* The NLRB gets its authority from Congress by way of the National Labor Relations Act. The power of Congress to regulate labor-management relations is limited by the commerce clause of the United States Constitution. Although it can declare generally what the rights of employee are or should be, Congress can make its declaration of rights effective only in respect to enterprises whose operations "affect commerce" and labor disputes that "affect commerce." The NLRB, therefore, can direct elect ions and certify the results only in the case of an employer whose operations affect commerce. Similarly, it can act to prevent unfair labor practices only in cases involving labor disputes that affect, or would affect, commerce.

What is commerce. "Commerce" includes trade, traffic, transportation, or communication within the District of Columbia or any Territory of the United States; or between any State or Territory and any other State, Territory, or the District of Columbia; or between two points in the same State, but through any other State, Territory, the District of Columbia, or a foreign country. Examples of enterprises engaged in commerce are:

- A manufacturing company in California that sells and ships its product to buyers in Oregon.
- A company in Georgia that buys supplies in Louisiana.
- A trucking company that transports goods from one point in New York State through Pennsylvania to another point in New York State.
- A radio station in Minnesota that has listeners in Wisconsin.

When the operations of an employer affect commerce. Although a company may not have any direct dealings with enterprises in any other State, its operations may nevertheless affect commerce. The operations of a Massachusetts manufacturing company that sells all of its goods to Massachusetts wholesalers affect commerce if the wholesalers ship to buyers in other States. The effects of a labor dispute involving the Massachusetts manufacturing concern would be felt in other States and the labor dispute would, therefore, "affect" commerce. Using this test, it can be seen that the operations of almost any employer can be said to affect commerce. As a result, the authority of the NLRB could extend to all but purely local enterprises.

The scope of the commerce clause is limited, however, by the first amendment's prohibition against Congress' enacting laws restricting the free exercise of religion. Because of this potential conflict, and because Congress has not clearly expressed an intention that the Act cover lay faculty in church-operated schools, the Supreme Court has held that the Board may not assert jurisdiction over faculty members in such institutions.

The Board does not act in all cases affecting commerce. Although the National Labor Relations Board could exercise its powers to enforce the Act in all cases involving enterprises whose operations affect commerce, the Board does not act in all such cases. In its discretion it limits the exercise of its power to cases involving enterprises whose effect on commerce is substantial. The Board's requirements for exercising its power or jurisdiction are called "jurisdictional standards." These standards are based on the yearly amount of business done by the enterprise,

or on the yearly amount of its sales or of its purchases. They are stated in terms of total dollar volume of business and are different for different kinds of enterprises. The Board's standards in effect on July 1, 1990, are as follows:

NLRB jurisdictional standards.

1. *Nonretail business:* Direct sales of goods to consumers in other States, or indirect sales through others (called outflow), of at least $50,000 a year; or direct purchases of goods from suppliers in other States, or indirect purchases through others (called inflow), of at least $50,000 a year.
2. *Office buildings:* Total annual revenue of $100,000 of which $25,000 or more is derived from organizations that meet any of the standards except the indirect outflow and indirect inflow standards established for nonretail enterprises.
3. *Retail enterprises:* At least $500,000 total annual volume of business.
4. *Public utilities:* At least $250,000 total annual volume of business, or $50,000 direct or in direct outflow or inflow.
5. *Newspapers:* At least $200,000 total annual volume of business.
6. *Radio, telegraph, television, and telephone enterprises:* At least $100,000 total annual volume of business.
7. *Hotels, motels, and residential apartment houses:* At least $500,000 total annual volume of business.
8. *Privately operated health care institutions:* At least $250,000 total annual volume of business for hospitals; at least $100,000 for nursing homes, visiting nurses associations, and related facilities; at least $250,000 for all other types of private health care institutions defined in the 1974 amendments to the Act. The statutory definition includes: "any hospital, convalescent hospital, health maintenance organizations, health clinic, nursing home, extended care facility or other institution devoted to the care of the sick, infirm, or aged person." Public hospitals are excluded from NLRB jurisdiction by Section 2(2) of the Act.
9. *Transportation enterprise, links and channels of interstate commerce:* At least $50,000 total annual income from furnishing interstate passenger and freight transportation services; also performing services valued at $50,000 or more for businesses which meet any of the jurisdictional standards except the indirect outflow and indirect inflow of standards established for nonretail enterprises.
10. *Transit systems:* At least $250,000 total annual volume of business.
11. *Taxicab companies:* At least $500,000 total annual volume of business.
12. *Associations:* These are regarded as a single employer in that the annual business of all association members is totaled to determine whether any of the standards apply.
13. *Enterprises in the Territories and the District of Columbia:* The jurisdictional standards apply in the Territories; all businesses In the District of Columbia come under NLRB jurisdiction.
14. *National defense:* Jurisdiction is asserted over all enterprises affecting commerce when their operations have a substantial impact on national defense, whether the enterprises satisfy any other standard.
15. *Private universities and colleges:* At least $1 million gross annual revenue from all sources (excluding contributions not available for operating expenses because of limitations imposed by the grantor).
16. *Symphony orchestras:* At least $1 million gross annual revenue from all sources (excluding contributions not available for operating expenses because of limitations imposed by the grantor).
17. *Law firms and legal assistance programs:* At least $250,000 gross annual revenues.
18. *Employers that provide social services:* At least $250,000 gross annual revenues.

