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Labor Union Violence as an Unfair Labor Practice

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LABOR UNION VIOLENCE AS AN UNFAIR LABOR PRACTICE®

THOMAS R. HAGGARD*

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PROLOGUE

Violence is no stranger to the American labor scene. From the first recorded American labor case¹ to the most current advance sheets, the law reports present depressing evidence of how economic conflicts between labor unions and management too often degenerate into acts of physical force and coercion. What one reads in these reports is but a pale reflection of a larger and undoubtedly more vivid reality.

The law has not been without responses. Labor violence has been treated as a conspiracy,² a tort,³ a breach of contract,⁴ an

1. In *Commonwealth v. Pullis* (Philadelphia Mayor's Court, 1806), reported in 3 J. COMMONS, A DOCUMENTARY HISTORY OF AMERICAN INDUSTRIAL SOCIETY, 59-248 (1958), a group of Philadelphia cordwainers were convicted under the criminal conspiracy doctrine for attempting to impose the equivalent of the closed shop on shoemakers within the city. Numerous acts of violence were alleged, including one rather poignant instance of a potato studded with shoe tacks being thrown through a shop window. Nelles, *The First American Labor Case*, 41 YALE L.J. 165, 176 (1931).

2. Many of the early "criminal conspiracy doctrine" cases were often construed as holding labor unions to be illegal per se but they may actually have turned on the fact that overt acts of violence were being committed by the alleged conspirators. Mr. Justice Shaw's brilliant narrowing of that doctrine in *Commonwealth v. Hunt*, 45 Mass. (4 Met.) 111 (1842), specifically left obtaining union objectives by "unlawful" (e.g. tortious) means intact as criminal conspiracy, *id.* at 123. See generally T. HAGGARD, COMPULSORY UNIONISM, THE NLRB, AND THE COURTS 1117 (1977)[hereinafter cited as HAGGARD, COMPULSORY UNIONISM].

3. See Comment, *Tort Liability of Labor Unions for Picket Line Assaults*, 10 U.

enjoinable offense,⁵ and a crime.⁶ Although the effectiveness of each of these legal responses might be questioned,⁷ the purpose of this article is to explore the scope and effectiveness of yet another legal response to acts of violence committed by one of the parties to the employment relationship—namely, the response contained in section 8(b)(1)(A) of the Labor Management Relations Act. This section makes it “an unfair labor practice for a labor organization or its agents . . . to restrain or coerce . . . employees in the exercise of rights guaranteed in section 7,”⁸ particularly the right to refrain from certain union and collective activities.

I. HISTORICAL BACKGROUND AND LEGISLATIVE HISTORY

In the years preceeding the passage of the original Wagner

MICH. J.L. REF. 517 (1977).

4. In this context, the issue is usually whether the misconduct constitutes “cause” for discharge under a collective employment contract. See Haggard, *Picket Line and Strike Violence As a Grounds For Discharge*, 18 Hous. L. Rev. 423 (1981)[hereinafter cited as Haggard, *Picket Line*].

5. Although the Norris-LaGuardia Act significantly limits the use of injunctions in the context of labor disputes, the Act does recognize an exception where acts of violence occur. Norris-LaGuardia Act § 3(e), (i), 29 U.S.C. § 104(e), (i)(1976).

6. In addition to the obvious state law crimes of assault and battery, murder, and trespass to land and chattels, the federal crime of extortion in interstate commerce is also potentially applicable to acts of violence committed by labor unions during a bargaining dispute with an employer. See Haggard, *Labor Violence: The Inadequate Response of the Federal Anti-Extortion Statutes*, 59 NEB. L. Rev. 859 (1980)[hereinafter cited as Haggard, *Labor Violence*].

7. See, e.g., Haggard, *Picket Line*, *supra* note 4; Haggard, *Labor Violence*, *supra* note 6; Willis, *Labor Violence—The Judiciary’s Refusal to Apply the Hobbs Act*, 28 S.C.L. REV. 143 (1976); Stewart & Townsend, *Strike Violence: The Need for Federal Injunctions*, 114 U. PA. L. REV. 459 (1966).

8. Labor Management Relations Act § 8(b)(1)(A), 29 U.S.C. § 158(b)(1)(A)(1976). A second part of this section makes it an unfair labor practice for a labor union to “restrain or coerce . . . an employer in the selection of his representatives for the purposes of collective bargaining or the adjustment of grievances. . . .” Labor Management Relations Act § 8(b)(1)(B), 29 U.S.C. § 158(b)(1)(B) (1976). The “restraint” or “coercion” that occurs most often under § 8(b)(1)(B) consists not of physical violence, but of otherwise peaceful strikes and picketing or the imposition of union discipline on members who also happen to be company supervisors. See generally R. GORMAN, *LABOR LAW* 405-06, 689-94 (1976). Moreover, in cases where the restraint or coercion of the employer in the selection of his collective bargaining representative consists of violent assaults upon management or supervisory personnel, it is likely that such conduct will also indirectly restrain or coerce employees in violation of section 8(b)(1)(A). See, e.g., *Broadway Hospital, Inc.*, 244 N.L.R.B. 341 (1979). The “violence” aspects of a section 8(b)(1)(B) violation do not, thus, warrant separate discussion.

Act, much of the violence perpetrated by, or in the name of, labor unions was allegedly in response to the refusal of employers to recognize and bargain with those unions as the exclusive representatives of their respective employees.⁹ This refusal was not illegal at the time; employers simply believed it to be an exercise of their constitutional rights.¹⁰ Proponents of unionization did not share this view. They considered this legally permitted employer intransigence to be a violation of *their* fundamental liberties of speech, association, and of some obscurely defined right to an "industrial democracy."¹¹ As is often the case when two sides are vigorously asserting mutually inconsistent "rights," the conflict readily and repeatedly produced violence.¹²

The impact of this violence was not, of course, limited to the parties themselves. It resulted in disruptions of production and commerce that ultimately inured to the disadvantage and inconvenience of the population at large. Inevitably, the pressure on Congress to do something about it became compelling. In the early days of the New Deal, after an unsuccessful and unconstitutional experiment in regulating labor relations under the Industrial Recovery Act,¹³ Congress finally responded with the passage of the National Labor Relations Act,¹⁴ often referred to as the Wagner Act after its principal author. In essence, the Wagner Act codified most of the rights that the labor unions had

9. In *NLRB v. Jones & Laughlin Steel Corp.*, the Supreme Court noted that:

[e]xperience has abundantly demonstrated that the recognition of the right of employees to self-organization and to have representatives of their own choosing for the purpose of collective bargaining is often an essential condition of industrial peace. Refusal to confer and negotiate has been one of the most prolific causes of strife. This is such an outstanding fact in the history of labor disturbances that it is a proper subject of judicial notice and requires no citation of instances.

301 U.S. 1, 42 (1937).

10. Since the Supreme Court of this era was a rather vigorous proponent of the "economic" due process doctrine, this belief was by no means an unwarranted one. See generally B. SEGAN, *ECONOMIC LIBERTIES AND THE CONSTITUTION* 126-55 (1980).

11. See generally M. DERBER, *THE AMERICAN IDEA OF INDUSTRIAL DEMOCRACY, 1865-1965* (1970); J. AUERBACH, *LABOR AND LIBERTY* (1966).

12. See generally S. LENS, *THE LABOR WARS* (1973); NATIONAL COMMISSION ON THE CAUSES AND PREVENTION OF VIOLENCE, *VIOLENCE IN AMERICA* 288-89 (1969); J. BECHER, *STRIKE!* (1972); Taft & Ross, *American Labor Violence: Its Causes, Character, and Outcome*, reprinted in *HISTORY OF VIOLENCE IN AMERICA* 281-395 (1969).

13. National Industrial Recovery Act, Pub. L. No. 73-67, 48 Stat. 195 (1933), declared unconstitutional in *Schechter Poultry Corp. v. United States*, 295 U.S. 495 (1935).

14. National Labor Relations Act, Pub. L. No. 74-198, 49 Stat. 449 (1935).

previously claimed and proscribed employer interference with those rights. In particular, the Act made it an "unfair labor practice" for an employer to interfere with the organizational activities of his employees,¹⁵ to dominate or interfere with the formation or activities of labor unions,¹⁶ to discriminate against employees on matters related to unionization,¹⁷ or to refuse to recognize and bargain collectively with the union selected by his employees.¹⁸ There were no corresponding union unfair labor practices.

Although the expressly stated purpose of the Wagner Act was to end strikes and other more egregious forms of industrial warfare,¹⁹ that purpose was apparently not fully served by the legislation. To be sure, the number of employees being represented by labor unions in collective bargaining rose dramatically,²⁰ but so did the number and intensity of strikes.²¹ In 1946, with the inhibiting effects of World War II finally removed, the nation was again inundated by a wave of long and sometimes bitter triangular confrontations between labor unions, non-union

15. *Id.* §§ 7, 8(1).

16. *Id.* § 8(2).

17. *Id.* § 8(3).

18. *Id.* § 8(5).

19. *Id.* § 1, *see also*, A. COX, D. BOK & R. GORMAN, *LABOR LAW—CASES AND MATERIALS* 72-77 (9th ed. 1979).

20. Between 1930 and 1940, union membership as a percentage of all employees in nonagricultural establishments rose from 11.6% to 26.9%. G. BLOOM & H. NORTHRUP, *ECONOMICS OF LABOR RELATIONS* 61 (7th ed. 1973).

21. The Bureau of Labor Statistics Work Stoppage figures for the twenty years between 1927 and 1947 are as follows:

employees, and management.²² These confrontations led to a growing public sentiment that unions were perhaps abusing the powers granted them by the Wagner Act. It was felt that legal constraints were necessary to restore the proper balance and to insure some degree of industrial order. A conservative Congress was apparently sympathetic to this viewpoint and responded in 1947 by passing the Labor Management Relations Act (Taft-Hartley), amending the Wagner Act in several particulars. The most important amendment was the addition of a list of *union* unfair labor practices paralleling, to some extent, those previously applied to employers.

Congressional concern over what many said was an abuse of a union's statutorily enhanced bargaining, organizational, and

[Worker and days idle in thousands]

Year	Stoppages beginning in year			
	Number	Average duration (calendar days)	Workers involved	
			Number	Percent of total employed
1927	707	26.5	330	1.4
1928	604	27.6	314	1.3
1929	921	22.6	289	1.2
1930	637	22.3	183	.8
1931	810	18.8	342	1.6
1932	841	19.6	324	1.8
1933	1,695	16.9	1,170	6.3
1934	1,856	19.5	1,470	7.2
1935	2,014	23.8	1,120	5.2
1936	2,172	23.3	789	3.1
1937	4,740	20.3	1,860	7.2
1938	2,772	23.6	688	2.8
1939	2,613	23.4	1,170	3.5
1940	2,508	20.9	577	1.7
1941	4,268	18.3	2,360	6.1
1942	2,968	11.7	840	2.0
1943	3,752	5.0	1,980	4.6
1944	4,956	5.6	2,120	4.8
1945	4,750	9.9	3,470	8.2
1946	4,985	24.2	4,600	10.5
1947	3,693	25.6	2,170	4.7

U.S. DEP'T OF LABOR, BUREAU OF LABOR STATISTICS, HANDBOOK OF LABOR STATISTICS 508 (1978). Apologists for the Wagner Act, of course, explain these statistics by reference to factors other than a failure of the underlying policy. See, e.g., I. BERNSTEIN, *THE NEW DEAL COLLECTIVE BARGAINING POLICY* 143-45 (1975).

22. See J. BRECHER, *STRIKE!* 276-80 (1972).

other economic powers was reflected in the new provisions. The Act made it an unfair labor practice for unions to refuse to bargain in good faith with employers,²³ to involve so-called "secondary employers" in labor disputes not of their own making,²⁴ or to engage in organizational or recognitional picketing.²⁵ A similar concern is evidenced in the prohibition of the "union shop" and of even peaceful union efforts to obtain and enforce these restrictive arrangements.²⁶

Congress, however, was concerned with more than merely figurative "coercive" union conduct. The legislative history clearly indicates equivalent dismay over the many reported instances of actual physical violence and intimidation that labor union supporters had directed against both employers and employees not sympathetic to the union cause.²⁷ In the case of violence directed towards employers, Congress simply reaffirmed what it thought should have been clear under the Wagner Act: that employee acts of personal intimidation toward supervisors and damage to company property are not a form of "concerted activity" protected by section 7. Rather, they are acts for which that employee can be discharged.²⁸ Congress went further in the

23. Labor Management Relations Act § 8(b)(3), 29 U.S.C. § 158(b)(3)(1976).

24. Labor Management Relations Act § 8(b)(4), 29 U.S.C. § 158(b)(4)(1976).

25. Labor Management Relations Act § 8(b)(7), 29 U.S.C. § 158(b)(7)(1976).

26. Labor Management Relations Act § 8(a)(3), (b)(2), 29 U.S.C. § 158(a)(3), (b)(2)(1976); see generally Haggard, *A Clarification of the Types of Union Security Agreements Affirmatively Permitted by Federal Statutes*, 5 RUT.CAM. L.J. 418, 439-44 (1974).

27. See, e.g., Labor Management Relations Act, Ch. 120, Pub. L. No. 101 (1947)(codified at 29 U.S.C. §§ 141-187 (1976)), reprinted in SUBCOMMITTEE ON LABOR OF THE SENATE COMM. ON LABOR AND PUBLIC WELFARE, 93d Cong., 2d Sess., LEGISLATIVE HISTORY OF THE LABOR MANAGEMENT RELATIONS ACT OF 1947, at 456, 882, 898, 905, 912, 1025, 1207-08 [hereinafter cited as LEGIS. HIST. LMRA]. The House Committee Report on an early version of what was to eventually become the Taft-Hartley Act explained:

For the last 14 years, as a result of labor laws ill-conceived and disastrously executed, the American workingman has been deprived of his dignity as an individual. He has been cajoled, coerced, intimidated, and on many occasions beaten up, in the name of the splendid aims set forth in section 1 of the National Labor Relations Act. . . .

The employer's plight has likewise not been happy. . . . He has been required to employ or reinstate individuals who have destroyed his property and assaulted other employees. . . . He has had to stand helplessly by while employees desiring to enter his plant to work have been obstructed by violence, mass picketing, and general rowdiness.

Id. at 295-96.

28. See generally Haggard, *Picket Line*, *supra* note 4, at 444-48.

case of violence directed toward employees and made it an unfair labor practice for a labor organization or its agents to commit acts of violence directed at the employer's other employees.

In many respects, the original House version of the Taft-Hartley Act was more stringent than the final bill. It made it an unfair labor practice for any employee, "by intimidating practices," to interfere with the section 7 rights of other employees.²⁹ Similarly, the original House version made it an unfair labor practice for a labor organization "to interfere with, restrain, or coerce individuals in the exercise of rights guaranteed in section 7(b)."³⁰ The section defining "unlawful concerted activities" specifically described the kinds of conduct which the authors of the bill apparently intended to prohibit, namely:

By the use of force or violence or threats thereof, preventing or attempting to prevent any individual from quitting or continuing in the employment of, or from accepting or refusing employment by, any employer; or by the use of force, violence, physical obstruction, or threats thereof, preventing or attempting to prevent any individual from freely going from any place and entering upon an employer's premises, or from freely leaving an employer's premises and going to any other place; or picketing an employer's place of business in numbers or in a manner otherwise than is reasonably required to give notice of the existence of a labor dispute at such place of business; or picketing or besetting the home of any individual in connection with any labor dispute.³¹

Persons injured by these activities were authorized to sue in federal court to recover the damages sustained as a result thereof.³²

The Committee Report adds little to this, except perhaps to suggest that mass picketing was a form of intimidation that was of special concern. It alone is cited as an example on several occasions.³³ The House debates on the original House bill are not particularly enlightening either. They refer to the problem of employee intimidation by labor union officials in general terms

29. LEGIS. HIST. LMRA at 52.

30. *Id.* at 52-53.

31. *Id.* at 78.

32. *Id.* at 79.

33. *Id.* at 296, 297, 335.

only.³⁴

In comparison to its House counterpart, the bill as originally introduced in the Senate was more moderate in its delineation of union unfair labor practices. In fact, it did not include any prohibition against union coercion of employees in the exercise of their statutory rights. Four members of the Senate Committee which introduced the bill proposed to correct that omission by floor amendments. In their Supplemental Views which were attached to the Senate Report, they indicated that "[t]he committee heard many instances of union coercion of employees such as that brought about by threats of reprisal against employees and their families in the course of organizing campaigns; also direct interference by mass picketing and other violence."³⁵ Accordingly, Senator Ball introduced a floor amendment adding a provision similar to the one in the House version making it an unfair labor practice for a labor organization "to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed by section 7."³⁶

The debate on this amendment was fairly extensive and is enlightening in several aspects. Among other things, the proponents of this amendment gave some fairly specific examples of the kinds of union conduct they intended to prohibit. As in the House debates, mass picketing was a repeated example.³⁷ The use or threatened use of ordinary physical violence as a means of forcing employees to support the union during an organizational or recognitional drive was frequently cited as an evil to which the amendment was directed. Senator Ball, for example, referred to a letter from a small employer in New York:

He is a wholesaler, and he tells how a goon squad from Union Local No. 65 of the CIO on several occasions sent gangs of men into his plant. They pushed his employees around and threatened them if they did not join the union. Finally, in desperation, many of them said, "We do not want to be beaten up, so we will join," even though it was not their free choice.³⁸

He also referred to a case where the union "several times

34. See, e.g., *id.* at 647, 649, 677.

35. *Id.* at 456.

36. *Id.* at 1018.

37. *Id.* at 1020, 1032, 1199, 1202.

38. *Id.* at 1018.

threatened, jostled, and beat up one of the employees as he was going to work.”³⁹ There are many other less specific references to beatings, threats, physical violence, and similar kinds of “goon squad” tactics.⁴⁰

The debates, however, also make it clear that the prohibition was intended to extend beyond coercive conduct that might otherwise be actionable under state criminal or civil law. Senator Ball, for example, noted that “if the unions, in their organizing drives cannot persuade a majority to join voluntarily, they place a picket line in front of the shop, make scurrilous remarks about the employees as they go to work, and subject them to all kinds of abuse, even verging on physical violence, but very often not reaching the point where State laws would come into effect.”⁴¹ The opponents of the amendment, on the other hand, feared that the prohibition might indeed reach too far. In particular, they were concerned that the phrase “interfere with” might be construed so broadly as to limit union organizers in making vigorous but peaceful appeals on behalf of the union cause.⁴²

As a matter of logic, the opponents’ fears may not have been totally unfounded. The “interfere with, restrain, or coerce” language of the amendment was identical to the equivalent Wagner Act prohibition against employer conduct. Senator Ball clearly stated that “[t]he purpose of the amendment is simply to provide that where unions, in their organizational campaigns, indulge in practices which, if an employer indulged in them, would be unfair labor practices, . . . the unions also shall be guilty of unfair labor practices.”⁴³ At one point in time the Board and some courts had indeed taken a narrow view of what an employer could say in opposition to unionization without committing an unfair labor practice.⁴⁴ In any event, without conceding

39. *Id.* at 1019.

40. *Id.* at 1020, 1024, 1025, 1028, 1031.

41. *Id.* at 1019-20. *See also, id.* at 1018, 1031.

42. *Id.* at 1023, 1138.

43. *Id.* at 1018. *See also, id.* at 1021, 1025, 1031, 1203.

44. *See, e.g., NLRB v. Federbush Co.*, 121 F.2d 954, 957 (2d Cir. 1941) (“What to an outsider will be no more than the vigorous presentation of a conviction, to an employee may be the manifestation of a determination which it is not safe to thwart,” thus making such a presentation a prohibited form of “interference.”). On the other hand, the fears of the opposition were perhaps unfounded in light of the further proposed addition to the statute of section 8(c), which was to severely limit the kinds of speech that could be considered an unfair labor practice by employers or unions. *See Labor Management Re-*

that it materially changed the scope of the prohibition, the proponents of the amendment finally agreed to drop the phrase "interfered with,"⁴⁵ and the amendment passed.⁴⁶

Even with the elimination of the arguably vague notion of interference, the prohibition against union restraint and coercion of employees remained fairly broad and was certainly intended to *at least* encompass any conduct even colorably tortious or criminal in nature. This suggests that the so-called "milder forms" of labor-related violence, tolerated by the law in other contexts,⁴⁷ were clearly intended to be considered an unfair labor practice when perpetrated by those acting on behalf of labor organizations.

Proving that the perpetrators of violence were acting on behalf of a labor union, and that a labor union was thus legally responsible for the conduct, was a difficulty recognized by both the opponents and proponents of section 8(b)(1). Senator Pepper, for example, doubted that making this conduct a union unfair labor practice would really solve the problems being referred to:

I wonder if, in the main, the abuses to which the Senator [Ball] refers are not acts which are consummated by individuals and which, if wrong, are their individual responsibility, but which cannot fairly be charged against the organization, the union, itself. Seldom would it be possible to find any resolution on the part of the union, or any action by the executives or authoritative agents of the union, directing that the acts complained of be committed.⁴⁸

Senator Ball, however, apparently believed that the responsibility of unions could be proved by somewhat less direct evidence:

I am sorry that I cannot agree with the Senator. I think that when there are mass picket lines, which usually produce acts of violence, which are organized in front of the entrance of

lations Act § 8(c), 29 U.S.C. § 158(c) (1976). See also LEGIS. HIST. LMRA at 1023 (in which Senator Taft contended that the hypotheticals posed by the opposition could not be considered a prohibited form of interference because of the proposed free speech provision).

45. LEGIS. HIST. LMRA at 1138-39.

46. *Id.* at 1216-17.

47. See generally Haggard, *Picket Line*, *supra* note 4, at 448-66.

48. LEGIS. HIST. LMRA at 1020.

a plant, it is virtually always the union leaders who organize them. Sometimes it may be a small minority of the union.⁴⁹

Senator Taft also conceded that “it may be difficult to prove the responsibility of a union”⁵⁰ for certain kinds of coercive conduct, such as telephone threats. Congress, however, apparently thought it was not an insurmountable difficulty—certainly not a reason for rejecting the proposed prohibition—and adopted the ordinary common law rules of agency for establishing union responsibility.⁵¹

Unlike the House version, the Senate bill did not contain a provision making it an unfair labor practice for individual employees to intimidate other employees in the exercise of section 7 rights. Nor did the Senate bill contain an equivalent of the House section on “unlawful concerted activities” which allowed for private damage actions by the victims of union violence. Because of these and other substantial differences between the House and the Senate bills, a joint conference committee was appointed.

The bill eventually reported out by the joint committee followed the Senate version in most material respects.⁵² Insofar as acts of union violence were concerned, the committee version followed the Senate amendment to section 8(b)(1) to the letter.⁵³ The House Conference Report, wherein the House members of the joint committee explained the differences between the House bill as originally passed and the committee (Senate) version and the reasons for their acceptance of the latter, does not say a great deal about section 8(b)(1)(A). The Report does, however, express the view that the kinds of conduct generally described in the “unlawful concerted activities” section of the House bill were now effectively proscribed as an unfair labor practice.⁵⁴ Although private remedies were not made expressly available by the committee bill, the Report noted that since section 301(b) made unions generally liable to suit, “unions that

49. *Id.* at 1020.

50. *Id.* at 1026-27.

51. See text accompanying note 64 *infra*.

52. For a detailed comparison of the Senate and committee bills, see LEGIS. HIST. LMRA at 1536-44.

53. *Id.* at 1539.

54. *Id.* at 546.

engage in these practices to the injury of another may subject themselves to liability under ordinary principles of law.”⁵⁵ The Report also noted the availability of injunctive relief, if requested by National Labor Relations Board, against violent conduct in violation of this section.⁵⁶

The Report’s explanation of omitting the “interference with” language comports generally with the above discussion. It noted the concern that the term might not be construed as it had been in the employer unfair labor practice section (as being no broader than the words “restraint” and “coercion”), and the term was thus omitted.⁵⁷ The use of this reasoning implies that the omission is otherwise without substantive significance.

With respect to the standard to be used in holding a union responsible for the violent conduct of individuals acting on the union’s behalf, the Committee Report noted substantial agreement between the House and the Senate bills. The original House bill had specifically stated that the Norris-LaGuardia Act was not to apply to the “unlawful concerted activities” section.⁵⁸ Under the Norris-LaGuardia Act, no labor organization or its officials could be held responsible for the acts of an individual member or official “except upon clear proof of actual participation in, or actual authorization of, such acts, or of ratification of such acts after actual knowledge thereof.”⁵⁹ In one case,⁶⁰ at least as it was construed by Senator Taft,⁶¹ the Supreme Court had held that the liability of a union under the Act’s definition was more limited than would be the case under the normal rules of agency. Senator Taft made it clear that the term “agent” in the proposed section 8(b) was not to have a similarly constricted meaning; but it was not to automatically include every individual who might happen to be a member of the union:

I think the word “agent” used here, as used in the contract section, and as used in other places in the bill, means an agent under the ordinary rules of agency, an agent of the labor union, the organization, as such. The fact that a man was a member of

55. *Id.*

56. *Id.* at 546-47.

57. *Id.* at 547.

58. *Id.* at 79-80.

59. Norris LaGuardia Act § 6, 29 U.S.C. § 106 (1976).

60. *United Bhd. of Carpenters v. United States*, 330 U.S. 395 (1947).

61. LEGIS. HIST. LMRA at 1599.

a labor union in my opinion would be no evidence whatever to show that he was an agent.⁶²

In order to clearly express this intention, the “definitions” section of the committee bill contained the following provision: “In determining whether any person is acting as an ‘agent’ of another person so as to make such other person responsible for his acts, the question of whether the specific acts performed were actually authorized or subsequently ratified shall not be controlling.”⁶³

The House Committee Report summarized the above background and concluded that “[h]ence, under the conference agreement, as under the House bill, both employers and labor organizations will be responsible for the acts of their agents in accordance with the ordinary common law rules of agency (and only ordinary evidence will be required to establish the agent’s authority.)”⁶⁴

The House debates on the committee (Senate) bill add little to the Committee Report explanation. Strike violence is generally referred to several times.⁶⁵ Mass picketing is again singled out as one particular kind of union conduct section 8(b)(1)(A) was designed to prohibit.⁶⁶ One speaker also referred to “sit down strikes” as a form of union unfair labor practice under this section.⁶⁷ Some members of the House had apparently expressed misgiving over the adequacy of the penalties under the committee (Senate) bill. In response, Congressman Landis detailed them as follows: “[O]n violence, mass picketing, and other intimidation and coercion, the penalties are, first discretionary injunction by the Board, second, possible suit for damages, third, cease-and-desist order of the Board, and fourth, employee discharged therefor not entitled to reinstatement.”⁶⁸ The final Senate debates on the committee bill add no further enlightenment on section 8(b)(1)(A).

62. *Id.* at 1204-05.

63. Labor Management Relations Act § 2(13), 29 U.S.C. § 152(13) (1976).

64. LEGIS. HIST. LMRA at 540; see also *id.* at 1537.

65. *Id.* at 882, 898, 927.

66. *Id.* at 882, 905, 912, 927. *But cf., id.* at 1202-03 (recognizing that unfair labor practice proceedings would be “a completely impractical way of dealing with a mass picket line” and declaring, thus, that this was not a “major objective” of the section).

67. *Id.* at 912.

68. *Id.* at 905.

It is against this background that the current Board and court decisions must be viewed.

II. THE ELEMENTS OF A SECTION 8(b)(1)(A) VIOLATION

There are three basic elements of a section 8(b)(1)(A) violation. First, the conduct that is to be sanctioned must fall within the legal definitions of "restraint" or "coercion." Second, the restraint or coercion of employees must be in the exercise of their section 7 rights. And third, the conduct must have been committed by a labor organization or its agents. These elements will be discussed more fully in turn.

A. *The Meaning of Restraint and Coercion*

1. *Introduction: General Legal Principles*

Several important issues concerning the exact scope of section 8(b)(1)(A) have arisen over the years. There was the question of whether recognitional picketing, although of a peaceful and not otherwise illegal nature, could nevertheless constitute "restraint" or "coercion" under section 8(b)(1)(A). The Supreme Court ultimately decided this issue in the negative.⁶⁹ An important aspect of the theoretical relationship between section 8(b)(1)(A) and other union unfair labor practice provisions was resolved when it was finally decided that violations of other provisions did not also *necessarily* amount to restraint or coercion under section 8(b)(1)(A).⁷⁰ A controversy still exists over the extent to which a union can fine or otherwise discipline its current (or former) members without restraining or coercing them.⁷¹ In a

69. *NLRB v. Local 639, Int'l Bhd. of Teamsters*, 362 U.S. 274 (1960).

70. *National Maritime Union (Texas Co.)*, 78 N.L.R.B. 971, 982-87 (1948), *enforced*, 175 F.2d 686 (2d Cir. 1949), *cert. denied*, 338 U.S. 954 (1950) (overruled on other grounds, 119 N.L.R.B. 307, 308 n.3 (1957)); *see IBEW v. NLRB*, 341 U.S. 694, 701-03 (1951). This is to be contrasted with the theoretical relationship between section 8(a)(1) and other employer unfair labor practices. Commission of any of the latter will necessarily also be a "derivative" form of "interference, restraint, and coercion" under the former. *See generally* R. GORMAN, *LABOR LAW* 132 (1976); Oberer, *The Scierter Factor in Sections 8(a)(1) and (3) of the Labor Act: Of Balancing, Hostile Motive, Dogs and Tails*, 52 CORNELL L.Q. 491 (1967).

71. *See Machinists Local 1327 (Dalmo Victor)*, 263 N.L.R.B. No. 141 (1982). *See generally* R. GORMAN, *LABOR LAW* 677-89 (1976).

dispute over the fundamental nature and intended scope of section 8(b)(1)(A), the District of Columbia Circuit Court of Appeals recently reversed a Board finding that a union does not restrain or coerce an employee when it refuses to allow him to post materials critical of the union on the union's inplant bulletin board.⁷²

However cloudy the ultimate dimensions of section 8(b)(1)(A), one thing is absolutely clear from the case law: the section *does* prohibit violence, physically intimidating conduct, and threats thereof. In one case, the Supreme Court reviewed the legislative history and observed that "[t]he note repeatedly sounded is as to the necessity for protecting individual workers from union organizational tactics tinged with violence, duress or reprisal."⁷³ Similarly, in an early case, the Board noted that in this section "Congress sought to fix the rules of the game, to insure that strikes and other organizational activities of employees were conducted peaceably by persuasion and propaganda and not by physical force, or threats of force, . . ."⁷⁴ Indeed, given the legislative history, no other conclusion is possible.

The Board and the courts adhere fairly consistently to an objective approach in identifying specific union conduct that falls within the above descriptions and which does, thus, restrain or coerce. The question is not whether a union agent subjectively intended to restrain or coerce. Nor is it whether any employees were in fact restrained or coerced.⁷⁵ The test, rather, "is whether the misconduct is such that, under the circumstances existing, it may reasonably tend to coerce or intimidate employees in the exercise of rights protected under the Act."⁷⁶ In the words of the First Circuit, "[a] violation is established if the nat-

72. *Helton v. NLRB*, 656 F.2d 883 (D.C. Cir. 1981).

73. *NLRB v. Local 639, Int'l Bhd. of Teamsters*, 362 U.S. 274, 286 (1960).

74. *Perry Norvell Co.*, 80 N.L.R.B. 225, 239 (1948).

75. *United Steelworkers Local 1397*, 240 N.L.R.B. 848, 849 (1979); *cf. United Rubber Workers Local 796* (Tennessee Wheel & Rubber Co.), 166 N.L.R.B. 165, 171 (1967) (the union agent's "motive" is likewise irrelevant). *But cf. Millwrights Local 1421*, *United Bhd. of Carpenters* (Jervis B. Webb Co.), 156 N.L.R.B. 94, 98 (1965) (the trial examiner conceded that the union agent's conduct "was bound to fill them [the employees] with some apprehension. . . . But I cannot conclude that Carter [the union agent] consciously intended to terrify them, or that they were actually terrified, or that either of them fled in fear of his life.").

76. *Local 542, Operating Eng'rs v. NLRB*, 328 F.2d 850, 852-53 (3d Cir. 1964), *cert. denied*, 379 U.S. 826 (1964).

ural tendency of the coercive misconduct is to deter the exercise of § 7 rights by the employees who either witness it or learn of it.”⁷⁷ Similarly, “[t]hat no one was in fact coerced or intimidated is of no relevance. The test of coercion and intimidation is not whether the misconduct proves effective.”⁷⁸ Thus, a violation can be made out even if the employees against whom the violence is directed nevertheless successfully persist in the exercise of their section 7 rights.⁷⁹

Against this background, it is not too surprising to find that the Board and the courts have been willing to include a wide range of strike, picket line, and organizational campaign misconduct within the prohibitions of section 8(b)(1)(A). Indeed, some apparently believe that the law imposes an unreasonably high standard of conduct. One trial examiner rather sarcastically noted, “[i]t may seem unrealistic to require that a picket line shed the sweetness and charm of Vassar’s daisy chain or that it maintain the dignity of the procession of cardinals (although so close a formation would not be tolerated), but that appears to be the trend of Board decisions.”⁸⁰

Such hyperbole aside, there is obviously a threshold level of coerciveness to which the misconduct must rise, and not every form of harassment, nonprivileged touching, or verbal abuse qualifies. The Board recognizes, for example, that some misconduct is simply “too trivial to be regarded as restraint or coercion.”⁸¹ Other misconduct has been dismissed as mere “picket

77. *NLRB v. Union Nacional de Trabajadores*, 540 F.2d 1, 7 (1st Cir. 1976), *cert. denied*, 429 U.S. 1039 (1977).

78. *Local 542, Operating Eng'rs v. NLRB*, 328 F.2d at 852.

79. *See, e.g.*, *Local 3887, United Steelworkers (Stephenson Brick & Tile Co.)*, 129 N.L.R.B. 6, 10 (1960), *enforced*, 290 F.2d 587 (5th Cir. 1961); *Local 761, Int'l Union of Elec. Workers (Gen. Elec. Co.)*, 126 N.L.R.B. 123, 124-25 (1960), *enforced*, 287 F.2d 565 (6th Cir. 1961); *United Furniture Workers Local 309 (Smith Cabinet Mfg. Co.)*, 81 N.L.R.B. 886, 888 (1949); *International Longshoremen's Union Local 6 (Sunset Line & Twine Co.)*, 79 N.L.R.B. 1487, 1505 (1948) (“It is immaterial that this conduct failed to deter the non-striking employees from returning to work. It was reasonably calculated to accomplish that end, and its inefficacy in this particular instance is no defense to the charge that it was violative of the Act.”).

80. *Local 235, Lithographers Union (Henry Wurst, Inc.)*, 187 N.L.R.B. 490, 495 (1970).

81. *International Longshoremen's Union Local 6 (Sunset Line & Twine Co.)*, 79 N.L.R.B. 1487, 1506 (1948) (union agent opened car door and “dared” nonstriking employee to come out); *see also* *United Mechanics Union Local 150-F (American Photocopy Equip. Co.)*, 151 N.L.R.B. 386, 391 (1965); *Joint Board, Cloak Makers Union (Free-Play*

line horseplay' devoid of sinister purpose."⁸² And in one case, the Board characterized some minor misconduct on the picket line in terms of "exuberance short of coercion."⁸³

Nevertheless, the range of misconduct falling within this "trivial" or "de minimus" exception is relatively narrow. Its absolute outer limits are probably marked by the facts of *Service Employees International Union, Local 50 (Evergreen Nursing Home)*:⁸⁴

Here, in the course of a number of days of picketing, we have two instances of employees being impeded in their entry to work . . . , one employee being grabbed at by an unidentified picket provoked by being called a "damned nigger," two chairs placed on the sides of one of two driveways, and two trucks briefly impeded from leaving the area and one truck briefly impeded from entering. No one was injured, nothing was thrown, no one was prevented from going to work or leaving, and no vehicle was harmed or excluded from the premises.⁸⁵

The trial examiner in *Evergreen Nursing* was "not disposed to equate conduct such as this, either instance by instance or in its totality, with the sort of conduct that section 8(b)(1)(A) was designed to prevent."⁸⁶ Thus, the complaint was dismissed.

On the other hand, if the misconduct in question is found to be more than trivial or de minimus, then the fact that it was a single, isolated, and nonrecurring incident will usually not be recognized as a defense. In one case, the union resisted enforcement of the Board's order on the grounds that "the alleged violation consisted of the single statement that 'somebody might get hurt.'"⁸⁷ The District of Columbia Circuit Court of Appeals, however, did not agree that a threat of physical violence should be disregarded because the evidence did not show it was re-

Togs, Inc.), 140 N.L.R.B. 1428, 1434-35 (1963). *But see* International Bhd. of Carpenters Local 1092 (Walsh Constr. Co.), 219 N.L.R.B. 372 (1975); United Steelworkers (Wright Line Div. of Barry Wright Corp.), 146 N.L.R.B. 71 (1964); UMW Local 7083 (Grundy Mining Co.), 146 N.L.R.B. 176 (1964).

82. Central Mass. Joint Board, Textile Workers Union (Charles Weinstein Co.), 123 N.L.R.B. 590, 606 (1959).

83. General Iron Corp., 224 N.L.R.B. 1180, 1189-90 (1976).

84. 198 N.L.R.B. 10 (1972).

85. *Id.* at 12.

86. *Id.* See also TKB Int'l Corp., 240 N.L.R.B. 1082, 1099 (1979).

87. Highway Truck Drivers Local 107 v. NLRB, 273 F.2d 815, 818 (D.C. Cir. 1959).

peated.⁸⁸ Similarly, in response to a union claim that its misconduct was only an "isolated incident," the Second Circuit Court of Appeals noted that "[i]t would be a sorry state of affairs if such improper conduct should be condoned and encouraged by a ruling that only unsuccessful and repeated mass picketing, attended by physical exclusion of employees from their place of work, should be considered sufficiently substantial to warrant [the finding of a violation]."⁸⁹

Even though a union's misconduct may not be trivial or isolated enough to keep it from being considered an illegal form of restraint and coercion, it can still be argued that it is sufficiently minor that the Board should refrain from issuing a remedial order. This argument was accepted and became a Board doctrine which was spelled out in detail in the *Jimmy Wakely Show* case.⁹⁰ It is premised on the notion that in situations of this kind issuance of a cease and desist order would not serve any good purpose, and that the Board's limited resources should be directed toward matters having a more significant impact in effectuating the purposes of the Act.⁹¹ Although the doctrine is not unique to section 8(b)(1)(A), it has been occasionally invoked in that context with varying results. In *Southwest Regional Joint Board, Amalgamated Clothing Workers (Finesilver Manufacturing Co.)*,⁹² for example, the administrative law judge said that even if he believed the threats had been uttered:

remedial relief nevertheless would not be warranted. Such relief would do little if anything to effectuate the policies of the Act. In a unit of 600 to 800 employees I would regard the two statements . . . as coercive, but, as having been made to a sin-

88. *Id.*

89. *NLRB v. Local 140, United Furniture Workers*, 233 F.2d 539, 540 (2d Cir. 1956); see also *NLRB v. United Mine Workers*, 429 F.2d 141, 145 (3d Cir. 1970); *International Bhd. of Pottery Workers (Homer Laughlin China, Inc.)*, 217 N.L.R.B. 25, 27-28 (1975); *Pacific Abrasive Supply Co.*, 182 N.L.R.B. 329, 336 (1970); *United Rubber Workers Local 796 (Tennessee Wheel & Rubber Co.)*, 166 N.L.R.B. 165, 171 (1967); *United Steelworkers Local 2118 (Worcester Stamped Metal Co.)*, 153 N.L.R.B. 1561, 1566 (1965). But see *Congreso de Uniones Industriales de Puerto Rico (National Packing Co.)*, 237 N.L.R.B. 1406, 1408 (1978) ("Standing alone, under the circumstances this statement made by a minor representative of the Respondent might be viewed as an isolated incident and one which would not warrant the finding of a Section 8(b)(1)(A) violation.").

90. *American Fed'n of Musicians (Jimmy Wakely Show)*, 202 N.L.R.B. 620 (1973).

91. *Id.* at 621.

92. 216 N.L.R.B. 644 (1975).

gle employee in such a large unit, I would consider the remarks as too insignificant and isolated to warrant remedial relief.⁹³

On the other hand, in *General Iron Corporation*,⁹⁴ the Board disagreed with its administrative law judge and found that the threats in question there *were* “sufficiently flagrant and coercive to necessitate a remedy.”⁹⁵ The two cases are certainly distinguishable;⁹⁶ but it is unlikely that acts of union violence and intimidation will escape the sanctions of the Board if they are found to constitute restraint and coercion.⁹⁷ The current disfavor of the *Wakely* doctrine⁹⁸ makes this especially true today.

Unions sometimes attempt to defend against section 8(b)(1)(A) violations by reference to the employer’s own alleged unfair labor practices. The defense can be conceptualized in terms of either “provocation” or “clean hands” (since the employer is usually the charging party in the section 8(b)(1)(A) case). But regardless of how the defense is conceptualized, it has been consistently rejected. As one trial examiner stated, “the fact that an employer may be violating the Act is no justification

93. *Id.* at 646 n.7. *Accord* Local 463, United Cement Workers Union (Trinty Concrete Prod. Co.), 190 N.L.R.B. 567 (1971); Taxi-Drivers Union (Morse Taxi & Baggage Transfer, Inc.), 174 N.L.R.B. 1 (1969); ILGWU (Twin-Kee Mfg. Co.), 130 N.L.R.B. 614 (1961).

94. 218 N.L.R.B. 770 (1975).

95. *Id.* at 770; *accord* General Teamsters Local 298 (Schumacher Elec. Corp.), 236 N.L.R.B. 428 (1978); United Steelworkers (Vuican-Cincinnati, Inc.), 137 N.L.R.B. 95, 97 (1962).

96. In *General Iron*, the Board noted that the threats were also tied in with the company’s own illegal attempts to keep a rival union out of the picture. The threats were made to the chief activist for the rival union, and although the threats were made to a single employee they “were likely to be disseminated to the small unit of 25 employees. . . .” 218 N.L.R.B. at 770.

97. Even though a cease and desist order may appear to be an unnecessary formality where the misconduct complained of is of an “isolated” nature, there is another valid reason for issuing the order. If the misconduct should recur, the order can be used as some evidence, at least, of the union’s propensity to violate the Act. In turn, this may justify a broader remedial order in the subsequent case. *See* text accompanying notes 466-88 *infra*. Since the Board’s remedies for section 8(b)(1)(A) violations are inadequate, at best, any doctrine which would tend to limit them even further should be strenuously avoided.