Through enactment of the 1970 Postal Reorganization Act, jurisdiction of the NLRB was extended to the United States Postal Service, effective July 1, 1971.

In addition to the above-listed standards, the Board asserts jurisdiction over gambling casinos when these enterprises are legally operated, when their total annual revenue from gambling is at least $500,000.

Ordinarily, if an enterprise does the total annual volume of business listed in the standard, it will necessarily be engaged in activities that "affect" commerce. The Board must find, however, based on evidence, that the enterprise does in fact "affect" commerce.

The Board has established the policy that when an employer whose operations "affect" commerce refuses to supply the Board with information concerning total annual business, the Board may dispense with this requirement and exercise jurisdiction.

Finally, Section 14(c)(1) authorizes the Board, in its discretion, to decline to exercise jurisdiction over any class or category of employers when a labor dispute involving such employees is not sufficiently substantial to warrant the exercise of jurisdiction, provided that it cannot refuse to exercise jurisdiction over any labor dispute over which it would have asserted jurisdiction under the standards it had in effect on August 1, 1959. In accordance with this provision the Board has determined that it will not exercise jurisdiction over racetracks, owners, breeders, and trainers of racehorses, and real estate brokers.

The Act does not cover certain Individuals. In addition to the foregoing limitations, the Act states that the term "employee" shall include any employee *except* the following:

- Agricultural laborers.
- Domestic servants.
- Any individual employed by his parent or spouse.
- Independent contractors.
- Supervisors.
- Individuals employed by an employer subject to the Railway Labor Act.
- Government employees, including those employed by the U .S. Government, any Government corporation or Federal Reserve Bank, or any State or political subdivision such as a city, town, or school district.

Supervisor defined. Supervisors are excluded from the definition of "employee" and, therefore, not covered by the Act. Whether an individual is a supervisor for purposes of the Act depends on that individual's authority over employees and not merely a title. A supervisor is defined by the Act as any individual who has the authority, acting in the interest of an employer, to cause another employee to be hired, transferred, suspended, laid off, recalled, promoted, discharged, assigned, rewarded, or disciplined, either by taking such action or by recommending it to a superior; or who has the authority responsibly to direct other employees or adjust their grievances; provided, in all cases, that the exercise of authority is not of a merely routine or clerical nature, but requires the exercise of independent judgment. For example, a foreman who determined which employees would be laid off after being directed by the job superintendent to layoff four employees would be considered a supervisor and would, therefore, not be covered by the Act; a "strawboss" who, after someone else determined which employees would be laid off, merely informed the employees of the layoff and who neither directed other employees nor adjusted their grievances would not be considered a supervisor and would be covered by the Act.