98. *See generally* United States Postal Serv., 253 N.L.R.B. 1203 (1981); Coca-Cola Bottling Co., 250 N.L.R.B. 1341 at n.13 (1980); Container Corp. of America, 244 N.L.R.B. 318, 324 (1979); United States Postal Serv., 242 N.L.R.B. 228 (1979); United Steelworkers Local 1397, 240 N.L.R.B. 849 (1979); General Motors Corp., 232 N.L.R.B. 335 (1977); Retail Clerks Int’l Ass’n, 226 N.L.R.B. 1393 (1976); Stanislaus Imports, Inc., 226 N.L.R.B. 1190, 1192 (1976).

for proscribed conduct by a union, either in retaliation or in defense."⁹⁹ The proper response, rather, is for the union to institute the *peaceful* procedures of the law by filing an unfair labor practice charge against the employer.¹⁰⁰ Moreover, the Board has noted that what is at stake in a section 8(b)(1)(A) case are the rights of *employees*. Since "[u]nlawful conduct on the part of the Company, if established, would neither extinguish the right of its employees to be free of union restraint and coercion, nor justify the Respondent Unions' alleged infringement of that right,"¹⁰¹ the defense is simply not meritorious. Finally, in allocating responsibility, the causal relationship between the mere commission of an unfair labor practice by the employer and the use of physical violence by the union is factually and conceptually questionable.¹⁰² An administrative law judge once noted in reference to this point, "[w]hile it is understandable that one may return a punch, this is not the case here because there is a distinct dichotomy in time, and one type of misconduct as such does not warrant unrelated conduct of the type developed here."¹⁰³ Of course, the Board recognizes literal or direct provocation by an alleged victim, whether an employee or agent of the employer, as a defense to a section 8(b)(1)(A) violation.¹⁰⁴ But

99. United Mine Workers (Chapel Coal Co.), 160 N.L.R.B. 913, 915 (1966); *see also* United Mine Workers (Solar Fuel Co.), 170 N.L.R.B. 1581, 1592 (1968), *enforced*, 418 F.2d 240 (3d Cir. 1969); Amalgamated Ass'n of Street Employees (Plymouth & Brockton Street Railway Co.), 142 N.L.R.B. 174, 178 n.2 (1963); United Furniture Workers Local 309 (Smith Cabinet Mfg. Co.), 81 N.L.R.B. 886, 888 (1949). On the other hand, under the so-called "Thayer Doctrine," NLRB v. Thayer Co., 213 F.2d 748 (1st Cir. 1954), *cert. denied*, 348 U.S. 883 (1954), an employer's unfair labor practices may serve as a "justification" of sorts for individual acts of violence. An employee who is guilty of such misconduct during the course of an unfair labor practice strike may be ordered reinstated, despite the unprotected nature of his activity, if the Board determines this would effectuate the policies of the Act. The rationale for the doctrine is, in part, that "the employer's antecedent unfair labor practices may have been so blatant that they provoked employees to resort to unprotected action." Local 833, UAW v. NLRB, 300 F.2d 699, 703 (D.C. Cir. 1962), *cert. denied*, 370 U.S. 811 (1962) (emphasis added). *See generally* Haggard, *Picket Line*, *supra* note 4, at 479-93.

100. Communications Workers (Ohio Consol. Tel.), 120 N.L.R.B. 684, 686-87 (1958), *enforced*, 266 F.2d 823 (6th Cir. 1959) (*per curiam*), *aff'd*, 362 U.S. 479 (1959) (*per curiam*).

101. International Longshoremen's Union, Local 6 (Sunset Line & Twine), 79 N.L.R.B. 1487, 1492 n.6 (1948).

102. *See* Haggard, *Picket Line*, *supra*, note 4, at 486-87.

103. ILGWU (Elsing Mfg. Co.), 186 N.L.R.B. 342, 343 n.1 (1970).

104. *See, e.g.*, General Iron Corp., 224 N.L.R.B. 1180, 1191 (1976); General Bldg. Laborers Local 66 (Courter & Co.), 198 N.L.R.B. 125, 128 (1972); Brewers Union, Local 6

even in such situations, the Board has cautioned against union “self help” remedies.¹⁰⁵

In most section 8(b)(1)(A) cases, the coercion in question is aimed at *nonstriking employees* and it operates upon them *directly*. But the section is not limited to those two particulars. The Board and the courts have held that even employees who are willingly participating in the strike or other concerted activity can be coerced by union violence and, similarly, that employees can be coerced even if the violence is directed in the first instance at someone else.

As to indirect coercion, physical violence against management personnel and company property is not itself an unfair labor practice under the statute except in the infrequent case where it is designed to affect the employer’s selection of collective bargaining representatives.¹⁰⁶ The Board and the courts, however, have consistently held that such violence can be said to indirectly restrain or coerce employees in the exercise of their rights. The theory is that the employees, upon learning of such violence, will reasonably assume that they can expect similar treatment if they, like the employer, are so brazen as to oppose the union. The Board once put it rather graphically:

When a gang of men, led by two union officials, assaults and seriously injures a middle-aged president of an employer, and the union officials are known to the persons assaulted, it can hardly be urged that the assailants should not have foreseen that their assault would be the subject of considerable

(Falstaff Brewing Corp.), 141 N.L.R.B. 448, 457-58 (1963); District 65, Retail Store Union (I. Posner, Inc.), 133 N.L.R.B. 1555, 1557 (1961). Alternatively, these cases can be read as saying that since the violence in question is a response to the employees’ own provocative conduct or speech instead of their failure to support the union, there has been no coercion of employees in *the exercise of their section 7 rights*—an essential element of a section 8(b)(1)(A) violation. See text accompanying notes 345-89, *infra*.

105. See Peninsula Shipbuilders’ Ass’n (Newport News Shipbuilding & Dry Dock Co.), 239 N.L.R.B. 831, 834 (1978).

106. Section 8(b)(1)(B) makes it an unfair labor practice for a labor organization to “restrain or coerce . . . an employer in the selection of his representatives for the purposes of collective bargaining or the adjustment of grievances; . . .” Labor Management Relations Act § 8(b)(1)(B), 29 U.S.C. § 158(b)(1)(B) (1976). Most of the violations of this section involve various nonviolent attempts by unions to control the employer’s selection of his bargaining representative. See generally R. GORMAN, LABOR LAW 405-06 (1976). Occasionally, however, actual physical violence is used in this regard. See, e.g., Broadway Hospital, Inc., 244 N.L.R.B. 341 (1979); Union de Trabajadores (Puerto Rico Corset & Brassiere Assoc.), 174 N.L.R.B. 489 (1969).

publicity and police action, and of necessity inevitably come to the attention of nonstriking employees. . . . [U]nder such circumstances nonstriking employees might have reasonably regarded such incidents as a reliable indication of what would befall them if they sought to work during the strike.¹⁰⁷

The Second Circuit Court of Appeals added:

But for the fact that someone called out "the cops," the beating would probably have continued until [the company president] and his son were left bleeding and unconscious in the doorway, as a gruesome warning to those who otherwise might wish to continue to work for their employer.¹⁰⁸

The critical fact in indirect coercion cases is that the violence against non-employees occurs in a context where it is likely that the employees will learn of it.¹⁰⁹ Violence which does not meet that requirement is usually of a fairly minor nature, occurs away from the picket line, and is not witnessed by any employees.¹¹⁰

The employees being coerced by union violence against non-employee third parties are usually employees who have declined to support the strike or join in the other concerted activities of the union. A separate question is whether *striking* employees can also be coerced by such violence. The Board and the courts have held that they can be indirectly coerced. The theory is that violence, even though certainly not directed at voluntary participants in the strike, may nevertheless operate to deter them from ever abandoning their support of the union.

For example, in *NLRB v. International Woodworkers of*

107. Local 140, United Furniture Workers (Brooklyn Spring Corp.), 113 N.L.R.B. 815, 822 (1955), *enforced*, 233 F.2d 539 (2d Cir. 1956); *see also* NLRB v. Union Nacional de Trabajadores, 540 F.2d 1 (1st Cir. 1976), *cert. denied*, 429 U.S. 1039 (1977); National Union of Marine Cooks (Irwin-Lyons Lumber Co.), 87 N.L.R.B. 54 (1949); United Furniture Workers Local 309 (Smith Cabinet Mfg. Co.), 81 N.L.R.B. 886, 888-89 (1949).

108. 233 F.2d at 541.

109. NLRB v. Union Nacional de Trabajadores, 540 F.2d 1, 6 (1st Cir. 1976), *cert. denied*, 429 U.S. 1039 (1977).

110. *See, e.g.*, Teamsters Local 695 (Wisconsin Supply Co.), 204 N.L.R.B. 866, 870 (1973); International Ass'n of Machinists (General Elec. Co.), 183 N.L.R.B. 1225, 1232 (1970); *see also* General Truck Drivers Local 5 (Union Tank Car Co.), 172 N.L.R.B. 137, 144 (1968) (Board declined to decide the issue of whether day-to-day roughhousing, horseplay, and harassment of management officials could ever be said to indirectly "restrain" or "coerce" employees; the trial examiner held that it could not), *enforced in part*, 410 F.2d 1344 (5th Cir. 1969).

America,¹¹¹ the union had committed various acts of violence against supervisory employees and independent contractors who were performing “struck work.” The acts were committed only in the presence of striking employees who were manning the picket line. The union argued that once an employee joins the picket line a presumption exists that this employee will stay out of the plant for the duration of the strike. It follows that it is conceptually impossible for any acts of violence against third persons to be considered the operative cause of an already striking employee’s decision not to return to work. Therefore, the violence does not restrain or coerce such an employee. The Board and the Fifth Circuit rejected the suggested presumption and a proposed requirement of proving that any specific employee on the picket line was actually deterred from returning to work:

We think it comports with common sense to find that out of a shifting mass of from twenty-five to fifty pickets that may have been on duty during the several days on which the acts of violence occurred, there were some whose adherence to the cause of the strike, especially in the light of the extreme methods used by their leaders, might well, but for these acts of violence by which they were cautioned against such a step, have joined the other employees who remained at work in the face of the strike.¹¹²

On the other hand, in *Taxi-Drivers Union (Morse Taxi & Baggage Transfer, Inc.)*,¹¹³ a union agent threatened to beat up a supervisor for allegedly discouraging employees from supporting the union. The trial examiner thought that the theory behind cases of violence against supervisors “is that employees may reasonably regard such threats as a reliable indication of what would befall them if they refrain from supporting the Union, as is their right under Section 7.”¹¹⁴ That trial examiner, however, concluded that the union agent’s “conduct posed no threat to those rights; rather, it purported on its face to be in aid of other Section 7 rights, namely the right to support the

111. 243 F.2d 745 (5th Cir. 1957).

112. *Id.* at 747; see also *International Ass’n of Machinists (General Elec. Co.)*, 183 N.L.R.B. 1225, 1231 (1970); *Local 88, Int’l Union, UAW (Miami Plating Co.)*, 144 N.L.R.B. 897, 903 n.15 (1963).

113. 174 N.L.R.B. 1 (1969).

114. *Id.* at 3.

Union."¹¹⁵ He apparently did not consider it a compelling possibility that such violence might deter employees from withdrawing support.

Such are generally the theoretical parameters of restraint and coercion under section 8(b)(1)(A). Examples of specific kinds of conduct that have been found to be illegal and some of the theoretical problems that exist with respect to identifying such conduct will be discussed in the following section.

2. *Specific Kinds of Misconduct that "Restrain" or "Coerce"*

Union misconduct that has been found to restrain or coerce includes the usual range of tortious and criminal activity—threats, assault and battery, property damage, blocking of egress and ingress, plant seizures, and other miscellaneous forms of intimidation.

a. *Threats and Threatening Statements*

The most common form of restraint and coercion consists of threats of physical violence or threatening statements which suggest the possibility of such violence. Almost every section 8(b)(1)(A) case contains a few instances of this particular form of misconduct.

The Board's attitude toward threats apparently depends on the legal context in which the threats are considered. When the issue is whether a striking employee loses the protection of section 7 and thus may be discharged for making threatening statements towards nonstriking employees, the Board tends to treat such statements with some degree of tolerance.¹¹⁶ Indeed, no matter how egregious the words themselves may be, the Board has taken the position that, when uttered within the context of

115. *Id.* But see *Union Nacional de Trabajadores (Macal Container Corp.)*, 219 N.L.R.B. 429 (1975), *enforced*, 540 F.2d 1 (1st Cir. 1976), *cert. denied*, 429 U.S. 1039 (1977). There, the union agent assaulted the company president in an attempt to induce him to reinstate some employees. Rather than saying that this conduct could not coerce employees because it was on their behalf, as in the *Morse Taxi & Baggage* case, the Board reverted to the normal theory about the effect of assaults on management. "That Respondents would resort to such tactics in enforcing their demands would, in the circumstances of this case, tend to have a coercive effect upon employees regarding their own exercise of rights guaranteed by the Act." 219 N.L.R.B. at 429.

116. See generally Haggard, *Picket Line*, *supra* note 4, at 450-52.

an otherwise legitimate strike, they are not “unprotected” unless accompanied by overt physical acts or gestures.¹¹⁷ In contrast, when the issue is whether a union agent has restrained or coerced employees, the Board views threatening remarks in a much less favorable light.

The most obvious kind of threat refers specifically to various kinds of physical injury or property damage that may be visited upon those who refuse to support the union. The Board has had no difficulty finding that such statements have the tendency to restrain or coerce. The following list is merely a representative sample of the thousands of threats that have been uttered over the years. It is not intended to titillate or embarrass. It is simply intended to give the uninitiated a good dose of the kind of vulgar brutality that dominates this sordid little corner of industrial relations. In light of the assaults and actual violence that will be described in subsequent sections, these threats, despite their apparently exaggerated nature, should not be taken lightly. Consider the following examples:

“The next time I catch you back in that plant I am going to give you a whipping.”¹¹⁸

“We’re going to crack your head.”¹¹⁹

Employee was told that a union agent “was going to get the hell beat out of him.”¹²⁰

“I only have one leg but I can beat the hell out of you.”¹²¹

Union agent said that the mine will stay union, “if it takes bloodshed to do it.”¹²²

Union agent told employees that they intended to organize the store and that “wives and children of employees had better stay out of the way if they didn’t want to get hurt.”¹²³

Union agent told employee that “he would see to it that Brown was beaten up until no one could recognize him and

117. See, e.g., *Arrow Indus., Inc.*, 245 N.L.R.B. 1376 (1979); *Bartlett-Collins Co.*, 230 N.L.R.B. 144 (1977); *Valley Oil Co.*, 210 N.L.R.B. 370, 376 (1974). But see *NLRB v. M.C. McQuaide, Inc.*, 552 F.2d 519, 527 (3d Cir. 1977).

118. *Perry Norvell Co.*, 80 N.L.R.B. 225, 235 (1948).

119. *Id.* at 236.

120. *Id.* at 237.

121. *International Longshoremen’s Union Local 6 (Sunset Line & Twine Co.)*, 79 N.L.R.B. 1487, 1498 (1948).

122. *Randolph Corp.*, 89 N.L.R.B. 1490, 1492 (1950), *enforced in part*, 187 F.2d 298 (7th Cir. 1951).

123. *United Mine Workers (Union Supply Co.)*, 90 N.L.R.B. 436, 437 (1950).

what was left would be dumped in the river."¹²⁴

"When this thing is over . . . you are going to be a dead son-of-a-bitch."¹²⁵

Union agent threatened to "take the camera and jam it' where cameras are not customarily encased."¹²⁶

Nonstriking employee told he was "liable to wind up' in a funeral home."¹²⁷

Union agent threatened to have the "_____ kicked out of" certain employees.¹²⁸

Nonstriking employee told he would "get a punch in the nose."¹²⁹

"I am going to smear you up."¹³⁰

"I will break your goddam legs."¹³¹

Nonstriking employee told he would not "get out alive" if he went back to the plant.¹³²

Nonstriking employee told he "would never reach the age of 21" if he kept working.¹³³

"If I had a gun I would shoot you."¹³⁴

"You are going to wind up in the hospital."¹³⁵

"If I see you again in any of the buildings, I'm going to break your head."¹³⁶

124. Local 595, Int'l Ass'n of Bridge Workers (Bechtel Corp.), 108 N.L.R.B. 1070, 1075 (1954), *enforced*, 218 F.2d 958 (6th Cir. 1954).

125. United Steelworkers, 114 N.L.R.B. 532, 535 (1955).

126. Communications Workers (Ohio Consol. Tel. Co.), 120 N.L.R.B. 684, 696 (1958), *enforced*, 266 F.2d 823 (6th Cir. 1959)(*per curiam*), *aff'd*, 362 U.S. 479 (1959)(*per curiam*).

127. United Packinghouse Workers, 123 N.L.R.B. 464, 469 (1959), *enforced*, 274 F.2d 816 (5th Cir. 1960).

128. Subordinate Lodge No. 169, Int'l Bhd. of Boilermakers, 129 N.L.R.B. 1003, 1009 (1960).

129. Industrial Union of Marine Workers (Bethlehem Steel Co.), 130 N.L.R.B. 412, 423 (1961).

130. Checker Taxi Co., 131 N.L.R.B. 611, 645 (1961), *enforced in part*, 99 L.R.R.M. 2903 (D.C. Cir. 1978).

131. *Id.*

132. Local 316, United Cement Workers Union (National Gypsum Co.), 133 N.L.R.B. 1445, 1448 (1961).

133. Local 542, Operating Eng'rs (Giles & Ransome, Inc.), 139 N.L.R.B. 1169, 1172 (1962), *enforced*, Local 542 Operating Eng'rs v. NLRB, 328 F.2d 850 (1964), *cert. denied*, 379 U.S. 826 (1964).

134. United Furniture Workers (Jamestown Sterling Corp.), 139 N.L.R.B. 1279, 1282 (1962).

135. Local 3, IBEW, 144 N.L.R.B. 1089, 1100 (1963), *enforced*, 340 F.2d 71 (2d Cir. 1964).

136. *Id.*

"We'll kill you."¹³⁷

Employee favoring a rival union told he was "looking for trouble and [was] going to get hurt."¹³⁸

"Kill the SOB's."¹³⁹

"You are going to be dead."¹⁴⁰

Union agent told supervisor, who was using a stick with a magnet on it to pick up nails, that he "was going to stick that stick up [his] rear." A picket on the same occasion threatened to "wrap the stick around his head."¹⁴¹

"You keep on insisting on getting your back broken."¹⁴²

Union agent made a threat to an employee to "beat your damn brains out [with an iron pipe] for going to work."¹⁴³

An employee said to a union agent, in reference to employees who did not join the strike, that "we will mash their heads down."¹⁴⁴

Employee asked if he would like a "roughing up."¹⁴⁵

Union agent said he would "knock your god-damn brains out."¹⁴⁶

"If you come back tommorrow, you get your ass kicked in."¹⁴⁷

Union agent told employees that some men were out looking for the rival union organizer and that they were going to "jerk his head off."¹⁴⁸

"We are going to mess up your pretty face one of these days."¹⁴⁹

137. *Id.*

138. United Sugar Workers Union Local 9 (American Sugar Co.), 146 N.L.R.B. 154, 159 (1964).

139. UMW Local 7244 (Grundy Mining Co.), 146 N.L.R.B. 244, 246 (1964).

140. *Id.*

141. United Steelworkers (Wright Line Div. of Barry Wright Corp.), 146 N.L.R.B. 71, 73 (1964).

142. Cleveland Local 24-P, Lithographers Union (Akron Engraving Co.), 160 N.L.R.B. 949, 951 (1966).

143. Teamsters Local 115 (E.J. Lavino & Co.), 157 N.L.R.B. 1637, 1640 (1966).

144. General Truck Drivers Local 5 (Union Tank Car Co.), 172 N.L.R.B. 137, 138 (1968), *enforced in part*, 410 F.2d 1344 (5th Cir. 1969).

145. General Drivers & Dairy Employees Local 563 (Fox Valley Material Suppliers Ass'n), 176 N.L.R.B. 386, 398 (1969), *enforced*, 76 L.R.R.M. 3002 (2d Cir. 1971)(per curiam).

146. Teamsters Local 327 (Whale, Inc.), 178 N.L.R.B. 422, 423 (1969), *enforced in part*, 432 F.2d 933 (6th Cir. 1970).

147. General Drivers & Dairy Employees Local 563 (Northern Contractors Supply, Inc.), 183 N.L.R.B. 1023, 1025 (1970).

148. General Truck Drivers Local 5 v. NLRB, 410 F.2d 1344, 1346 (5th Cir. 1969).

149. Local 115, Int'l Bhd. of Teamsters, 186 N.L.R.B. 56, 60 (1970).

Employee told that "he might be pulled off the road one night and get his brains knocked out."¹⁵⁰

Employee told that "his wife and children might wind up dead."¹⁵¹

Union agent said he was going to have employee "killed and shipped back to the country in a pine box," that he would have his head "mashed in," and have him "beat up."¹⁵²

Union agent told employee he would "kick the stuff out of him" and "wipe the streets with him."¹⁵³

Union agent told employee he would "put him in a meat grinder and grind him up."¹⁵⁴

Union agents said they would "break heads and beat people" if necessary to get them to join the union.¹⁵⁵

Union agent threatened to "whip up on" nonstriking employee.¹⁵⁶

Union agent threatened to "break open" nonstriking employee's head.¹⁵⁷

"We are going to bomb you."¹⁵⁸

Union agent indicated a desire to "bust" nonstriking employee or her husband in the mouth.¹⁵⁹

Woman picket told business manager that "they would hang his 'ass' from a pole and use the pole as his backbone."¹⁶⁰

Nonstriking employee asked if she wanted to be a "bloody mess."¹⁶¹

Nonstriking employee told she "was the mother _____ they wanted to get, a nigger, and they would like to mess [her] up good."¹⁶²

Union agent told employee he would not drive a truck

150. Local 235, Lithographers Union (Henry Wurst, Inc.), 187 N.L.R.B. 490, 492 (1970).

151. *Id.* at 493.

152. Brewers Local 6 (Custom Packaging Corp.), 192 N.L.R.B. 1263, 1265 (1971).

153. Isaac Putterman (Rockville Nursing Center), 193 N.L.R.B. 959, 976 (1971).

154. *Id.*

155. Nationwide Plastics Co., 197 N.L.R.B. 996, 1005 (1972).

156. Plastic Workers Local 929 (Doughboy Recreational, Domain Ind., Inc.), 200 N.L.R.B. 419 (1972).

157. Local 810, Steel Fabricators Warehousemen (Scales Air Compressor Corp.), 200 N.L.R.B. 575, 579, 583 (1972).

158. Teamsters, Local 695 (Wisconsin Supply Co.), 204 N.L.R.B. 866, 868 (1973).

159. Coopers Int'l Union (Independent Stave Co.), 208 N.L.R.B. 175 (1974).

160. Service Employees Int'l Union, Local 50 (Our Lady of Perpetual Help Nursing Home, Inc.), 208 N.L.R.B. 117, 119 (1974).

161. *Id.* at 122.

162. *Id.*

again if the agent “had to break his arms and legs.”¹⁶³

Employee testified that he was told that he “might get a block along side [his] head.”¹⁶⁴

Union agent asked employee who refused to honor the picket line, “Do you know you could have bodily harm done to you? Did you know you could have your husband—do you know things could happen to your friends and your family?”¹⁶⁵

Union agent invited employee outside where agent said “he would kick him in the ass.”¹⁶⁶

Union agent told employee that if he did not stop circulating a decertification petition they would find him “floating face down in the river.”¹⁶⁷

Union agent, while holding a brick over the employee’s head, threatened to “bust [the employee’s] brains out.”¹⁶⁸

“I’ll just knock your ass over this gas pump.”¹⁶⁹

Union agent told employee that he would have to leave the job and that he could go “either peaceful or in a coffin.”¹⁷⁰

Union agent said “he was going to wipe [employee’s] ass up with the floor.”¹⁷¹

Union agent said union would “beat your fucking ass with a baseball bat.”¹⁷²

Employee told he would be “one dead mother fucker.”¹⁷³

Union agent said he would “beat in [employee’s] fucking brains.”¹⁷⁴

Employee told that “he would be taken out in a box” if he remained in the state.¹⁷⁵

163. Truck Drivers Local 705 (Associated Transp., Inc.), 209 N.L.R.B. 292, 307 (1974), *enforced*, 532 F.2d 1169 (7th Cir. 1976), *cert. denied*, 429 U.S. 1022 (1976).

164. Local 275, Laborers Int’l Union (S.B. Apartments, Inc.), 209 N.L.R.B. 279, 287 (1974).

165. Local 723, IBEW, 213 N.L.R.B. 1, 2 (1974).

166. International Bhd. of Pottery Workers (Home Laughlin China, Inc.), 217 N.L.R.B. 25, 27 (1975).

167. *Id.*

168. Freight Drivers Local 557 (Liberty Transfer Co.), 218 N.L.R.B. 1117, 1122 (1975).

169. Laborers Int’l Union Local 245 (Apex Contracting, Inc.), 219 N.L.R.B. 142, 145 (1975), *enforced*, 91 L.R.R.M. 2559 (4th Cir. 1976).

170. *Id.*

171. International Bhd. of Carpenters Local 1092 (Walsh Constr. Co.), 219 N.L.R.B. 372, 377 (1975).

172. *Id.*

173. *Id.*

174. *Id.*

175. IBEW, Local 1547 (M & M Elec. Co.), 225 N.L.R.B. 331, 333 (1976), *enforced*, 96 L.R.R.M. 3413 (D.C. Cir. 1977).

Employee told to get out of the state or "I'll kill you."¹⁷⁶
 Union agent said "I will tear his goddamned head off his shoulders."¹⁷⁷

Union agent, while raising an automatic pistol in his pocket, said "Shut up or I'll blow your goddam head off."¹⁷⁸

Subcontractor told that if he were caught out by himself his "ass was going to be filled with so much lead that he was not going to be able to walk."¹⁷⁹

"We are going to blow your head off."¹⁸⁰

Employee testified that a union agent threatened "to get her little girl" who was in the car with her.¹⁸¹

Employee told that if he went in to work he "would not have a pickup [truck] left."¹⁸²

Employee asked "if we would like to have our house blown up."¹⁸³

"You don't think too much of your life do you buddy?"¹⁸⁴

As employee crossed the picket line, union agent called out, "Peggy's dead."¹⁸⁵

"You fucking bitch, I am going to fucking kill you."¹⁸⁶

As employee crossed the picket line, union agent called out, "you are a dead man."¹⁸⁷

"I will bust your fucking head."¹⁸⁸

Union agent told six-year-old child of nonstriking employee "that they intended to burn her mother and cut her."¹⁸⁹

Union agent attacked employee, saying "I'm going to beat

176. *Id.*

177. *Alberici-Fruin-Colnon*, 226 N.L.R.B. 1315, 1323 (1976), *enforced*, 567 F.2d 833 (8th Cir. 1977).

178. *Id.*

179. *Local 30, United Slate, Tile and Composition Roofers (Associate Builders & Contractors)*, 227 N.L.R.B. 1444, 1446 (1977).

180. *Local 30, United Slate, Tile and Composition Roofers (Kitson Bros., Inc.)*, 228 N.L.R.B. 652, 656 (1977).

181. *Amalgamated Meat Cutters (Iowa Beef Processors, Inc.)*, 233 N.L.R.B. 839, 842 (1977).

182. *Id.*

183. *Id.* at 844.

184. *Local 810, Int'l Bhd. of Teamsters (Russell Plastics Technology, Inc.)*, 235 N.L.R.B. 40, 41 (1978).

185. *Id.* at 42.

186. *Id.*

187. *Maywood Plant of Grede Plastics*, 235 N.L.R.B. 363, 380 (1978), *enforced in part*, 628 F.2d 1 (D.C. Cir. 1980).

188. *Broadway Hosp., Inc.*, 244 N.L.R.B. 341, 344 (1979).

189. *Id.* at 347.

your m_____ f_____ head off.”¹⁹⁰

“With a few broken bones, you won’t be able to drive that truck.”¹⁹¹

In the foregoing examples, both the intended victim and the nature of the harm are rather expressly stated. One hardly needs background or context to recognize them as illegal threats. Other statements are perhaps somewhat more ambiguous on their face, but take on decidedly sinister overtones when uttered during a strike or organization drive dominated by acts of violence and intimidation. In this context, the following statements have also been found to restrain and coerce:

“While no heads were broken last time . . . things could be different now.”¹⁹²

“I hate to think what would happen if you walked in there.”¹⁹³

“You better not try it [cross the picket line] or there will be trouble.”¹⁹⁴

Employee told that “there may be trouble later” if she did not sign a union authorization card.¹⁹⁵

“If you go in [the plant] you gotta come out,” said in a harsh tone.¹⁹⁶

“Lay off the union business or your ulcers will be bothering you.”¹⁹⁷

“Let him go *this time*.”¹⁹⁸

Union agent told nonstriking employees that “We are going to get your women next.”¹⁹⁹

190. Pipeline Local 38 (Hancock-Northwest, J.V.), 247 N.L.R.B. 1250 (1980), *enforced*, 108 L.R.R.M. 2816 (D.C. Cir. 1981).

191. General Teamsters Local 959 (Frontier Transportation Co.), 248 N.L.R.B. 743, 744 (1980).

192. United Sugar Workers Union Local 9 (American Sugar Co.), 146 N.L.R.B. 154, 159 (1964).

193. United Furniture Workers Local 309 (Smith Cabinet Mfg. Co.), 81 N.L.R.B. 886, 906 (1949).

194. *Id.* at 900.

195. United Mine Workers (Union Supply Co.), 90 N.L.R.B. 436, 438 (1950).

196. Local 5367, United Steelworkers, 123 N.L.R.B. 216, 224 (1959).

197. Checker Taxi Co., 131 N.L.R.B. 611, 620 (1961), *enforced in part*, 99 L.R.R.M. 2903 (D.C. Cir. 1978).

198. Dressmakers Joint Council, ILGWU (Susan Evans, Inc.), 146 N.L.R.B. 559, 561 (1964), *enforced*, 342 F.2d 988 (2d Cir. 1965).

199. Teamsters Local 327 (Coca Cola Bottling Co.), 184 N.L.R.B. 84, 91 (1970).

"You're a family man, aren't you?"²⁰⁰

Employee told "not to come into work because something could happen to [his] family."²⁰¹

"We'll get you."²⁰²

"We'll take care of you."²⁰³

"You shouldn't try to work today because somebody is really going to get hurt bad."²⁰⁴

"You never know what is going to happen at home if you work."²⁰⁵

"We'll get you sooner or later."²⁰⁶

Nonstriking employee told it would be "unhealthy" for him to drive the company president's car.²⁰⁷

"[W]here's your wife? When you get home tonight you better make sure your children are there, where exactly is your wife right now?"²⁰⁸

"You F_____ Bitch, we know who you are and we will get you."²⁰⁹

"We will fix her so she won't work permanently."²¹⁰

Employee testified that union agent threatened "*to fix me to where I would not be filing no more charges.*"²¹¹

Statements might be considered too ambiguous to rise to the level of a threat when the identity of the person or persons who are supposed to inflict the anticipated injury is unclear. A legally recognized threat requires intimations by the speaker that he or his agents intend to cause pain, injury, or harm to the person being addressed. It should thus be distinguished from

200. Allou Distributors, Inc., 201 N.L.R.B. 47, 54 (1973).

201. United Rubber Workers Local 796 (Tennessee Wheel & Rubber Co.), 166 N.L.R.B. 165, 168 (1967).

202. Street Employees (Plymouth & Brockton Street Railway Co.), 142 N.L.R.B. 174, 179 (1963).

203. *Id.*

204. District 11, UMW (S & S Coal Co.), 235 N.L.R.B. 757, 759-60 (1978).

205. District 50, UMW (Tungsten Mining Corp.), 106 N.L.R.B. 903, 922 (1953).

206. Perry Norvell Co., 80 N.L.R.B. 225, 238 (1948).

207. Local 810, Fabricators & Warehousemen (Scales Air Compressor Corp.), 200 N.L.R.B. 575, 583 (1972).

208. Local 30, United Slate, Tile and Composition Roofers (Kitson Bros., Inc.), 228 N.L.R.B. 652, 656 (1977).

209. Amalgamated Meat Cutters (Iowa Beef Processors, Inc.), 233 N.L.R.B. 839, 843 (1977).

210. *Id.* at 846.

211. Pipeline Local 38 (Hancock-Northwest, J.V.), 247 N.L.R.B. 1250 (1980), *enforced*, 108 L.R.R.M. 2816 (D.C. Cir. 1981) (emphasis in original).

mere warnings or predictions that some third party, over whom the speaker has no control, might engage in such conduct. Since the latter is not a threat, it would probably not rise to the level of restraint or coercion. This issue arose in *International Brotherhood of Teamsters, Local 745*.²¹² An employee named Brown had been distributing literature on behalf of PROD, a group of dissident Teamsters. He was approached by Henry, an agent of the Teamsters local, and asked to join DRIVE, the political arm of the Teamsters. Brown refused. According to the Administrative Law Judge:

Henry then told Brown, "Well, I can't help you then . . . [L]et me state, I circulate with some pretty rough people. . . . The word is out." Brown asked "Well, what word?" and Henry responded that he (Brown) was in danger. Brown asked what kind of danger and was told, "Well, PROD, they have done used you enough. They don't need you anymore because you are going too far and they are going to get rid of you." Brown asked Henry what he meant and Henry said, "I mean completely." When Brown asked "You mean kill me?" Henry said, "Right." Henry further elaborated by saying "How about some morning would you like to go out and your motor is missing out of your car. . . . you start your car and blow your car up or maybe the side of your house might be blowed out, or something like that."²¹³

Board member Murphy felt that the union, through its agent Henry, was merely suggesting that some third party (over whom Henry had absolutely no control) might take violent action against Brown. Thus, the statement could in no measure be construed as a threat by the respondent union to take such action.²¹⁴ The majority of the Board panel, consisting of members Penello and Truesdale, disagreed. They noted that:

Such a position ignores the obvious import of Henry's message: namely, that Henry, and those "rough" people with whom he circulated, would make sure, through violence if necessary, that Brown discontinued his anti-Teamster activities. In this respect, our dissenting colleague concedes that Henry had no knowledge or involvement with PROD, and that Brown him-

212. 240 N.L.R.B. 537 (1979).

213. *Id.*

214. *Id.* at 538.

self, an active PROD member, knew that Henry could not and did not speak for that organization. Thus, Brown could only have believed that Henry, not PROD, was threatening him with violence if he failed to join Respondent Local and abandon his PROD activities.²¹⁵

Similarly, in another case, the union agent told employees who were crossing the picket line that "the people who had gone out on strike were not going to hurt them but that outsiders would and that he was telling them as a friend."²¹⁶ The administrative law judge construed this as a coercive warning.²¹⁷ In another case, a union agent admitted that she asked a nonstriking employee "if she had thought what might happen to her small children if she crossed the line," as there had been some talk of burning the homes of such employees. The agent claimed "that she asked the question from friendship and concern, not malice"²¹⁸—an explanation which this administrative law judge accepted.

Statements that might appear to be threatening have been held otherwise in a number of cases. In some instances, it is simply because the statement does not unambiguously refer to physical violence; the statement can also be construed as indicating that the union intends to make some perfectly legal response to what the dissident employee is doing. In one case, for example, union agents said they would get two employees "off the job, one way or the other."²¹⁹ The General Counsel argued that such language threatened the use of violent and illegal as well as legal means. The Board disagreed, saying that it was simply too ambiguous.²²⁰ In another case, the union president said of a member who was causing some internal trouble, "I don't know what I am going to do with O'Brien, but I'll get him in my own way." That language was found to be too ambiguous to be

215. *Id.* at 537.

216. General Teamsters Local 959 (Frontier Transp. Co.), 248 N.L.R.B. 743, 745 (1980).

217. *Id.* at 746. See also Warehouse & Distribution Workers Union, Local 688 (Coca-Cola Bottling Co.), 115 N.L.R.B. 1506, 1511 (1956).

218. Plastic Workers Local 929 (Doughboy Recreational, Domain Indus., Inc.), 200 N.L.R.B. 419, 422 (1972).

219. Mill & Smeltermen Union, Local 16A, 170 N.L.R.B. 578 (1968).

220. *Id.*

construed as a threat of illegal retaliation.²²¹

The *Taxi Maintenance Corporation*²²² case probably contains the largest number of this kind of allegedly ambiguous statements. The union agent's statement to dissidents that he would "get them one at a time"²²³ was, for example, construed as merely an indication that he intended to bring charges against them before the union executive committee. A statement that the union agent would make an employee "eat his words" was characterized as "a symbolic metaphor referring only to inducing a retraction of the insulting name calling"²²⁴ that the employee had engaged in. "We have just started to fight and you are not going to like what is going to happen"²²⁵ was found not to be a threat of violence. Even the following statement was allowed: "This is war, we're going to get you. We are going to get every one of you."²²⁶ The administrative law judge noted that "[a]lthough the term 'war' as a specific activity is associated with violence, in modern parlance it can refer to any all-out contest short of violence and does not necessarily connote bodily harm."²²⁷

Sometimes what the union agent says he will do is so improbable or exaggerated that the Board and the courts feel warranted in not treating it as a serious threat. In one case, for example, a union dissident testified that a union agent had said "he could see himself obtaining a Norden bomb sight and flying over my home."²²⁸ In another case, the First Circuit Court of Appeals dismissed as mere hyperbole a statement by the union president that the union "would tear down the gates" if the company closed them "and that not even the police could stop" them.²²⁹ And in *NLRB v. United Papermakers*,²³⁰ the Sixth Cir-

221. Operating Eng'rs Local 150 (Builders Ass'n of Chicago), 165 N.L.R.B. 159, 160 (1967); see also *J. Ziak & Sons, Inc.*, 152 N.L.R.B. 380, 382 (1965) (union official said he would "take care of" or "get" some dissidents; held to be too ambiguous).

222. *New York City Taxi Drivers Union Local 3036 (Taxi Maintenance Corp.)*, 231 N.L.R.B. 965 (1977).

223. *Id.* at 968.

224. *Id.*

225. *Id.* at 970.

226. *Id.*

227. *Id.* at 971.

228. *The Buffalo Newspaper Guild Local 26 (Buffalo Courier-Express, Inc.)*, 220 N.L.R.B. 79, 85 (1975).

229. *NLRB v. Union Nacional de Trabajadores*, 540 F.2d 1, 10-11 (1st Cir. 1976),

cuit refused to treat as a threat of actual physical harm a statement by a union agent that he would "bring in the big boys from New York" and "chop up" an employee if he tried to obtain a Board decertification election.²³¹ The court noted that "[s]uch a threat literally read would be an extraordinary one. This record presents no pattern of violence, let alone chopping into little pieces."²³²

Occasionally the Board refuses to treat a statement as a threat of violence simply because the recipients themselves did not regard it seriously. In one case, for example, a company guard testified that a union agent had said "[t]he next scab that walks across that picket line, they would work him over [so] that we would have to pack him back over."²³³ The Board held that there was no violation because the guard to whom this statement was made apparently did not believe that the person who made it was "the kind" who could carry it out.²³⁴ And in another case, the union agent doubled up his fist and said, "I'll use that if it's necessary. If you ain't damn careful, I'll use that on you."²³⁵ The statement was found not to be a violation because it was not "intended or taken as more than a bluff."²³⁶

Finally, one case must simply be considered an aberration insofar as Board law is concerned. An employee was told by a union agent that "if the strike keeps on it might indulge in physical violence and you just might get hurt."²³⁷ The Board, over Member Leedom's dissent,²³⁸ said this was "an ambiguous statement which we . . . cannot construe as a warning that the strikers would resort to violence if nonstrikers continued to work."²³⁹ That case, however, is an exception to an otherwise good Board record in treating threatening statements for what

cert. denied, 429 U.S. 1039 (1977).

230. 397 F.2d 153 (6th Cir. 1968).

231. *Id.* at 154.

232. *Id.*

233. International Woodworkers Local 3-3 (Western Wirebound Box), 144 N.L.R.B. 912, 924 (1963).

234. *Id.*

235. Perry Norvell Co., 80 N.L.R.B. 225, 234 (1948).

236. *Id.* at 242.

237. District 65, Retail Store Union (I. Posner, Inc.), 133 N.L.R.B. 1555, 1556 (1961).

238. *Id.* at 1557 n.3.

239. *Id.* at 1556-57.

they are, an unwarranted restraint and coercion of employees in the exercise of their workplace rights.

b. Assaults Upon Persons

Physical assaults upon management employees and personnel is another kind of union misconduct which occurs with a high degree of frequency in reported cases and is perhaps the most literal form of restraint and coercion. These assaults range from being highly aggravated to relatively technical.

The assault described in the *Higbee Company*²⁴⁰ case is typical of the more serious kinds of beatings that occur. The assault, upon an employee (Vitko) as he approached the picket line, was committed by an "unidentified stranger" but for whom the union was legally responsible:

The stranger . . . struck Vitko in the face and knocked him to the ground. As Vitko attempted to rise, the stranger either kicked or delivered a violent blow to the back of Vitko's head. . . . A policeman arrived and gave assistance to Vitko, who began vomiting and shortly thereafter "passed out." He was taken to the hospital and several hours later to his home. He remained at his home about a month under the care of a doctor and suffered continuous headaches. Around Thanksgiving time, he was hospitalized again for approximately a week and subjected to X-rays, examinations, and four spinal taps.²⁴¹

Similarly terrifying and brutal are the assaults described in the *L.E. Cleghorn*²⁴² case. One hundred to one hundred and twenty-five men invaded a mine site cursing and threatening employees, throwing rocks, and forcing them to discontinue their work.²⁴³ During the course of this:

Mrs. Starcher, a clerk employed in the scale house, attempted to record the license numbers of some of the pickets' automobiles. Several of the pickets assaulted her, took her

240. Painters Dist. Council No. 6 (*Higbee Co.*), 97 N.L.R.B. 654 (1951), *enforced*, 202 F.2d 957 (6th Cir.), *cert. denied*, 345 U.S. 995 (1953).

241. 97 N.L.R.B. at 661-62.

242. UMW Dist. 31 (*L.E. Cleghorn*), 95 N.L.R.B. 546 (1951), *enforced*, 198 F.2d 389 (4th Cir. 1952), *cert. denied*, 344 U.S. 884 (1952).

243. 95 N.L.R.B. at 560.

notes from her, and threw her against the screen door leading to the scale house, breaking the door. She was then forced into the scale house where she was imprisoned by the pickets. Cleghorn attempted to go to her rescue and about 15 or 20 pickets assaulted him, striking him on the head and face, knocking off his eyeglasses, beat him to the ground, and then kicked him, and finally rolled him down an embankment onto the railroad siding about 75 feet from where the assault began. At the time of the hearing, about a year after the assault, there was still a small lump on his back where he was kicked by the pickets.²⁴⁴

There are, unfortunately, other reported instances of equally brutal attacks.²⁴⁵ Relatively less serious beatings, punchings, slappings, kickings, and assaults with various objects seem almost commonplace in the case law.²⁴⁶ Persons have been fired

244. *Id.*

245. *See, e.g.,* Local 810, Int'l Bhd. of Teamsters (Russell Plastics Technology, Inc.), 235 N.L.R.B. 40, 41 (1978) (during a strike, job applicant was hit in the head by a striker with a rock in his hand; he fell to his knees and was then kicked); Local 612, Int'l Bhd. of Teamsters (Deaton Truck Line), 146 N.L.R.B. 498, 500-03 (1964) (described as a "cruel beating"); Operating Eng'rs Local 513 (Long Constr. Co.), 145 N.L.R.B. 554, 558 (1963) (employee on job site was beaten into unconsciousness and hospitalized for four days; his jaw was broken in two places, he had to buy false teeth to replace his own that were knocked out during the assault, and he was out of work for almost two months); United Furniture Workers, Local 309 (Smith Cabinet Mfg. Co.), 81 N.L.R.B. 886, 912-13 (1949) (*inter alia*, a 71 year old man was struck behind the right ear and suffered a concussion).