"Managerial" employees are also excluded from the protection of the Act. A managerial employee is one who represents management interests by taking or recommending actions that effectively control or implement employer policy.

The Act does not cover certain employers. The term "employer" includes any person who acts as an agent of an employer, but it does not include the following:

- The United States or any State Government, or any political subdivision of either, or any Government corporation or Federal Reserve Bank.
- Any employer subject to the Railway Labor Act.

NLRB Procedures. The authority of the NLRB can be brought to bear in a representation proceeding only by the filing of a petition. Forms for petitions must be signed, sworn to or affirmed under oath, and filed with the Regional Office in the area where the unit of employees is located. If employees in the unit regularly work in more than one regional area, the petition may be filed with the Regional Office of any of such regions.

Procedure in representation cases. Section 9(c)(1) provides that when a petition is filed, "the Board shall investigate such petition and if it has reasonable cause to believe that a question of representation affecting commerce exists shall provide for an appropriate hearing upon due notice," if the Board finds from the evidence presented at the hearing that "such a question of representation exists, it shall direct an election by secret ballot and shall certify the results thereof." When there are three or more choices on the ballot and none receives a majority, Section 9(c)(3) provides for a runoff between the choice that received the largest and the choice that received the second largest number of valid votes in the election. After the election, if a union receives a majority of the votes cast, it is certified; if no union gets a majority, that result is certified. A union that has been certified is entitled to be recognized by the employer as the exclusive bargaining agent for the employees in the unit. If the employer fails to bargain with the union, it commits an unfair labor practice.

Procedure in unfair labor practice cases. The procedure in an unfair labor practice case is begun by the filing of a charge. A charge may be filed by an employee, an employer, a labor organization, or any other person. Like petitions, charge forms, which are also available at Regional Offices, must be signed, sworn to or affirmed under oath, and filed with the appropriate Regional Office that is, the Regional Office in the area where the alleged unfair labor practice was committed. Section 10 provides for the issuance of a complaint stating the charges and notifying the charged party of a hearing to be held concerning the charges. Such a complaint will issue only after investigation of the charges through the Regional Office indicates that an unfair labor practice has in fact occurred.

In certain limited circumstances when an employer and union have an agreed-upon grievance arbitration procedure that will resolve the dispute, the Board will defer processing an unfair labor practice case and await

resolution of the issues through that grievance arbitration procedure. If the grievance arbitration process meets the Board's standards, the Board may accept the final resolution and defer that decision. If the procedure fails to meet all the Board standards for deferral, the Board may then resume processing of the unfair labor practice issues.

An unfair labor practice hearing is conducted before an NLRB administrative law judge in accordance with the rules of evidence and procedure that apply in the U.S. district courts. Based on the hearing record, the administrative law judge makes findings and recommendations to the Board. All parties to the hearing may appeal the administrative law judge's decision to the Board. If the board considers that the party named in the complaint has engaged in or is engaging in the unfair labor practices charged, the Board is authorized to issue an order requiring such person to cease and desist from such practices and to take appropriate affirmative action.

The 6-month rule limiting issuance of complaint. Section 10(b) provides that "no complaint shall issue based upon any unfair labor practice occurring more than 6 months prior to the filing of the charge with the Board and the service of a copy thereof upon the person against whom such charge is made." An exception is made if the charging party "was prevented from filing such charge by reason of service in the armed forces, in which event the 6-month period shall be computed from the day of his discharge." It should be noted that the charging party must, within 6 months after the unfair labor practice occurs, file the charge with the Regional Office and serve copies of the charge on each person against whom the charge is made. Normally service is made by sending the charge by registered mail, return receipt requested.

Appeal to the General Counsel if complaint is not issued. If the Regional Director refuses to issue a complaint in any case, the person who filed the charge may appeal the decision to the General Counsel in Washington. Section 3(d) places in the General Counsel "final authority, on behalf of the Board, in respect of the investigation of charges and issuance of complaints." If the General Counsel reverses the Regional Director's decision, a complaint will be issued. If the General Counsel approves the decision not to issue a complaint, there is no further appeal.

Powers of the NLRB. To enable the NLRB to perform its duties under the Act, Congress delegated to the Agency certain powers that can be used in all cases. These are principally powers having to do with investigations and hearings.

Powers concerning investigations. As previously indicated, all charges that are filed with the Regional Office are investigated, as are petitions for representation elections. Section 11 establishes the powers of the Board and the Regional Offices in respect to hearings and investigations. The provisions of Section 11(1) authorize the Board or its agents to:

- Examine and copy "any evidence of any person being investigated or proceeded against that relates to any matter under investigation or in question."
- Issues subpoenas, on the application of any party to the proceeding, requiring the attendance and testimony of witnesses or the production of any evidence.
- Administer oaths and affirmations, examine witnesses, and receive evidence.
- Obtain a court order to compel the production of evidence or the giving of testimony.

The Act is remedial, not criminal. The National Labor Relations Act is not a criminal statute. It is entirely remedial. It is intended to prevent and remedy unfair labor practices, not to punish the person responsible for them. The Board is authorized by Section 10(c) not only to issue a cease-and-desist order, but "to take such affirmative action including reinstatement of employees with or without back pay, as will effectuate the policies of this Act."

Affirmative action may be ordered by the Board. The object of the Board's order in any case is twofold: to eliminate the unfair labor practice and to undo the effects of the violation as much as possible. In determining what the remedy will be in any given case, the Board has considerable discretion. Ordinarily, its order in regard to any particular unfair labor practice will follow a standard form that is designed to remedy that unfair labor practice, but the Board can, and often does, change the standard order to meet the needs of the case. Typical affirmative action of the Board may include orders to an employer who has engaged in unfair labor practices to:

Examples of affirmative action directed to employers.

- Disestablish an employer-dominated union.
- Offer certain named individuals immediate and full reinstatement to their former positions or, if those positions no longer exist, to substantially equivalent positions without prejudice to their seniority and other rights and privileges, and with backpay, including interest.
- On request, bargain collectively with a certain union as the exclusive representative of the employees in a certain described unit and sign a written agreement if an understanding is reached.

Examples of affirmative action directed to unions. Examples of affirmative action that may be required of a union that has engaged in unfair labor practices include orders to:

- Notify the employer and the employees that it has no objection to reinstatement of certain employees, or employment of certain applicants, whose discriminatory discharge, or denial of employment, was caused by the union.
- Refund dues or fees illegally collected, plus interest.
- On request, bargain collectively with a certain employer and sign a written agreement if one is reached.

The Board's order usually includes a direction to the employer or the union or both requiring them to post notices in the employer's plant or the union's office notifying the employees that they will cease the unfair labor practices and informing them of any affirmative action being undertaken to remedy the violation. Special care is taken to be sure that these notices are readily understandable by the employees to whom they are addressed.

Special Proceedings in Certain Cases. Special proceedings are required by the Act in certain kinds of cases. These include the determination of jurisdictional disputes under Section 10(k) and injunction proceedings under Section 10(1) and (j).

Proceedings in jurisdictional disputes. Whenever it is charged that any person has engaged in an unfair labor practice in violation of Section 8(b)(4)(D), the Board must hear and determine the dispute out of which the unfair labor practice arises. Section 8(b)(4)(D) prohibits unions from striking or inducing a strike to compel an employer to assign particular work to employees in one union, or in one trade or craft, rather than another. For a jurisdictional dispute to exist, there must be real competition between unions or between groups of employees for certain work. In effect, Section 10(k) provides an opportunity for the parties to adjust the dispute during a 10-day period after notice of the 8(b)(4)(D) charge has been served. At the end of this period if the parties have not submitted to the Board satisfactory evidence that they have adjusted, or agreed on a method of adjusting, the dispute, the Board is "empowered and directed" to determine which of the competing groups is entitled to have the work.