246. *See, e.g.,* UAW Local 552 (Delavan Corp.), 239 N.L.R.B. 312, 314, 317 (1978) (security officer jabbed in neck with a picket sign; non-striking employees hit with rubber hose, kicked in face, and hit with picket sign; non-striking employee jabbed with a picket sign, fracturing two ribs); Newport News Shipbuilding & Dry Dock Co., 233 N.L.R.B. 1443, 1453-54 (1977), *enforced*, 85 L C #11073 (4th Cir. 1979); Union de Operadores y Canteros (Puerto Rican Cement Co.), 231 N.L.R.B. 171, 174 (1977) (5 foot, 165 pound employee beaten by a 200 pound striker); Local 30, United Slate, Tile and Composition Roofers (Associated Builders & Contractors), 227 N.L.R.B. 1444, 1448-49 (1977) (roofer struck and knocked off garage); District 1199, Hosp. Health Care Employees (Southport Manor Convalescent Center, Inc.), 227 N.L.R.B. 1732, 1734 (1977) (striker reached into car and slapped lady in the face); IBEW Local 1547 (M & M Elec. Co.), 225 N.L.R.B. 331, 333 (1976) (union agent scratched employee with a hammerclaw, drawing blood), *enforced*, 96 L.R.R.M. 3413 (D.C. Cir. 1978); Edward Kraemer & Sons, Inc., 203 N.L.R.B. 739 (1973) (union agent hit employee with a pistol and his fists); International Bhd. of Teamsters Local 327 (Det Distrib. Co.), 201 N.L.R.B. 787, 791 (1973) (assault upon president of rival union); Local 3, IBEW, 144 N.L.R.B. 1089, 1101 (1963) (employee hit in the face with a pair of steel pliers), *enforced sub nom*, New Power Wire & Elec. Corp. v. NLRB, 340 F.2d 71 (2d Cir. 1965); United Steelworkers, 114 N.L.R.B. 532, 535 (1955) (while getting into car to go to work, employee seized and knocked unconscious); Perry Norvell Co., 80 N.L.R.B. 225, 237 (1948) (woman employee

upon²⁴⁷ and every conceivable kind of missile has been hurled at nonstriking employees, management personnel, and vehicles that have attempted to enter a plant during a strike.²⁴⁸ Pickets have caused a wide range of damage to vehicles²⁴⁹ and occasionally personal injury to the occupants.²⁵⁰ The pickets have used their own hands and feet as well as a variety of other objects.²⁵¹

was hit in the face, suffered a bloody nose, had her hair pulled, and was knocked down).

247. See, e.g., District 11, UMW (S & S Coal Co.), 235 N.L.R.B. 757, 759 (1978); UMW Local 7083 (Grundy Mining Co.), 146 N.L.R.B. 176, 179 (1964); Local 316, United Cement Workers Union (National Gypsum Co.), 133 N.L.R.B. 1445, 1449 (1961); United Mine Workers (Union Supply Co.), 90 N.L.R.B. 436, 449 (1950).

248. See, e.g., Broadway Hosp., Inc., 244 N.L.R.B. 341, 346 (1979)(shoe); UAW Local 552 (Delvan Corp.), 239 N.L.R.B. 312, 314 (1978)(eggs, rocks, soda water); Philadelphia Ambulance Serv., 238 N.L.R.B. 1070 (1978)(lit cigarette, dousing with skunk perfume); General Teamsters Union Local 298 (Schumacher Elec. Corp.), 236 N.L.R.B. 428, 434 (1978)(rocks); Amalgamated Meat Cutters (Iowa Beef Processors, Inc.), 233 N.L.R.B. 839, 842 (1977) (blocks of wood); Union de Operadores v. Canteros (Puerto Rican Cement Co.), 231 N.L.R.B. 171, 172 (1977)(beer cans, rocks); District 1199, Hosp. Health Care Employees (Southport Manor Convalescent Center, Inc.), 227 N.L.R.B. 1732, 173435 (1977) (coffee, hot chocolate); Warehouse Employees Local 590 (Southern States Coop.), 211 N.L.R.B. 807, 808 (1974)(stones); Oil Workers Int'l Union, Local 1-591 (Snelson, Inc.), 208 N.L.R.B. 296, 298 (1974)(crowbar); Local 918, Int'l Bhd. of Teamsters (Tale-Lord Mfg. Co.), 206 N.L.R.B. 382, 385 (1973)(eggs, rocks); Teamsters Local 327 (Whale, Inc.), 178 N.L.R.B. 422, 424-25 (1969)(rocks), *enforced in part*, 432 F.2d 933 (6th Cir. 1970); Drivers Local 695 (Tony Pellitteri Trucking Service, Inc.), 174 N.L.R.B. 753, 758 (1969)(unidentified object, eggs); Teamsters Local 327 (Hartmann Luggage Co.), 173 N.L.R.B. 1403, 1404-05 (1968)(eggs, rocks, six-inch iron bolt), *enforced in part*, 419 F.2d 1282 (6th Cir. 1970); Teamsters Local 115 (E.J. Lavino & Co.), 157 N.L.R.B. 1637, 1641, (1966)(lawn chair); Teamsters Local 536 (Connecticut Foundry Co.), 165 N.L.R.B. 916, 920 (1967) (fire cracker); Teamsters Local 783 (Coca-Cola Bottling Co.), 160 N.L.R.B. 1776, 1778 (1966)(beer bottle); United Steelworkers Local 2118 (Worcester Stamped Metal Co.), 153 N.L.R.B. 1561, 1570-72 (1965)(fire crackers, eggs); ILGWU (F.R. Knitting Mills, Inc.), 145 N.L.R.B. 10, 15 (1963)(rocks); Local 346, International Leather Goods Union (Baronet of Puerto Rico, Inc.), 133 N.L.R.B. 1617, 1628 (1961) (bottles, rocks); Local Union 5367, United Steelworkers, 123 N.L.R.B. 216, 224 (1959)(bricks, bats, rocks).

249. See, e.g., Maywood Plant of Grede Plastics, 235 N.L.R.B. 363, 385 (1978)(shattered windshield, dents), *enforced in part*, 628 F.2d 1 (D.C. Cir. 1980); Local 810, Int'l Bhd. of Teamsters (Russell Plastics Technology, Inc.), 235 N.L.R.B. 40, 42 (1978)(dents, shattered windshield, vinyl top ripped); Puerto Rico Newspaper Guild Local 225 (El Mundo, Inc.), 201 N.L.R.B. 423, 425 (1973)(dents, cracked windshield, vinyl top ripped); International Woodworkers, Local 33 (Western Wirebound Box Co.), 144 N.L.R.B. 912, 916-21 (1963)(tailpipe and taillight broken; rearview mirror, windshield wipers, antenna, and chrome strip torn off).

250. See, e.g., UAW Local 552 (Delanan Corp.), 239 N.L.R.B. 312 (1978); Laborers' Int'l Union (Apex Contracting Co.), 219 N.L.R.B. 142 (1975), *enforced*, 91 L.R.R.M. 2559 (4th Cir. 1976).

251. See, e.g., UAW Local 552 (Delanan Corp.), 239 N.L.R.B. 312, 314 (1978)(fists, picket signs); Amalgamated Meat Cutters (Iowa Beef Processors, Inc.), 233 N.L.R.B. 839,

Pickets have also scratched cars with sharp objects as they pass through the picket line.²⁵² A more terrifying practice is violently rocking cars back and forth²⁵³ and occasionally even turning them over.²⁵⁴

Busses carrying nonstriking employees seem to be an especially attractive target of union violence. One truly egregious assault of this kind occurred in the *General Electric*²⁵⁵ case:

Among the women on the second bus were nonstriking employees Monserrate Fuentes, Carmen Maria Diaz, and Luz A. Martinez. The composite testimony of these three employees show that as their bus neared the church, Nicolas Matta, the aforementioned right-hand man of strike leader Maldonado, threw a can of inflammable fluid into the bus through its door and a nearby open window, drenching it and a number of its occupants. Immediately, another striker, William Rosario, who was standing next to Matta, threw a lighted object at the part of the bus that had been drenched with the liquid. The bus immediately burst into flames. At least four identified non-strikers in the bus, besides other unidentified persons, were burned as a result of the flames which engulfed the inside of the bus. One employee, Zelmina Gonzalez Matta, was seriously burned on her shoulders, back, and neck, while another non-striking employee, Paulina Ramos Fuentes, was still hospitalized at the time of the trial herein, some 3 months after the incident, as a result of the burns received in the bus. As the occupants fled from the burning bus, they were chased by strikers carrying sticks and stones. Several sought refuge in

841-42 (1977)(small log, branch of tree, piece of firewood, a 2 x 4); Local 248, Meat & Allied Food Workers (Milwaukee Indep. Meat Packers Ass'n), 222 N.L.R.B. 1023, 1028 (1976)(meat hook), *enforced*, 84 L C #10826 (7th Cir. 1978); International Union Local 245 (Apex Contracting, Inc.), 219 N.L.R.B. 142, 145 (1975) (shovels), *enforced*, 91 L.R.R.M. 2559 (4th Cir. 1976); Puerto Rico Newspaper Guild Local 225 (El Mundo, Inc.), 201 N.L.R.B. 423, 425 (1973)(fists, sticks, picket signs).

252. *See, e.g.*, Amalgamated Meat Cutters (Iowa Beef Processors, Inc.), 233 N.L.R.B. 839, 842-43 (1977); Local 248, Meat & Allied Food Workers (Milwaukee Indep. Meat Packers Ass'n.), 222 N.L.R.B. 1023, 1027-28 (1976).

253. *See, e.g.*, District 11, UMW (S & S Coal Co.), 235 N.L.R.B. 757, 760 (1978); Puerto Rico Newspaper Guild, Local 225 (El Mundo, Inc.), 201 N.L.R.B. 423, 425 (1973); Brotherhood of Locomotive Firemen (Phelps Dodge Corp.), 130 N.L.R.B. 1147, 1148 (1961), *enforcement denied in part*, 302 F.2d 198 (9th Cir. 1962).

254. *See, e.g.*, United Auto Workers (American Metals Prod. Co.), 146 N.L.R.B. 1349, 1354 (1964); United Furniture Workers, Local 309 (Smith Cabinet Mfg.), 81 N.L.R.B. 886, 912-13 (1949).

255. International Ass'n of Machinists (General Elec. Co.), 189 N.L.R.B. 50 (1971).

nearby houses where they became captives because of the taunting threats of physical violence from strikers if they came out. Finally they were evacuated under police protection about 7 p.m. that night.²⁵⁶

As the Board once put it, “[c]ertainly this type of criminal and tortious conduct is the very type of activity intended to be banned by Section 8(b)(1)(A).”²⁵⁷

Furthermore, the Board has even evidenced concern over “technical” kinds of assault; assaults referred to as “minor picket line and other misconduct” in other contexts.²⁵⁸ The Board has found employees and management personnel to have been illegally grabbed,²⁵⁹ pushed,²⁶⁰ tripped,²⁶¹ jostled,²⁶² pinched,²⁶³ jabbed,²⁶⁴ shoved,²⁶⁵ bumped,²⁶⁶ spit upon,²⁶⁷ wrestled with,²⁶⁸

256. *Id.* at 56.

257. *United Mine Workers (Union Supply Co.)*, 90 N.L.R.B. 436, 450 (1950).

258. *Associated Grocers v. NLRB*, 562 F.2d 1333, 1335 (1st Cir. 1977); *see also* *Southern Fla. Hotel & Motel Ass’n*, 245 N.L.R.B. 561 (1979). The “minor violence” doctrine holds that an employee who is otherwise engaged in a legitimate strike does not lose his protected status and thus cannot be discharged when he engages in certain of the less egregious forms of strike and picket line misconduct. Thus, such misconduct is a “protected concerted activity” under the statute. *See generally* Haggard, *Picket Line*, *supra* note 4, at 448-50. The Board’s approach in those cases is, however, logically inconsistent with the tougher approach that it takes in the section 8(b)(1)(A) context. The legislative history of the Taft-Hartley Act makes it clear that conduct which is an unfair labor practice when engaged in by a union agent is definitely *not* a “protected concerted activity” when engaged in by a mere employee acting on his own. LEGIS. HIST. LMRA at 544, 546, 912.

259. *E.g.*, *Broadway Hosp., Inc.*, 244 N.L.R.B. 341, 349 (1979); *Checker Taxi Co.*, 131 N.L.R.B. 611, 619 (1961); *United Steelworkers*, 114 N.L.R.B. 532, 535 (1955); *UMW, District 50 Local 12824 (Eagle Mfg. Co.)*, 112 N.L.R.B. 74, 78 (1955); *Perry Norvell Co.*, 80 N.L.R.B. 225, 235 (1949).

260. *E.g.*, *Maywood Plant of Grede Plastics*, 235 N.L.R.B. 363, 379 (1978), *modified*, 628 F.2d 1 (D.C. Cir. 1980); *Dressmakers Joint Council, ILGWU (Susan Evans, Inc.)*, 146 N.L.R.B. 559, 561 (1964), *enforced*, 342 F.2d 988 (2d Cir. 1965); *Painters Dist. Council No. 6 (Higbee Co.)*, 97 N.L.R.B. 654, 661 (1951), *enforced*, 202 F.2d 957 (6th Cir. 1953), *cert. denied*, 345 U.S. 995 (1953); *Essex County Council of Carpenters, Number 10 (Fairmount Constr. Co.)*, 95 N.L.R.B. 969, 997 (1951).

261. *E.g.*, *Central Mass. Joint Board, Textile Workers Union (Charles Weinstein Co.)*, 123 N.L.R.B. 590, 591 (1959); *Essex County Council of Carpenters, Number 10 (Fairmount Constr. Co.)*, 95 N.L.R.B. 969, 997 (1951).

262. *E.g.*, *Maywood Plant of Grede Plastics*, 235 N.L.R.B. 363, 379 (1978), *modified*, 628 F.2d 1 (D.C. Cir. 1980); *Painters Dist. Council No. 6 (Higbee Co.)*, 97 N.L.R.B. 654, 661 (1951), *enforced*, 202 F.2d 957 (6th Cir. 1953), *cert. denied*, 345 U.S. 995 (1953).

263. *Central Mass. Joint Board, Textile Workers Union (Charles Weinstein Co.)*, 123 N.L.R.B. 590, 591 (1959).

264. *Industrial Union of Marine Workers (Bethlehem Steel Co.)*, 130 N.L.R.B. 412, 423 (1961).

and elbowed.²⁶⁹ They have also had their hair pulled,²⁷⁰ their hands²⁷¹ and heels²⁷² stepped on, and their feet stomped.²⁷³ Indeed, even the systematic harassment, jostling, and taunting of an employee while he works has been held to constitute illegal restraint and coercion.²⁷⁴ Although these kinds of misconduct most often occur in the context of other, more serious acts of violence, it would seem that the Board also views them as an independent violation of section 8(b)(1)(A).²⁷⁵

c. *Hindering Egress and Ingress*

A great deal of the union violence previously described is aimed at preventing employees from going to work during a strike. Another method pickets use to accomplish that same objective is physically obstructing or blocking egress and ingress to the employer's business. This may be done in mass, in some tight formation, or by other obstacles. The legislative history makes it clear that this was one of the principal evils section 8(b)(1)(A) was intended to eliminate,²⁷⁶ and the Board and the courts have generally respected that intent. Although the Board is willing to tolerate a little inconvenience in crossing a picket

265. *E.g.*, UAW Local 552 (Delanan Corp.), 239 N.L.R.B. 312, 316 (1978); IBEW Local 309 (R. Dron Elec. Co.), 212 N.L.R.B. 409, 411 (1974); ILGWU (F.R. Knitting Mills, Inc.), 145 N.L.R.B. 10, 14 (1963).

266. IBEW Local 309 (R. Dron Elec. Co.), 212 N.L.R.B. 409, 411 (1974).

267. Broadway Hosp., Inc., 244 N.L.R.B. 341, 346, 349 (1979).

268. *E.g.*, Local 888, Int'l Union, UAW (Miami Plating Co.), 144 N.L.R.B. 897, 899 (1963); District 65, Retail Store Union (Eastern Camera & Photo Corp.), 141 N.L.R.B. 991, 993 (1963).

269. Perry Norvell Co., 80 N.L.R.B. 225, 236 (1948).

270. Local 1150, United Elec. Workers (Cory Corp.), 84 N.L.R.B. 972, 995 (1949).

271. *E.g.*, International Union of Elec. Workers (Sperry Rubber & Plastics Co.), 134 N.L.R.B. 1713, 1723 (1961); *see also* United Steelworkers (Wright Line Div. of Barry Wright Corp.), 146 N.L.R.B. 71, 73 (1964).

272. District 1199, Hosp. Health Care Employees (Southport Manor Convalescent Center, Inc.), 227 N.L.R.B. 1732, 1734 (1977).

273. Dressmakers Joint Council, ILGWU (Susan Evans, Inc.), 146 N.L.R.B. 559, 561 (1964), *enforced*, 342 F.2d 988 (2d Cir. 1965).

274. Newport News Printing Pressmen's Union Local 288 (The Daily Press, Inc.), 188 N.L.R.B. 475, 480 (1971)(trial examiner said the conduct "manifest[s] many of the clodish features of a carnival fun house and low level vaudeville," *id.* at 478-79).

275. *But see* Joint Board, Cloak Makers Union (Free-Play Togs, Inc.), 140 N.L.R.B. 1428, 1434 (1963)(nudging, pushing, and shaking a hand in front of an employee's face were, in the absence of any other acts of violence, held not to constitute a violation).

276. *See* text accompanying notes 31, 33, 35, 37 and 66 *supra*.

line, it has held that “[b]locking an entrance or exit even for a short period of time constitutes restraint and coercion within the meaning of the Act.”²⁷⁷ The Board has condemned delays of “from a few seconds to a few minutes”²⁷⁸ and of “one to five minutes.”²⁷⁹ However, it has refused to find a violation where the picketing merely caused nonstriking employees “to ‘deviate’ from their usual route in order to detour around the pickets.”²⁸⁰ In one case, the Board said that an alleged illegal blocking by a single automobile that pulled out into the middle of a street “strain[ed] at a gnat.”²⁸¹ On the other hand, the Board has consistently held that an attempt to block ingress and egress need not be actually successful in order for a violation to occur.²⁸²

A number of techniques have been used to block ingress and egress. The most effective has been so-called “mass picketing.” Although the Board has been reluctant to label this a per se violation,²⁸³ the presence of a large number of pickets may nevertheless make entrance physically impossible. It may at least create such a coercive atmosphere that no one would be inclined to even attempt entrance. As the Third Circuit Court of Appeals once put it:

the massing of large numbers of men . . . was itself violative of Section 8(b)(1)(A) strictures. It is well settled that picketing which interferes with or blocks the ingress or egress of employees and others at a place of employment, or which, in effect, forces employees to “run a gauntlet,” is inherently coercive and

277. Shopmen's Local 455 (Stokvis Multi-Ton Corp.), 243 N.L.R.B. 340, 346 (1979); see also Service Employees Local 254 (M.I.T.), 218 N.L.R.B. 1399, 1401 (1975) (ingress found to have been impeded even though pickets allowed in any cars that so “insisted”), modified, 535 F.2d 1335 (1st Cir. 1976). But cf. United Elec. Workers Local 813 (Ryan Constr. Corp.), 85 N.L.R.B. 417, 435 (1949) (locking gate held not to be a violation because it was promptly opened on request), overruled on other grounds, 126 N.L.R.B. 905, 906 (1960).

278. Lithographers Int'l Union (Holiday Press), 193 N.L.R.B. 11, 15 (1971).

279. Metal Polishers Union Local 67 (Alco-Cad Nickel Plating Corp.), 200 N.L.R.B. 335, 336 (1972); see also United Furniture Workers, Local 472 (Colonial Hardwood Flooring Co.), 84 N.L.R.B. 563, 564 (1949) (car blocked for three or four minutes).

280. Central Mass. Joint Board, Textile Workers Union (Charles Weinstein Co.), 123 N.L.R.B. 590, 606 (1959); see also Perry Norvell Co.), 80 N.L.R.B. 225, 237-38 (1948).

281. General Iron Corp., 224 N.L.R.B. 1180 (1976).

282. See, e.g., Local 761, Int'l Union of Elec. Workers (General Elec.), 126 N.L.R.B. 123, 124-25 (1960), enforced, 287 F.2d 565 (6th Cir. 1961).

283. See, e.g., United Steelworkers (Vulcan-Cincinnati, Inc.), 137 N.L.R.B. 95, 98 (1962); Local 1150, United Elec. Workers (Cory Corp.), 84 N.L.R.B. 972, 976-77 (1949).

in contravention of the Act.²⁸⁴

Cases in which ingress and egress have been prevented "through the sheer force of massed numbers,"²⁸⁵ or by what might better be called simple "mob action," are fairly numerous. What transpired in the *Grundy Mining Company*²⁸⁶ case is illustrative of this particular technique:

after Poor's passenger car turned into Pocket Road, the large, surging mob of men completely blocked and sealed off that road, for practical purposes precluding travel thereon and, therefore, access to the minesite where they worked. . . . [T]he second convoy vehicle, driven by John Higgins, was unable to proceed down Pocket Road, since Pocket Intersection and Pocket Road to a distance of about 50 to 75 feet was "completely blocked off" by about 300 men "hollering and squalling and whooping and cussing and doing most anything," and who "threatened and cussed" John Higgins and told him "that they'd been fooling with him long enough, to get out of there they were going to kill every one of the damn son-of-a-bitches."²⁸⁷

Moreover, even if the mass of pickets does not actually block ingress and egress, the presence of large numbers of union demonstrators may be sufficiently threatening to deter nonstriking employees from risking retaliation.²⁸⁸ In the *Weirton Construction Company* case, the pickets did not physically bar access to the mine. However, the Board noted that "the presence of a large group of men milling about on the road, without identifying signs and possessed of a considerable numerical advantage over the 15 . . . employees located at the mine site would tend, when taken together with the remarks made by the pick-

284. *NLRB v. United Mine Workers*, 429 F.2d 141, 146 (3d Cir. 1970).

285. *Industrial Union of Marine Workers Locals 5 & 9 (Bethlehem Steel Co.)*, 130 N.L.R.B. 412, 422 (1961).

286. *UMW Local 7083 (Grundy Mining Co.)*, 146 N.L.R.B. 176 (1964).

287. *Id.* at 178-79; see also *Union de Operadores y Canteros (Puerto Rican Cement Co.)*, 231 N.L.R.B. 171, 172 (1977); *ILGWU (F.R. Knitting Mills, Inc.)*, 145 N.L.R.B. 10 (1963); *UMW, District 31, (Bitner Fuel Co.)*, 92 N.L.R.B. 953, 954 (1950), *enforced*, 190 F.2d 251 (4th Cir. 1951); *UMW, District 23 (W. Ky. Coal Co.)*, 92 N.L.R.B. 916, 936 (1950), *enforced*, 195 F.2d 961 (6th Cir. 1952), *cert. denied*, 344 U.S. 920 (1952); *International Longshoremen's Union Local 6 (Sunset Line & Twine Co.)*, 79 N.L.R.B. 1487, 1500 (1948).

288. *Local 275, Laborers Int'l Union (S.B. Apts., Inc.)*, 209 N.L.R.B. 279, 286 (1974).

ets, to chill the desire of employees to cross the picket line and come to work."²⁸⁹

Although ingress and egress may be directly or indirectly blocked by the mere presence of a mass of pickets, a lesser number can accomplish the same result through the technique of "close formation" picketing.²⁹⁰ Another technique is simply refusing to move from in front of an entrance or gate.²⁹¹ The non-striking employee who desires to enter the plant is unwittingly compelled to *initiate* the contact with the union pickets and thereby risk retaliatory assaults of the kinds previously described.²⁹² Most of those assaults occurred in just this context. Nonstriking employees who attempt to enter in vehicles face an additional dilemma when confronted by pickets who refuse to move out of a driveway. As the Board put it in one case, "[t]he car drivers were faced with the choice of running down the pickets, at the risk of inflicting serious injury, or driving away. This interposition of passive force to prevent employees from going to work is, we believe, a form of restraint proscribed by section 8(b)(1)(A)."²⁹³

289. *United Mine Workers (Weirton Constr. Co.)*, 174 N.L.R.B. 344 (1969). *But see* *North Elec. Mfg. Co.*, 84 N.L.R.B. 136 (1949), where the trial examiner's suggestion that an unfair labor practice is committed by "mass picketing . . . and the creation of the general atmosphere inducing a belief that going to work would be at the risk of sustaining physical injury," *id.* at 155, was apparently rejected by the Board, *id.* at 136 n.2.

290. *See, e.g., Service Employees Local 254 (M.I.T.)*, 218 N.L.R.B. 1399, 1401 (1975)(pickets in driveway 5 to 7 feet apart), *enforced in part*, 535 F.2d 1335 (1st Cir. 1976); *International Longshoremens' Union Local 6 (Eureka Chem. Co.)*, 164 N.L.R.B. 1158, 1160 (1967)(20 to 30 pickets walking 2 to 10 inches apart in a close circle in front of the door; so-called "back-to-belly" picketing), *enforced*, 420 F.2d 957 (9th Cir. 1969); *International Woodworkers, Local 3-3 Western Wirebound Box Co.*, 144 N.L.R.B. 912, 917 (1963). *But cf. United Elec. Workers Local 813 (Ryan Constr. Co.)*, 85 N.L.R.B. 417 (1949) ("Although there were as many as 20 pickets before a 23 foot wide entrance on occasion, none of the pickets at any time engaged in any violence or threats, overt or implicit," and employees were told they could pass through), *overruled on other grounds*, 126 N.L.R.B. 905, 906 (1960).

291. *See, e.g., Metal Polishers Union, Local 67 (Alco-Cad Nickel Plating Corp.)*, 200 N.L.R.B. 335 (1972)(union agent stood in front of door); *Local 235, Lithographers Union (Henry Wurst, Inc.)*, 187 N.L.R.B. 490, 495 (1970)(two pickets walked in front of car; one of them jumped on the hood); *Teamsters Local 115 (E.J. Lavino & Co.)*, 157 N.L.R.B. 1637, 1639-40 (1966) (pickets blocked entry by walking and standing in front of cars); *International Union of Elec. Workers (Sperry Rubber & Plastics Co.)*, 134 N.L.R.B. 1713, 1722 (1961)(pickets refused to move out of driveway).

292. *See* text accompanying notes 240-75 *supra*.

293. *International Longshoremens' Union Local 6 (Sunset Line & Twine Co.)*, 79 N.L.R.B. 1487, 1506 (1948).

Finally, vehicular ingress and egress is often hindered or blocked by the placement of various obstacles in the roadway²⁹⁴ or by the time-honored tactic of scattering nails in the path of on-coming cars and trucks.²⁹⁵ Reflecting sunlight into the eyes of drivers is another annoying and potentially dangerous tactic.²⁹⁶ But, regardless of how it is accomplished, physically preventing people from freely entering and leaving a place of business has consistently been held to be an illegal form of restraint and coercion.

d. Invasions and Seizures of Company Property

Not content to just intimidate nonstriking or non-union employees as they attempt to enter the employer's premises, some labor unions have carried their violence into the workplace itself. Such invasions of company property, and the attendant coercion of working employees by various threats and assaults, were a common occurrence in the mine fields during the 1950's. Roving bands of from a few hundred to over two-thousand unionists would converge upon a particular mine, effectively shutting it down. What happened next, in several instances, was described by the Sixth Circuit Court of Appeals:

The project had been carefully organized and planned, for in each mine visited, while the union agents were ordering the management to bring the men up out of the shafts and pits, the union men who followed Suver and Chaney proceeded in a

294. See, e.g., *Union de Operadores y Canteros (Puerto Rican Cement Co.)*, 231 N.L.R.B. 171, 172 (1977) (metal drums); *Local 761, Int'l Union of Elec. Workers (General Elec. Co.)*, 126 N.L.R.B. 123, 124 (1960) (concrete blocks, milk bottle crates, water buckets, lawn chairs), *enforced*, 287 F.2d 565 (6th Cir. 1961); *United Furniture Workers, Local 309 (Smith Cabinet Mfg. Co.)*, 81 N.L.R.B. 886 (1949) (automobiles, railroad ties, raised gutter plates); see also *International Ass'n of Machinists (General Elec. Co.)*, 183 N.L.R.B. 1225, 1231 (1970) (chaining gate shut).

295. See, e.g., *District 34, Int'l Ass'n of Machinists (Wolf Mach. Co.)*, 254 N.L.R.B. 282 (1981); *Amalgamated Meat Cutters (Iowa Beef Processors, Inc.)*, 233 N.L.R.B. 839, 844 (1977); *District 50, Allied & Technical Workers (Austin Co.)*, 198 N.L.R.B. 1184, 1186 (1972), *enforced*, 83 L.R.R.M. 2455 (6th Cir. 1973); *Local 235, Lithographers Union (Henry Wurst Co.)*, 187 N.L.R.B. 490, 494 (1970) (employer paid \$700 to have the tires of non-striking employees repaired); *ILGWU (Elsing Mfg. Co.)*, 186 N.L.R.B. 342, 345 (1970).

296. See, e.g., *District 50, Allied Technical Workers (Austin Co.)*, 198 N.L.R.B. 1184, 1186 (1972); *United Steelworkers Local 2118 (Worcester Stamped Metal Co.)*, 153 N.L.R.B. 1561, 1568 (1965).

definite pattern of operation. They rounded up all the non-union men working above ground and herded them with force and constant abuse to a place designated by the union agents for speeches. The union men encircled the non-union men so that they were hemmed in by the overwhelming number of the union group. The union agents then declared that the mines would be closed and the men would not be allowed to work until they had joined the union and collective bargaining contracts had been signed by the management. The non-union men were ordered to raise their hands to show that they would comply with these conditions. When some hands were not raised, abusive epithets were hurled at the non-union men and they were threatened.²⁹⁷

Vicious assaults, destruction of company property, and threats of violence occurred in several of the other cases of mine invasion and seizure that were litigated during this period.²⁹⁸ The United Mine Workers, however, has not been the only union to engage in this particular form of organizational activity. In *Susan Evans, Inc.*,²⁹⁹ fifteen to twenty-five men of the International Ladies Garment Workers Union stormed into a shop. In the words of the Board "there ensued a wild melee. The raiders ran in screaming and yelling, 'This place is on strike, everybody out.'"³⁰⁰ The employer ordered them to leave, but they refused. One employee was forcibly prevented from phoning the police. Another employee was pushed around and punched in the chest. Yet another was threatened with being hit on the head with a coke bottle. The employees left the premises. The union agents then "forcibly escorted them to the ILGWU office"³⁰¹ to have them join the union. A similarly violent invasion occurred in *Ho-*

297. *NLRB v. UMW*, 195 F.2d 961, 961-62 (6th Cir. 1952), *cert. denied*, 344 U.S. 920 (1953).

298. *See, e.g.*, *UMW District 2 (Fetterolf Coal Co.)*, 103 N.L.R.B. 1572 (1953), *enforced*, 210 F.2d 281 (3d Cir. 1954); *UMW District 2 (Mercury Mining & Constr. Co.)*, 96 N.L.R.B. 1389 (1951), *enforced*, 202 F.2d 177 (3d Cir. 1953); *UMW District 31 (L.E. Cleghorn)*, 95 N.L.R.B. 546 (1951), *enforced*, 198 F.2d 389 (4th Cir. 1952), *cert. denied*, 344 U.S. 884 (1952); *UMW District 31 (Bitner Fuel Co.)*, 92 N.L.R.B. 953 (1950), *enforced*, 190 F.2d 251 (4th Cir. 1951); *see also Allou Distrib., Inc.*, 201 N.L.R.B. 47, 55-56 (1973) ("invasion" of a warehouse area and threats of violence).

299. *Dressmakers Joint Council, ILGWU (Susan Evans, Inc.)*, 146 N.L.R.B. 559 (1964), *enforced*, 342 F.2d 988 (2d Cir. 1965).

300. 146 N.L.R.B. at 563.

301. *Id.* at 564.

tel La Concha,³⁰² where "a group of people came bursting into the hotel lobby armed with metal pipes, sticks, and clubs, shouting 'to the casino' and heading for the casino door."³⁰³ They beat up a security officer who tried to stop them. Once inside, "the casino was thrown into an uproar of shouting, violence, and confusion. . . ."³⁰⁴

Needless to say, the Board and the courts have had no difficulty in finding violent conduct of this nature to be illegal restraint and coercion. However, the illegality of a union invasion and seizure of company property does not necessarily turn on the violent acts that usually accompany it. The Board first began defining the parameters of this doctrine in the *District 65, Retail Store Union*³⁰⁵ case. The organizing tactic used there was described by the Board as follows:

they entered the premises of the employer without invitation or permission, and after entering went to the work stations of various of the employees, remained there for brief periods . . . against the will and over the protest of the employer, and while at such work stations either engaged the employees in conversation, or gained their attention while informing the employees either orally, or by handing out literature, concerning the Union, and . . . in this manner prevented the employees from engaging in their normal work.³⁰⁶

The union apparently used this tactic in several different stores. In some, there were threats of physical violence which were obviously illegal. In at least one store, however, there were no accompanying threats or acts of violence. The Board was thus confronted with the issue of whether the above-described con-

302. *Union de Tronquistas Local 901 (Hotel La Concha)*, 193 N.L.R.B. 591 (1971).

303. *Id.* at 595.

304. *Id.* An equivalent kind of misconduct, involving an invasion and violent disturbance of a union dissidents' meeting, is reported in *Local 57, UAW (Louis R. Miller)*, 102 N.L.R.B. 111 (1953).

305. *District 65, Retail Store Union (B. Brown Assoc., Inc.)*, 157 N.L.R.B. 615 (1966), *enforced*, 375 F.2d 745 (2d Cir. 1967). In a much earlier case, *Gimbel Brothers*, 100 N.L.R.B. 870 (1952), the union used the following tactic to convince employees to join: "surround them on the selling floor—together with the customers they were trying to serve—and . . . maintain a loud, continuing commotion, including name-calling." *Id.* at 876. Although this was unattended by any actual physical obstruction, the Board concluded without much discussion that "this kind of indoor picketing is the equivalent of physical coercion." *Id.* at 877.

306. 157 N.L.R.B. at 617.

duct could alone be considered a form of restraint or coercion. The Board held that it could:

In these cases . . . , the mass of union representatives, by sheer force of moving bodies, impose the union's will over that of the protesting employer, on its own premises, and in the presence of its employees. Such conduct I find and conclude was reasonably calculated to coerce the employer. Coercive conduct directed against an *employer* in the presence of his employees is deemed to be coercive of the *employees* under a well-established Board principle. . . . Implicit in this rule is the valid assumption that employees, observing that the employer cannot withstand the force of the union, naturally conclude, or would be inclined to conclude, that they too should yield to the union's wishes.³⁰⁷

Subsequently, the *District 65* case was more or less limited to its facts. The touchstone of the doctrine was further clarified in *Levitz Furniture*³⁰⁸ wherein four to six union agents came into the store's employee luncheonette to distribute literature and solicit union membership. They refused to leave when asked, and even argued with the police about this for over an hour. The Board found this conduct not to be a section 8(b)(1)(A) violation. It noted that in *Levitz*, unlike the *District 65* case, there was no mob of union agents, the few that entered occupied only a limited area of the store, and there was no disruption of the business. The Board concluded that such conduct "did not result in the imposition of the Respondent's will over the Company and its premises so as to constitute restraint and coercion. . . ."³⁰⁹ It is now clear that not every trespass or uninvited entry onto company property by union agents necessarily rises to the level of demonstrating to the employees that the union "can impose its will over the company and its premises. . . ."³¹⁰ Rather, it would seem that some significant degree

307. *Id.* at 623.

308. Retail Store Employees Local 1001 (*Levitz Furniture Co.*), 203 N.L.R.B. 580 (1973).

309. *Id.* at 581.

310. New York Typographical Union Local 6 (*Artintype, Inc.*), 213 N.L.R.B. 925, 929 (1974). Although there were some instances of physical shoving in that case, the administrative law judge found them to be minor. No one was hurt; there was no disruption; and the union agents were not successful in gaining entry. Thus, the judge concluded that the *Levitz* factor, the imposition of the union's will over the employer, sim-

of disruption must occur before an otherwise non-violent invasion can be said to represent an imposition of the union's will over the employer.³¹¹

e. Destruction of Company Property

Just as assaults upon management personnel and seizures of the plant premises have been construed as methods of indirectly restraining and coercing employees, the Board and the courts have similarly condemned the damage or destruction of company property by union agents. As the Second Circuit Court of Appeals once explained it, "[d]estruction of the employer's property restrains the employees in the exercise of their rights under Section 7 by threatening their jobs and by creating a general atmosphere of fear of violence."³¹² Union agents have been found guilty of a section 8(b)(1)(A) violation for vandalizing company trucks,³¹³ smashing windows,³¹⁴ throwing firebombs,³¹⁵ and otherwise causing damage to company property, buildings, and equipment.³¹⁶

ply was not present.

311. See *Bartenders Local 2 (Zim's Restaurants, Inc.)*, 240 N.L.R.B. 757 (1979). In *Zim's Restaurants*, thirty to forty union agents entered the restaurant and approached employees who were on duty. On the union's instruction, the employees subsequently left their duty stations to attend a five to ten minute meeting in a banquet room. In another incident, from twelve to seventeen union agents invaded the kitchen and remained there for twenty minutes "making noises by clanging pots and pans and by shouting, screaming and swearing." *Id.* at 774. The judge found this conduct to easily fall within the *District 65* doctrine.

312. *New Power Wire & Elec. Corp. v. NLRB*, 340 F.2d 71, 72, n.1 (1965).

313. See, e.g., *Local 30, United Slate, Tile and Composition Roofers (Associated Builders & Contractors, Inc.)*, 227 N.L.R.B. 1444, 1446 (1977).

314. See, e.g., *Broadway Hosp., Inc.*, 244 N.L.R.B. 341, 346 (1979); *Teamsters Local 327 (Whale, Inc.)*, 178 N.L.R.B. 422, 423 (1969), *enforced in part*, 432 F.2d 933 (6th Cir. 1970); *North Electric Mfg. Co.*, 84 N.L.R.B. 136, 151 (1949) (more than 443 window panes broken).

315. See, e.g., *Teamsters Local 327 (Whale, Inc.)*, 178 N.L.R.B. at 423.

316. See, e.g., *Teamsters Local 695 (Wisconsin Supply Corp.)*, 204 N.L.R.B. 866 (1973); *Teamsters Local 327 (Coca-Cola Bottling Co.)*, 184 N.L.R.B. 84 (1970); *American Newspaper Guild (Vindicator Printing Co.)*, 151 N.L.R.B. 1558 (1965); *UMW District 2 (Mercury Mining & Constr. Corp.)*, 96 N.L.R.B. 1389 (1951), *enforced*, 202 F.2d 177 (3d Cir. 1953); *North Elec. Mfg. Co.*, 84 N.L.R.B. 136 (1949).

f. Other Menacing Conduct on the Picket Line

Although the mere maintenance of a picket line has been described as a “coercive technique,”³¹⁷ it is obviously not illegal under section 8(b)(1)(A) unless something more is involved. That something more, however, need not rise to the level of express threats or actual assaults in order for a violation to occur. Rather, the Board has recognized that various other kinds of menacing conduct on the picket line can serve to illegally restrain or coerce employees in the exercise of their rights.

For example, in one case picketing employees carried “ax handles, iron bars, signs, and boards with large nails protruding from them.”³¹⁸ The Board characterized this as an “implicit threat of physical violence. . . .”³¹⁹ Similarly, carrying or displaying guns and rifles,³²⁰ and the conspicuous use of knives to whittle on sticks,³²¹ have been held to be inherently coercive. Possession of explosive devices in a truck parked near the picket line has also been held to be a violation.³²²

Under certain circumstances, even attempts by the union to identify those who are crossing the picket line can be considered sufficiently menacing to be a violation. For example, in one case

317. Printing Specialties Union, 82 N.L.R.B. 271, 292 (1949).

318. Brotherhood of Railway Carmen, Local 543, 248 N.L.R.B. 285, 288 (1980).

319. *Id.* See also Union de Operadores y Canteros (Puerto Rican Cement Co.), 231 N.L.R.B. 171, 173 (1977) (“shovels, sticks, rakes, and other equipment susceptible of being used as a weapon”); Oil Workers Int’l Union Local 1-591 (Snelson, Inc.), 208 N.L.R.B. 296, 297 (1974) (“clubs resembling baseball bats or ax handles”); Local 235, Lithographers Union (Henry Wurst, Inc.), 187 N.L.R.B. 490, 493 (1970) (sticks held in a threatening manner); General Truckdrivers Local 5 (Ryder Truck Lines, Inc.), 161 N.L.R.B. 493, 50102 (1966) (pieces of lumber or sticks), *enforced*, 389 F.2d 757 (5th Cir. 1968); International Woodworkers (Region 5) (Pioneer Lumber Co.), 140 N.L.R.B. 602, 605 (1963) (brandishing of clubs); Hermandad de Trabajadores de la Construcción (Levitt Corp.), 127 N.L.R.B. 900, 913 (1960) (broken bottle); United Packinghouse Workers, 123 N.L.R.B. 464, 465 (1959) (“heavy sticks and clubs”), *enforced*, 274 F.2d 816 (5th Cir. 1960) (*per curiam*); North Electric Mfg. Co., 84 N.L.R.B. 136, 151 (1949) (sticks, clubs, stones); United Furniture Workers Local 309 (Smith Cabinet Mfg. Co.), 81 N.L.R.B. 886, 900-01 (1949) (sticks or clubs; bricks were also broken up and put in piles along the picket line).

320. See, e.g., Local 918, Int’l Bhd. of Teamsters (Tale-Lord Mfg. Co.), 206 N.L.R.B. 382, 383-84 (1973) (exhibition of hand gun); Teamsters Local 695 (Wisconsin Supply Corp.), 204 N.L.R.B. 866, 868 (1973) (union agent appeared on picket line carrying a partially covered rifle); *accord* General Truck Drivers Local 5 v. NLRB, 410 F.2d 1344, 1346 (5th Cir. 1969) (display of revolver at union meeting).

321. UMW Local 7083 (Grundy Mining Co.), 145 N.L.R.B. 247, 254 (1963).

322. Union de Operadores y Canteros, 231 N.L.R.B. 171, 176 (1977).

the Board noted that:

During the mass picketing, automobile license numbers of nonstriking employees were recorded by the pickets at the Respondent's instructions. At the same time threats were voiced by pickets that: "We will get you" and "We have your license number. . . ." In the context of the threats and violence on the picket line it would have been reasonable for the nonstriking employees who were not cooperating with the strikers to have anticipated that the taking of the license numbers was for the purpose of identifying them for reprisals.³²³

Similarly, "[p]hotographing of nonstrikers has been found by the Board to be 'calculated to instill in [employees'] mind[s] a fear of retribution, because of [their] refusal to join the strike, . . . particularly when coupled with other conduct such as the pickets' actions here in blocking certain vehicles and appearing to take down license plate numbers.'"³²⁴ These same acts, however, have been allowed in the absence of an otherwise coercive atmosphere.³²⁵

Section 8(c), another Taft-Hartley Act amendment, provides that "[t]he expressing of any views, argument, or opinion . . . shall not constitute . . . an unfair labor practice under any of the provisions of this subchapter if such expression contains no threat of reprisal or force. . . ."³²⁶ The Board has taken the position that, without more, mere "name calling" does not violate section 8(b)(1)(A) and is privileged under section 8(c).³²⁷ In the *Charles Weinstein Company*³²⁸ case, for example, the trial

323. Local 761, Int'l Union of Electrical Workers (General Elec. Co.), 126 N.L.R.B. 123, 124 (1960), *enforced*, 287 F.2d 565 (6th Cir. 1961); *see also* Local 235, Lithographers Union (Henry Wurst, Inc.), 187 N.L.R.B. 490, 495 (1970); United Steelworkers (Vulcan-Cincinnati, Inc.), 137 N.L.R.B. 95, 96 (1962); Local 316, United Cement Workers Union (National Gypsum Co.), 133 N.L.R.B. 1445, 1449 (1961).