The investigation of certain charges must be given priority. Section 10(1) provides that whenever a charge is filed alleging a violation of certain sections of the Act relating to boycotts, picketing and work stoppages, the preliminary investigation of the charge must be given priority over all other types of cases in the Regional Office where it is filed. The unfair labor practices subject to this priority concerning the investigation are those defined in Section 8(b)(4)(A), (B), or (C), all three subparagraphs of Section 8(b)(7), Section 8(e) and, where appropriate, 8(b)(4)(D), Section 10(m) requires that second priority be given to charges alleging violations of Section 8(a)(3), the prohibition against employer discrimination to encourage or discourage membership in a union, and Section 8(b)(2), which forbids unions to cause or attempt to cause such discrimination.

Injunction proceedings under Section 10(l). If the preliminary investigation of any of the first priority cases shows that there is reasonable cause to believe that the charge is true and that a complaint should issue, Section 10(l) further requires the Board to petition a U.S. district court to grant an injunction pending the final determination of the Board. The section authorizes the court to grant "such injunctive relief or temporary restraining order as it deems just and proper." Another provision of the section prohibits the application for an injunction based on a charge of violation of Section 8(b)(7) (the prohibition on organizational or recognitional picketing in certain situations) if a charge against an employer alleging violation of Section 8(a)(2) has been filed and the preliminary investigation establishes reasonable cause to believe that such charge is true.

Injunctive relief may be sought in other cases. Section 10(j) allows the Board to petition a Federal district court for an injunction to temporarily prevent any unfair labor practice after a complaint has been issued and to restore the status quo. pending the full review of the case by the Board. This section does not require that injunctive relief be sought, but only makes it possible for the Board to do so in cases when it is considered appropriate.

Court Enforcement of Board Orders—*In the U.S. court of appeals.* If an employer or a union fails to comply with a Board order, Section 10(e) empowers the Board to petition the U.S. court of appeals for a court decree enforcing the order of the Board enjoining conduct that the Board has found to be unlawful. Section 10(l) provides that any person aggrieved by a final order of the Board granting or denying in whole or in part the relief sought may obtain a review of such order in any appropriate circuit court of appeals. When the court of appeals hears a petition concerning a Board order, it may enforce the order, remand it to the Board for reconsideration, change it, or set it aside entirely. If the court of appeals issues a judgment enforcing the Board order, failure to comply may be punishable by fine or imprisonment for contempt of court.

Review by the U.S. Supreme Court. In some cases the U.S. Supreme Court may be asked to review the decision of a circuit court of appeals, particularly when there is a conflict in the views of different courts on the same important problem.

Conclusion

In this material the entire Act has been covered, but, of necessity, the coverage has been brief. No attempt has been made to state the law in detail or to supply you with a textbook on labor law. We have tried to explain the Act in a manner intended to make it easier to understand what the basic provisions of the Act are and how they may concern you. If it helps you to recognize and know your rights and obligations under the Act, and aids in determining whether you need expert assistance when a problem arises, its purpose will have been satisfied. More than that, the objective of the Act will have been furthered.

The objective of the National Labor Relations Act, to avoid or reduce industrial strife and protect the public health, safety, and interest, can best be achieved by the parties or those who may become parties to an individual dispute. Voluntary adjustment of differences at the community and local level is almost invariably the speediest, most satisfactory, and longest lasting way of carrying out the objective of the Act.

Efforts are being made in all our Regional Offices to increase the understanding of all parties about what the law requires of them. Long experience has taught us that when the parties fully understand their rights and obligations, they are more ready and able to adjust their differences voluntarily. Seldom do individuals go into a courtroom, a hearing, or any other avoidable contest, knowing that they are in the wrong and that they can expect to lose the decision. No one really likes to be publicly recorded as a law violator (and a loser too). Similarly, it is seldom that individuals refuse to accept an informal adjustment of differences that is reasonable, knowing that they can obtain no better result from the formal proceeding, even if they prevail.

The consequences of ignorance in these matters—formal proceedings that can be time consuming and costly, and that are often followed by bitterness and antagonism—are economically wasteful, and usually it is accurate to say that neither party really wins. It is in an attempt to bring about more widespread awareness of the basic law and thus help the parties avoid these consequences that this material has been prepared and presented as a part of a continuing program to increase understanding of the National Labor Relations Act.

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