324. NLRB v. Service Employees Int'l Union Local 254, 535 F.2d 1335, 1337 (1st Cir. 1976).

325. *See, e.g.*, Service Employees Int'l Union, Local 50 (Our Lady of Perpetual Help Nursing Home, Inc.), 208 N.L.R.B. 117, 119 (1974); *cf.* Laborers' Int'l Union Local 245 (Apex Contracting, Inc.), 219 N.L.R.B. 142, 147 (1975), *enforced*, 91 L.R.R.M. 2559 (4th Cir. 1976).

326. Labor Management Relations Act § 8(c), 29 U.S.C. § 158(c) (1976).

327. *See, e.g.*, International Longshoremen's Union Local 6 (Sunset Line & Twine Co.), 79 N.L.R.B. 1487, 1505 (1948); Perry Norvell Co., 80 N.L.R.B. 225, 242 (1948).

328. Central Mass. Joint Board, Textile Workers Union (Charles Weinstein Co.), 123 N.L.R.B. 590 (1959).

examiner noted that “although the atmosphere was not that of a Sunday-school picnic, the language repeatedly used was mostly familiar picket-line jargon.”³²⁹ This included the use of such words of “scabs,” “whore,” “sluts,” “whoremaster,” “bags,” “tramps,” “dirty rats,” “bums,” “bastards,” “dirty pigs,” and “sons-of-bitches.” Used less frequently were “dried-up redhead,” “Christ-killer,” “fucking Jew,” “white nigger,” “herring choker,” and “cockroach.”³³⁰ On the other hand, when name calling occurs in an otherwise coercive atmosphere, it can become a violation. In *West Kentucky Coal Company*³³¹ for example, the Board noted that the union’s verbal abuse was “an integral part of the coercive conduct, and cannot be dismissed or disregarded, in view of the circumstances under which they were uttered, as being mere expressions of views, arguments, or opinions, or as merely name calling, or as momentary exuberance of spirit.”³³²

g. Restraint and Coercion Away From the Picket Line and Work Site

Violence between those who are working and those who are not might possibly be explained as a momentary loss of control in the emotionally supercharged atmosphere of a picket line confrontation.³³³ That explanation, however, becomes increasingly

329. *Id.* at 604.

330. *Id.* at 602-03.

331. *United Mine Workers (West Kentucky Coal Co.)*, 92 N.L.R.B. 916 (1950), *enforced*, 195 F.2d 961 (6th Cir. 1952), *cert. denied*, 344 U.S. 920 (1953).

332. 92 N.L.R.B. at 949. The Court of Appeals also noted that “[i]t is true that the calling of names under certain circumstances may not amount to coercion; but in the degree to which it was exhibited here it expressed overwhelming hostility.” 195 F.2d at 962. *See also Taxicab Drivers Union Local 777 (Crown Metal Mfg. Co.)*, 145 N.L.R.B. 197, 204 (1963) (“The loud use of profanity and obscenity in the public streets directed to an employer and to police whose duty it is to preserve order at the scene of a strike is, when committed in the presence of employees going to work and employees on strike, an act of coercion in itself”), *enforced*, 340 F.2d 905 (7th Cir. 1964).

333. Courts, the Board, and labor arbitrators frequently take this into account when determining whether a striking employee who has engaged in so-called minor picket line misconduct thereby has lost the protections of the statute and can be discharged for cause. *See, e.g., Associated Grocers of New England, Inc. v. NLRB*, 562 F.2d 1333, 1335 (1st Cir. 1977) (“[M]inor picket line and other misconduct, even though crude or offensive, will not justify discipline, as the right to strike necessarily implies some ‘leeway for impulsive behavior.’”); *Indiana Desk Co.*, 56 N.L.R.B. 76, 79 (1944) (“jostling on the picket line . . . can normally be expected in any extensive strike”), *enforced in part*, 149 F.2d 987 (7th Cir. 1945); *Southern Bell Tel. & Tel. Co.*, 26 Lab. Arb. (BNA) 186, 192

strained the further the misconduct is from the actual scene of the labor dispute.³³⁴ Of course the Board has condemned the same kinds of misconduct found to restrain and coerce on the picket line when that misconduct occurs away from the picket line. However, there are also some unique kinds of restraint and coercion that occur away from the picket line.

Following nonstriking employees as they leave work has been found to be coercive conduct under certain circumstances. In *Sunset Line & Twine*³³⁵ for example, some employees were followed by a large group of strikers who were yelling, swearing, using profane language, and blowing automobile horns. The Board said that:

The conduct of the strikers and their companions, quite apart from the words they used, in trailing the greatly outnumbered little group of strikebreakers for a considerable distance through the town was clearly intimidatory. This pursuit away from the plant by an inimical superior force clearly conveyed the unspoken threat that the strikebreakers might well be subjected to bodily harm. As such it was hardly less coercive within the meaning of Section 8(b)(1) than an express threat of physical violence.³³⁶

Employees driving to and from work are also frequently "harrassed" by strikers in automobiles: following bumper-to-bumper,³³⁷ cutting in front of the nonstriking employees' cars and suddenly slowing down,³³⁸ zig-zagging in front of them,³³⁹

(1956)(McCoy, Arb.)(attempt to provoke a fight characterized as "only the sort of angry reaction, sudden flareup of temper, so-called 'animal exuberance,' to be expected in tense situations on the picket line").

334. Labor arbitrators certainly take a more serious view of misconduct occurring away from the picket line. See, e.g., *General Tel. Co.*, 69 Lab. Arb. (BNA) 351, 360 (1977)(Bowles, Arb.); *Southern Bell Tel. & Tel. Co.*, 26 Lab. Arb. (BNA) 593, 596 (1956)(Alexander, Arb.).

335. *International Longshoremen's Union Local 6 (Sunset Line & Twine Co.)*, 79 N.L.R.B. 1487 (1948).

336. *Id.* at 1505; see also *Drivers Local 695 (Tony Pellitteri Trucking Serv., Inc.)*, 174 N.L.R.B. 753, 755 (1969). But see *Lumber Workers Union, Local 1407 (Santa Ana Lumber Co.)*, 87 N.L.R.B. 937, 938 (1949)(merely following company trucks to see destination of deliveries was not coercive).

337. *Plastic Workers Local 929 (Doughboy Recreational, Domain Indus., Inc.)*, 200 N.L.R.B. 419, 421 (1972).

338. *Metal Polishers Union, Local 67 (Alco-Cad Nickel Plating Corp.)*, 200 N.L.R.B. 335 (1972); *Teamsters Local 356 (Connecticut Foundry Co.)*, 165 N.L.R.B. 916, 918 (1967).

attempting to force them off the road,³⁴⁰ pushing them when stopped at an intersection,³⁴¹ and other forms of assault with a vehicle.³⁴² Needless to say, the Board has had no difficulty in finding such dangerous and intimidating conduct to be illegal under the statute.

Finally, the Board has also taken a fairly hard position on picketing and demonstrations in front of the homes of nonstriking employees and management officials. In one case, for example, the union and a large group of strikers picketed in front of nonstriking employees' residences with signs accusing them, by name, of "scabbing." There was also a lot of shouting and the wife of one nonstriker became hysterical with fear. Ignoring the union's first amendment claim, the Board found that this conduct "constituted a coercive force" which "held the nonstrikers up to ridicule and sought public condemnation for their failure to join the strike."³⁴³ Therefore, it was illegal under the statute.³⁴⁴

B. The Section 7 Rights That are at Issue

In the majority of section 8(b)(1)(A) cases, the restraint and coercion occurs in the context of either an organizational campaign, a work stoppage, or a strike. It is directed at employees who choose not to participate in these particular union activities. It is readily apparent from both the legislative history³⁴⁵ and the case law that such a refusal is included in the section 7

339. Local Union 5367, United Steelworkers, 123 N.L.R.B. 216, 224 (1959).

340. UMW District 50 (Eagle Mfg. Co.), 112 N.L.R.B. 74, 78 (1955).

341. Amalgamated Meat Cutters (Iowa Beef Processors, Inc.), 233 N.L.R.B. 839, 845 (1977).

342. See, e.g., Local 810, Fabricators & Warehousemen (Scales Air Compressor Corp.), 200 N.L.R.B. 575, 583 (1972); ILGWU (Elsing Mfg. Co.), 186 N.L.R.B. 342, 347-48 (1970); Local 456, Int'l Bhd. of Teamsters (Strauss Paper Co.), 149 N.L.R.B. 49, 57 (1964).

343. United Mechanics Union Local 150-F (American Photocopy Equip. Co.), 151 N.L.R.B. 386, 393-94 (1965).

344. *Id.* See also District 34, Int'l Ass'n of Machinists (Wolf Mach. Co.), 254 N.L.R.B. 1282, 1284 (1981)(car full of union supporters shouting obscenities and threats drove back and forth in front of non-striking employee's home); Communications Workers (Ohio Consol. Tele.), 120 N.L.R.B. 684, 685, 695 (1958)(8 to 10 strikers followed manager and congregated in front of his house), *enforced*, 266 F.2d 823 (6th Cir. 1959)(*per curiam*), *modified and aff'd*, 362 U.S. 479 (1960)(*per curiam*).

345. See text accompanying notes 38 and 41 *supra*.

rights to refrain from union concerted activities.³⁴⁶ This issue warrants little further discussion.

Insofar as the *affirmative* exercise of section 7 rights is concerned, employee participation in the collective bargaining process certainly should be protected.³⁴⁷ In addition, the exercise of other rights under the statute, such as the filing of decertification petitions³⁴⁸ or unfair labor practice charges against the union,³⁴⁹ should easily come under the umbrella of section 7 insofar as retaliatory measures by the union are concerned. Indeed, almost any kind of dissident activity or opposition to the union would seem to be protected. Voicing objections to the manner in which the hiring hall is run,³⁵⁰ holding "rump" meetings to discuss working conditions,³⁵¹ voicing opposition to specific union leaders,³⁵² and attempting to have them removed from office³⁵³ have all received protection.

In order for criticism of and opposition to specific union leaders to be considered protected, however, the union related purpose must somehow be disclosed. In the *Bethlehem Steel Corporation*³⁵⁴ case, for example, the assaulted employee had

346. See text accompanying notes 73, 74 *supra*. In *NLRB v. International Woodworkers*, 243 F.2d 745 (5th Cir. 1957), the court expressly noted that "the right to work in the face of a strike" is a right protected by section 7, *id.* at 747 n.3.

347. *Accord* *Brewers Local 6* (Custom Packaging Corp.), 192 N.L.R.B. 1263 (1971). In that case, some employees apparently were not happy with the way in which the union was conducting the bargaining for a new contract; the employees took the initiative themselves in dealing with the employer and in formulating a counterproposal. The trial examiner found this to be a protected concerted activity. The Board, probably because it felt this conduct may well have been in derogation of the union's statutory role as the exclusive bargaining representative, chose not to rely on this finding but upheld the violation on a different theory. *Id.* at n.2. See text accompanying notes 384-89, *infra*. Clearly, however, an employee's *legitimate* participation in the collective bargaining process would be considered protected in the *full* sense of the word.

348. *Painters' Dist. Council No. 6* (Higbee Co.), 97 N.L.R.B. 654, 66266 (1951), *enforced* 202 F.2d 957 (6th Cir.), *cert. denied*, 345 U.S. 995 (1953).

349. *Truck Drivers Local 705* (Associated Transp., Inc.), 209 N.L.R.B. 292, 307 (1974), *enforced*, 532 F.2d 1169 (7th Cir.), *cert. denied*, 429 U.S. 1022 (1976).

350. *International Ass'n of Bridge Workers Local 433* (Associated Gen. Contractors of Calif., Inc.), 228 N.L.R.B. 1420 (1977), *enforced*, 600 F.2d 770 (9th Cir. 1979), *cert. denied*, 445 U.S. 915 (1980).

351. *Local 57, UAW* (Louis R. Miller), 102 N.L.R.B. 111, 118 (1953).

352. *General Truckdrivers Local 5* (Ryder Truck Lines, Inc.), 161 N.L.R.B. 493 (1966), *enforced*, 389 F.2d 757 (5th Cir. 1968).

353. *Cf. New York City Taxi Drivers Union Local 3036* (Taxi Maintenance Corp.), 231 N.L.R.B. 965 (1977).

354. *United Steelworkers Local 2610* (Bethlehem Steel Corp.), 225 N.L.R.B. 310

been vocally critical of a grievance committeeman who had refused to support a particular grievance. The trial examiner found that what the employee did and said “was not criticism of union policies at a union meeting seeking to reverse union policy. . . . This was criticism of Harmon to other employees for some *undisclosed purpose*.”³⁵⁵ Similarly, even when an employee is assaulted or threatened during an organizational campaign, a strike, or while participating in intra-union activities, the General Counsel must prove that the restraint and coercion are related to *these* matters rather than something else. The “something else” that is occasionally found to exist is a purely personal animosity that has flared into violence, often because of the employee-victim’s own provocative words or conduct. When personal animosity is the reason for the violence, the violence does not amount to restraint or coercion of employees *in the exercise of their section 7 rights*. The factual distinction is a fine one to draw in some cases. For example, in *Ryder Truck Lines*,³⁵⁶ the trial examiner concluded that “[t]he incident was an outgrowth of the hostility between the two men, the exchange of insults between them, and Albin’s movement toward Partin which could reasonably have been interpreted by Partin as a threatening move.”³⁵⁷ The Board, however, construed the facts differently, concluding that the threat “was caused by Albin’s opposition to Partin’s leadership of the Respondent [Union].”³⁵⁸ In several other cases, the Board has agreed that the assaults were the result of personal animosities instead of union related behavior.³⁵⁹ Therefore, no violation of the statute occurred.

A more difficult theoretical problem exists when a union re-

(1967).

355. *Id.* at 314 (emphasis added). *Accord* NLRB v. IBEW Local 1229, 346 U.S. 464 (1953) (public criticism of employer that did not disclose its connection with a labor dispute held not to be protected against discharge by the employer).

356. *General Truckdrivers Local 5 (Ryder Truck Lines, Inc.)*, 161 N.L.R.B. 493 (1966), *enforced*, 389 F.2d 757 (5th Cir. 1968).

357. *Id.* at 499.

358. *Id.* at 494 n.1.

359. *See, e.g.*, *New York Typographical Union Local 6 (Artintype, Inc.)*, 213 N.L.R.B. 925, 930 (1974); *General Bldg. Laborers Local 66 (Courter & Co.)*, 198 N.L.R.B. 125, 128 (1972); *Carpenters Dist. Council of Sabine Area (Miner-Dederick Constr. Corp.)*, 195 N.L.R.B. 178, 181 (1972) (racial animosity); *Hotel Employees Union Local 466 (Treadway Inn)*, 191 N.L.R.B. 528, 533 (1971); *ILGWU (Twin-Kee Mfg. Co.)*, 130 N.L.R.B. 614, 615 (1961); *Strauss Stores Corp.*, 94 N.L.R.B. 440, 463 (1951).

strains or coerces during the course of a jurisdictional or work assignment dispute. The Board generally finds a violation in this situation by using a broad conception of what constitutes a protected concerted activity. In *Edward Kraemer & Sons*,³⁶⁰ for example, the union objected to the fact that a member of another union was driving a truck on the job and proceeded to pistol whip him. The Board simply noted that the "assault . . . was in furtherance of the Union's claim to all truckdriving work and its opposition to Curtsinger's driving a truck on the project. Therefore, we conclude that such action was coercion and restraint of an individual employee on the basis of union related considerations. . . ." ³⁶¹

By stating the test for "protectedness" broadly, the Board shifted the focus of the section 7 analysis from the conduct of the individual (which is the usual one made) to the conduct and purpose of the union. This approach gives the individual, and properly so, an open ended sort of section 7 right to be free of *any* union related violence. It obviates the necessity of closer inquiry into whether what the employee was doing (or refraining from doing) fits into one of the traditional section 7 activity molds.

A much narrower conception of the scope of section 7 was articulated by Board Member Murdock in *Rufus M. Tackett*.³⁶² That case also centered around a jurisdictional or work assignment dispute between two unions. In dissent, he said that "[n]ormally, employees engage in concerted activity to secure some benefit from their employer. Other employees may be satisfied to continue or begin working without that benefit. Section 8(b)(1)(A) protects the latter from restraint or coercion by the former."³⁶³ He then intimated that the union's purpose in *Tackett*, by contrast, was simply to drive the members of another union out of the mine; that the union was certainly not asking them to act in concert with this "demand for their own liquidation;"³⁶⁴ and that the violence that was directed against them could not be because they were *refraining* from so acting, in a

360. *Edward Kraemer & Sons*, 203 N.L.R.B. 739 (1973).

361. *Id.* at 740.

362. *Local 6281, UMW (Rufus M. Tackett)*, 100 N.L.R.B. 392 (1952).

363. *Id.* at 396.

364. *Id.* at 396-97.

section 7 sense. Rather, he noted that “[t]he demand in this case was the very essence of a dispute between two labor organizations and, in my opinion, had nothing to do with the concerted activities of either.”³⁶⁵ This narrower conception, however, has not prevailed.³⁶⁶

The most controversial section 7 issue to confront the Board and the courts in a section 8(b)(1)(A) context concerns employees who engage in conduct in violation of a collective bargaining agreement and who are assaulted or threatened by the union for doing so. This issue first arose in *Abe Meltzer, Inc.*³⁶⁷ wherein union agents blocked ingress and physically attacked two employees who had performed overtime work in another shop in violation of the collective bargaining agreement. The Board found this to be a section 8(b)(1)(A) violation:

We believe that the Union’s action in requiring employee compliance with the overtime provisions of the contract reflected a union policy having mutual aid and protection as its objective. The determination by Zweig and Abravaya to work notwithstanding the Union’s general “spread the work” policy constituted a refusal on their part to assist the Union in effectuating that policy. . . . We do not, as our dissenting colleague contends, condone employee breaches of contractual obligations. We find only that where, as here, there is a conflict between union policy and the action of individual employees refraining from promotion of that policy, the statute does not permit resort to violence by a union to enforce the policy. For it is well settled that section 8(b)(1)(A) outlaws, without qualification, all union violence against employees which has the effect of interfering with their statutory right to refrain from assisting labor organizations or engaging in concerted activities.³⁶⁸

Board Member Peterson dissented and his position was subsequently adopted by the Second Circuit Court of Appeals. It noted that “Section 8(b)(1)(A) was not intended to confer on the Board general police power covering all acts of violence by a

365. *Id.* at 397.

366. *Accord* *Dover Corp.*, 211 N.L.R.B. 955 (1974), *enforced in part*, 535 F.2d 1205 (10th Cir.), *cert. denied*, 429 U.S. 978 (1976).

367. 108 N.L.R.B. 1506 (1954), *enforcement denied*, *NLRB v. Furriers Joint Council*, 224 F.2d 78 (2d Cir. 1955).

368. 108 N.L.R.B. at 1508-09.

Union.”³⁶⁹ Rather, the section only covers acts of violence directed at the exercise by employees of their section 7 rights. And the court thus concluded that once a union policy, such as that of “spreading the work,” becomes incorporated in a contract between the union, as the exclusive bargaining representative, and an employer, the individual employee no longer has a section 7 right to ignore that policy or violate the contract in which it appears. To hold otherwise, the court noted, would not be “consistent with the underlying purpose of the Act to promote the consummation of collective bargaining agreements as ‘the effective instrument of stabilizing labor relations and preventing, through collective bargaining, strikes and industrial strife.’”³⁷⁰ The court concluded that the object of the violence did not pertain to the exercise of section 7 rights and, thus, no section 8(b)(1)(A) violation had occurred.

Several years later, the Board adhered to the court’s view that an employee does not have a section 7 right to violate the terms of a collective bargaining agreement. The alleged section 8(b)(1)(A) violation consisted merely of the union’s attempt to have the employee discharged.³⁷¹ It was not until 1971 that the Board was again confronted with a case of violence.

In *Penntruck Co.*,³⁷² a union agent assaulted an employee who was engaged in a work stoppage, allegedly in violation of the no-strike provision of the union-employer contract. After a careful review of competing policy considerations, legislative history, and the theoretical construct of section 7 itself, the Board decided to adhere to the position it took in *Abe Meltzer*: that such conduct does in fact violate the Act.

The Board’s conclusion is ultimately founded on an abstract, but apparently correct, proposition that “protected activity” and its converse, “unprotected activity,” are not static concepts.³⁷³ The status of a particular kind of conduct does not

369. 224 F.2d at 80.

370. *Id.*

371. *Millwrights Local Union 1102 (Planet Corp.)*, 144 N.L.R.B. 798, 801 (1963).

372. *Teamsters Local 729 (Penntruck Co.)*, 189 N.L.R.B. 696 (1971).

373. Indeed, with respect to some kinds of conduct, the fluidity of the concept is such that it is difficult if not impossible for employees, employers, labor unions, or practitioners to ever predict with certainty whether this conduct will or will not be held to be protected under the facts of their respective cases. *See, e.g., Haggard, Picket Line Observation as a Protected Concerted Activity*, 53 N.C.L. REV. 43, 84-85 (1974). The holding in

remain the same “for all purposes and in all contexts, . . . regardless of the nature of the coercion applied against that employee conduct.”³⁷⁴ Rather, in a section 7 case, one must also ask, “protected against what?” The answer may vary. For example, the fundamental section 7 activity of going on an economic strike is certainly protected against an employer response of discharge; but it is not protected against permanent replacement.³⁷⁵ The difference flows from the fact that one response can be justified by the employer’s legitimate interest in keeping his business going,³⁷⁶ but the other cannot. That is only one of innumerable factors that must be included in the analytical equation used to resolve section 7 issues.

In *Penntruck*, the Board conceded that an individual’s work-stoppage despite a contractual no-strike clause would not be protected against a union response requesting that the employer discharge such an employee, nor against discharge itself.³⁷⁷ Thus, the Board’s task was simply to identify the element in the equation that would protect the discharge of an employee but not protect a union’s response of physical violence. The element it relied on was the limited nature of a union’s power to waive the individual’s section 7 rights.

In *Penntruck*, the employee was striking to protest the discharge of fellow employees. This is almost prototypical section 7 activity, with respect to both the objective and the means being used to achieve it. What would render it unprotected, however, is the fact that the union has waived the employees’ right to engage in this activity in the exercise of its statutory power as the exclusive bargaining representative of the employees. Although the policy of exclusive representation is central to the structure of the Act, the power of such a representative to waive an individual employee’s section 7 rights must be limited by other policy considerations.³⁷⁸

In *Penntruck*, the Board looked to the abhorrent nature of what the employee was allegedly “waiving”: the right to be pro-

Penntruck, however, would not seem to raise this difficulty.

374. 189 N.L.R.B. at 698-99.

375. *NLRB v. Mackay Radio & Tel. Co.*, 304 U.S. 333 (1938).

376. *Id.* at 345-46.

377. 189 N.L.R.B. at 699.

378. *See, e.g., NLRB v. Magnavox Co.*, 415 U.S. 322 (1974) (union cannot contractually waive individual employee’s section 7 solicitation rights).

tected against physical violence.³⁷⁹ The Board read the legislative history of section 8(b)(1)(A) as requiring a “blanket prohibition upon all forms of violence, [without] qualification or exception.”³⁸⁰ It noted the absence of a parallel congressional concern about the union response of requesting discharge.³⁸¹ Under the facts, discharge would have been a permitted response. Violence was not. The Board concluded:

An employer and a union acting on behalf of his employees may waive, to a limited extent, the Section 7 protection of those employees by agreeing, in effect, that certain activity otherwise shielded by Section 7 will be subject to the imposition of job or internal union discipline; no contract, however, can surrender the right of employees to be protected against violence directed at their participation in what are essentially acts of “mutual aid or protection.”³⁸²

Finally, the Board did not find compelling the countervailing policy consideration relied on by the Second Circuit in the *Abe Meltzer* case: the importance of achieving industrial peace and stability through the inviolability of collective bargaining agreements. The Board simply noted that:

the withholding of the sanctions of the Act in a case such as this—in effect, tolerating the use of violence in the context of a labor dispute—hardly promises to foster a reduction of “industrial strife.” And it would be the rare employee, indeed, who, when contemplating whether to breach a contractual provision, would be encouraged to do so by the possibility that any physical assaults perpetrated against him by his union might be found to be violative of Section 8(b)(1)(A).³⁸³

Meltzer and *Penntruck* dealt with employee conduct that would normally be considered unprotected because it breached the collective bargaining agreement. It was nevertheless found to

379. Indeed, the mere suggestion that a union, which may be the individual employee's bargaining agent *only* by operation of federal law and without his express consent, should ever have the power to waive the rights of such a “principal” against the agent itself would be outrageous—especially if the waiver concerns the fundamental right to be free of physical violence.

380. 189 N.L.R.B. at 699.

381. *Id.* at 700 n.9.

382. *Id.* at 699.

383. *Id.* at 698.

be protected against violent union reprisals. The logic of those decisions can, however, be extended to cover another kind of conduct. In the *Custom Packaging Corp.*³⁸⁴ case, several employees engaged in bargaining activities with the employer, arguably in derogation of the union's status as the statutory and exclusive bargaining representative. That conduct would not normally be considered protected.³⁸⁵ The Board, nevertheless, found that the union had violated section 8(b)(1)(A) when it resorted to physical violence against one of these employees.

Of course, employees have an express section 7 right to bargain collectively. That right, however, is limited by the section 9 concept of exclusive representation. A union that is selected by a majority of the employees becomes the exclusive bargaining representative of those employees.³⁸⁶ Individual agreements are without force and effect.³⁸⁷ In fact, an employer violates his own duty to bargain in good faith when he deals directly with employees in circumvention of the union.³⁸⁸ Yet just as a union's power to redefine protectedness through the exercise of its right of exclusive representation (*i.e.*, by waiving certain rights in a contract with the employer) is limited by the overriding consideration that union violence must be condemned, so also should the concept of exclusive representation itself be similarly limited. In short, collective bargaining activities by individual employees in derogation of the union's status as exclusive representative should, nevertheless, be protected against union violence.

The *Custom Packaging* case arguably stands for that proposition. The Board, unfortunately, did not put it in precisely those terms. The trial examiner held that the conduct was protected in the conventional sense, and proceeded with the normal analysis. Affirming the trial examiner's decision, the Board, however, did not rely on that finding. Citing the *Penntruck* decision, the Board said, "Assuming, *arguendo*, that his conduct was unprotected within the meaning of Section 7 of the Act, we would,

384. *Brewers Local 6 (Custom Packaging Corp.)*, 192 N.L.R.B. 1263 (1971).

385. *Emporium Capwell Co. v. Western Addition Community Org.*, 420 U.S. 50 (1975)(attempt to bargain separately for a minority group held to be in derogation of the authority of the exclusive bargaining representative and thus not protected against the employer's reprisal of discharge).

386. Labor Management Relations Act § 9(a), 29 U.S.C. § 159(a) (1976).

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

388. See generally R. GORMAN, *LABOR LAW* 381-85 (1976).

nonetheless, find that the Respondent's resort to violence in the circumstances set forth herein violated Section 8(b)(1)(A) of the Act."³⁸⁹ Such a statement is, however, conceptually and linguistically confusing. It is one thing to say that certain conduct is protected but only against union violence; it is quite another to say that it is unprotected but that union violence will nevertheless be considered a violation of section 8(b)(1)(A)—a section which *only* prohibits the restraint and coercion of employees who are engaged in *protected* conduct. Nevertheless, the bottom line seems to be that union violence against employees in performing the union's normal functions restrains or coerces employees in the exercise of their section 7 rights. Put differently, employees have an unqualified section 7 right to be free from such violence.

C. *The Agency Question*

Frequently, the most contested issue in a section 8(b)(1)(A) case is whether the restraint and coercion of employees in the exercise of their section 7 rights has in fact been committed by a labor organization or its agents rather than someone simply acting on their own. The tests for establishing such responsibility vary, depending on whether only the local union has been charged or whether the national or international union has also been named as a respondent.

1. *Proving the Responsibility of the Local Union*

The burden of proving that the union entity is legally responsible for the violent acts of its employees, members, or others acting on its behalf is, of course, on the General Counsel.³⁹⁰ As a matter of general agency law, responsibility can be established by proof that the acts were previously authorized, that they were committed within the individual's "scope of employment" with the union, or that they were subsequently ratified.³⁹¹ There does not appear to be any section 8(b)(1)(A) cases

389. 192 N.L.R.B. at 1263 n.2.

390. International Longshoremen's Union Local 6 (Sunset Line & Twine Co.), 79 N.L.R.B. 1487, 1508 (1948).

391. United Furniture Workers Local 472 (Colonial Hardwood Flooring Co.), 84 N.L.R.B. 563, 583 (1949).

where the General Counsel was able to show that the union, acting formally in its institutional capacity, ever gave specific prior authorization or subsequent ratification to acts of violence³⁹²—although the systematic and obviously well-coordinated use of force by some unions strongly suggests the existence of a deliberately conceived policy in that regard. In any event, union responsibility is nearly always established by showing that the acts of violence were committed “within the scope of employment” of some agent or subagent of the union. In *Sunset Line & Twine*,³⁹³ the Board states the test this way:

A principal may be responsible for the act of his agent within the scope of the agent’s general authority, or the “scope of his employment” if the agent is a servant, even though the principal has not specifically authorized or indeed may have specifically forbidden the act in question. It is enough if the principal actually empowered the agent to represent him in the general area within which the agent acted.³⁹⁴

Union officers, business agents, and stewards have general authority to conduct the affairs of the union. When they are individually responsible for an act of violence, then the union itself is nearly always responsible as well.³⁹⁵ In one case, for example, the union job steward (Allen) was given general authority to police a shopping center job, report any non-members he found working there, and attempt to secure their removal. He secured the latter by physical assault. The Board found that the “Respondent Union is chargeable with Allen’s resort to violence in his zeal to carry out Respondent Union’s policy of reserving the

392. *But cf.* Union de Tronquistas Local 901 (Hotel La Concha), 193 N.L.R.B. 591, 598 (1971)(union found to have condoned assault by declaring assailants “not guilty” without investigating the matter and by giving two of the assailants jobs with the union).

393. International Longshoremen’s Union Local 6 (Sunset Line & Twine Co.), 79 N.L.R.B. 1487 (1948).

394. *Id.* at 1509.

395. *See, e.g.*, District 34, Int’l Ass’n of Machinists (Wolf Mach. Co.), 254 N.L.R.B. 282 (1981)(chief steward and business representative); Industrial Union of Marine Workers (Bethlehem Steel Co.), 130 N.L.R.B. 412, 424 (1961)(officers and stewards); Local 1150, United Elec. Workers (Cory Corp.), 84 N.L.R.B. 972, 977-78 (1949)(stewards); International Longshoremen’s Union Local 6 (Sunset Line & Twine Co.), 79 N.L.R.B. 1487, 1507 (1948)(business agent and the vice president of the local). *Contra* NLRB v. Dallas General Drivers Local 745, 264 F.2d 642, 648 (5th Cir. 1959), *cert. denied*, 361 U.S. 814 (1959).

work . . . for its members.”³⁹⁶

Insofar as strike and picket line violence is concerned, the acts of strike committees and picket line captains are nearly always found to be acts for which the union is legally responsible.³⁹⁷ As the Second Circuit Court of Appeals once put it, “a union cannot leave the direction of a strike and picketing to a ‘strike committee’ and escape liability for the activities of the committee.”³⁹⁸ Indeed, in one case the union was held responsible for picket line violence because of its failure to disavow one individual’s assumption of the role as spokesman for the union on the picket line.³⁹⁹ The union was not held responsible for his conduct away from the picket line.

In 1951, the Board expressly declined to “pass upon the question of whether individuals engaged in picketing activities become, *per se*, agents of the sponsoring labor organizations.” Subsequently, the Board has determined that the union is at least responsible for the acts of “authorized pickets.” In the *Coca-Cola Bottling Works*⁴⁰⁰ case, the Board noted that:

[i]t is well known that in authorized strikes unions are normally responsible for the acts of authorized pickets. Threats and the employment of force on a picket line, even though forbidden, are reasonably to be expected, and so “within the scope of employment of pickets for which the labor organization is responsible.”⁴⁰¹

396. *United Bhd. of Carpenters Local 55 (Grauman Co.)*, 100 N.L.R.B. 753, 754 (1952), *enforced*, 205 F.2d 515 (10th Cir. 1953).

397. *District 34, Int’l Ass’n of Machinists (Wolf Mach. Co.)*, 254 N.L.R.B. 282 (1981)(picket line captain); *Industrial Union of Marine and Shipbuilding Workers (Bethlehem Steel Co.)*, 130 N.L.R.B. 412, 424 (1961)(picket captains); *Perry Norvell Co.*, 80 N.L.R.B. 225, 244 (1948)(strike committee). *But see* *District 1199, Health Care Employees (Frances Schervier Home & Hosp.)*, 245 N.L.R.B. 800, 804 n.6 (1979)(members of the negotiating committee not “agents” of the union insofar as strike violence was concerned).

398. *New Power Wire & Elec. Corp. v. NLRB*, 340 F.2d 71, 73 (2d Cir. 1965).

399. *National Union of Marine Cooks (Irwin-Lyons Lumber Co.)*, 87 N.L.R.B. 54, 55, 77-78 (1949).

400. *Teamsters Local 327 (Coca-Cola Bottling Works of Nashville)*, 184 N.L.R.B. 84 (1970).

401. *Id.* at 94; *see also* *Local 612, Int’l Bhd. of Teamsters (Deaton Truck Line, Inc.)*, 146 N.L.R.B. 498, 503 (1964) (“[I]t is well settled that a labor organization is responsible for violence in which its pickets engage at a picket line.”). But even if authorized pickets are not agents *per se*, the union can still be held responsible for this misconduct on the theory that the union has an affirmative duty to control what they do. *See* text accompanying notes 408-09 *infra*.

In another case, the trial examiner noted that “the sanctioning of a strike by a labor organization’s agent . . . makes the participants in strike activities (such as picketing) the subagents of the labor organization in such activities.”⁴⁰² However, the Board has refused to find that the acts of rank and file members, without more, are necessarily the acts of the union itself.⁴⁰³ The Second Circuit has criticized this position as a “rather narrow conception of who constitute[s] the union.”⁴⁰⁴

If a labor organization is to be held responsible for breaches of a statutory duty committed by its agents while acting within the scope of their employment, the next step is to determine the exact parameters of that duty. Obviously, it prohibits the agent from personally engaging in any of the acts of violence previously described.⁴⁰⁵ If an agent does commit such an act, neither a prior prohibition⁴⁰⁶ nor a subsequent repudiation⁴⁰⁷ by the union will serve as a defense. The agent, however, is obligated to do more than just refrain from violence himself.

In *Tony Pellitteri Trucking Service, Inc.*,⁴⁰⁸ the trial examiner advanced the theory that union officials have an affirmative duty to insure that strike and picket line violence do not occur. He said:

a union which calls a strike and authorizes picketing must retain control over the pickets in whatever manner it deems nec-

402. United Furniture Workers Local 472 (Colonial Hardwood Flooring Co.), 84 N.L.R.B. 563, 585 (1949).

403. *New Power Wire & Elec. Corp. v. NLRB*, 340 F.2d 71, 72 (2d Cir. 1965). The Board’s position would appear to be consistent with the legislative history. See text accompanying note 62 *supra*.

404. 340 F.2d at 72.

405. See, e.g., *Freight Drivers Local Union 557 (Liberty Transfer Co.)*, 218 N.L.R.B. 1117 (1975); *ILGWU (Elsing Mfg. Co.)*, 186 N.L.R.B. 342 (1970); *Perry Norvell Co.*, 80 N.L.R.B. 225 (1948).

406. *Local 235, Lithographers Union (Henry Wurst, Inc.)*, 187 N.L.R.B. 490 (1970) (Instructions not to commit violence “are not sufficient to absolve a labor organization of responsibility for acts of violence committed by . . . agents of the union during the course of an unauthorized strike).

407. *United Bhd. of Carpenters Local 55 (Grauman Co.)*, 100 N.L.R.B. 753, 755 (1952) (A statement by another union official “at the scene of the assault that the Respondent Union disapproved of, and regretted, the assault was [not] sufficient to relieve the Respondent Union of responsibility therefor), *enforced*, 205 F.2d 515 (10th Cir. 1953).

408. *Drivers Union, Local 695 (Tony Pellitteri Trucking Serv., Inc.)*, 174 N.L.R.B. 753 (1969).

essary, in order to insure that they do not act improperly. If a union is unwilling, or unable, to take the necessary steps to control its pickets, it must then bear responsibility for their misconduct.⁴⁰⁹

In most cases, however, the Board relies on a closely related but perhaps somewhat narrower theory for holding the union responsible for the violent misconduct of pickets. Union responsibility can be established through the principle of tacit ratification even if the misconduct of subagents is not deemed to be within the scope of their "employment" as pickets (for which the union would be directly responsible).⁴¹⁰ When misconduct occurs in the presence of a union's primary agent who does nothing to repudiate or stop it, the law routinely treats it as a form of ratification.⁴¹¹ As the Board put it in one case, "the principal's

409. *Id.* at 758. See also *Local 30, United Slate, Tile and Composition Roofers (Associated Builders & Contractors)*, 227 N.L.R.B. 1444, 1450 (1977); *Teamsters Local 783 (Coca-Cola Bottling Co. of Louisville)*, 160 N.L.R.B. 1776 (1966)(liability of the union based "on the fact that Respondent, which authorized the strike, knew of the acts of misconduct and violence but took no steps reasonably calculated effectively to stop such acts").

410. See text accompanying notes 401 and 402 *supra*.

411. See, e.g., *NLRB v. Union Nacional de Trabajadores*, 540 F.2d 1, 9 n.7 (1st Cir. 1976)("silent approbation"), *cert. denied*, 429 U.S. 1039 (1977); *International Ass'n of Bridge Workers Local 433 (Associated Gen. Contractors of Calif., Inc.)*, 228 N.L.R.B. 1420, 1425 (1977)(union agent "acquiesced in those threats through his silence"), *enforced*, 600 F.2d 770 (9th Cir. 1979), *cert. denied*, 445 U.S. 915 (1980); *Local 30, United Slate, Tile and Composition Roofers (Kitson Bros., Inc.)*, 228 N.L.R.B. 652, 653 (1977); *Teamsters Local 783 (Coca-Cola Bottling Co. of Louisville)*, 160 N.L.R.B. 1776 (1966); *International Woodworkers Local 3-3 (Western Wirebound Box Co.)*, 144 N.L.R.B. 912, 915 (1963); *Local 542, Operating Eng'rs (Giles & Ransome, Inc.)*, 139 N.L.R.B. 1169, 1175 (1962), *enforced*, 328 F.2d 850 (3d Cir. 1964), *cert. denied*, 379 U.S. 826 (1964); *Bonnaz Embroideries Tucking & Pleading Union Local 66 (V. & D. Machine Embroidery Co.)*, 134 N.L.R.B. 879, 880-81 (1961); *Local 346 International Leather Goods Union (Baronet of Puerto Rico, Inc.)*, 133 N.L.R.B. 1617, 1628, 1632 (1961)(local politician incited and led a riot against the plant: "No evidence was offered by Respondents that they publically disassociated themselves from the speaker's conduct or statements"); *Central Mass. Joint Bd., Textile Workers Union (Charles Weinstein Co.)*, 123 N.L.R.B. 590, 591 (1959). But see *NLRB v. Service Employees Local 254*, 535 F.2d 1335, 1338 (1st Cir. 1976)(assault, which occurred in first week of strike, was the only act of violence, no union officers were present, and only 3 or 4 pickets were present; the court found "no recurrence, nor anything indicating Union acquiescence in or approbation of the assault."); *NLRB v. Dallas General Drivers, Local 745*, 264 F.2d 642, 648 (5th Cir. 1959) (board found union responsible because of steward's failure to repudiate threats made in his presence; the court, however, refused to presume the authority of a steward to acquiesce in and to adopt, on behalf of the Union, threats made by union members who were not themselves officers), *cert. denied*, 361 U.S. 814 (1959).

consent, technically called authorization or ratification, may be manifested by conduct, *sometimes even passive acquiescence*, as well as by words.”⁴¹² In other words, a union has an affirmative duty to disassociate itself from violence. Breach of this duty by one of its primary agents renders the union responsible.

One notable exception to the theory of ratification by silence concerns threatening statements made by members during the course of a union meeting. In *Union Tank Car*,⁴¹³ the Board explained:

we do not think that each and every remark made from the floor which goes unrenounced by the presiding [sic] officer can be held to be a statement of union policy. . . . *To hold the union responsible, absent any positive evidence of ratification or approval, for every course of conduct suggested from the floor goes beyond any reasonable presumption of acquiescence by silence.*⁴¹⁴

Of course, prior instructions to pickets not to engage in violence does not relieve the union of responsibility when an agent nevertheless acquiesces in such violence.⁴¹⁵

Another theory under which a union may be held responsible for acts of violence committed in the presence of its agents is predicated on the legal maxim that “in mob action, the acts of one may in legal contemplation justifiably be regarded as acts of all.”⁴¹⁶ The duty and responsibility of the union and its agents is not limited, however, to acts of violence committed by or in the presence of these agents. On the contrary, when a union agent has committed or acquiesced in various acts of violence, this

412. International Longshoremen’s Union Local 6 (Sunset Line & Twine Co.), 79 N.L.R.B. 1487, 1508 (1948)(emphasis added).

413. General Truck Drivers Local 5 (Union Tank Car Co.), 172 N.L.R.B. 137 (1968).

414. *Id.* at 138 (emphasis in original); see also District 1199, Hosp. Health Care Employees (Southport Manor Convalescent Center, Inc.), 227 N.L.R.B. 1732, 1733-34 (1977) (Board found no “positive evidence as to show ratification or approval. . . . [I]t would be unreasonable to hold the Union responsible for such remarks made by employees in the confused and emotional atmosphere of such union meetings.”).

415. See, e.g., Local 235, Lithographers Union (Henry Wurst, Inc.), 187 N.L.R.B. 490 (1970); Teamsters Local 327 (Whale, Inc.), 178 N.L.R.B. 422, 427 (1969), *enforced in part*, 432 F.2d 933 (6th Cir. 1970); Local 379, Bldg. Material & Excavators (Catalano Bros.), 175 N.L.R.B. 469, 470 (1969).

416. UMW Local 7083 (Grundy Mining Co.), 146 N.L.R.B. 176, 182 (1964); see also UMW Dist. 2 (Mears Coal Co.), 173 N.L.R.B. 665, 669 (1968), *enforced*, 429 F.2d 141 (3d Cir. 1970).

may be said to have instigated the perpetration of similar misconduct. The Board in *Bethlehem Steel*⁴¹⁷ put it this way: "Where authorized union agents, by their misconduct, set an example for rank-and-file pickets, thereby instigating the similar type of misconduct engaged in by such pickets, the Union is equally liable for such latter misconduct which occurred in the absence of authorized agents."⁴¹⁸ Similarly, with respect to violence that is committed by individuals away from the picket line, one trial examiner rather eloquently noted that "[i]n this situation, it may be said that the ugly flower of unlawfulness which blossomed away from the picket line resulted from the seed of defiance planted and nurtured at the picket line" by union agents.⁴¹⁹

The union, however, can apparently cut off its liability for subsequent misconduct by repudiating the prior acts of its agents and by taking steps to insure that they are not repeated. The Board has held that such repudiation will prevent the imputation of any "subsequent similar misconduct committed by [non-officials to the local] without a specific showing of their express or implied sanction."⁴²⁰

2. *Proving the Responsibility of the National or International Union*

Although the matter is obviously affected by the specific terms of the constitution and bylaws of the two bodies,⁴²¹ a national or international union and its local affiliates are generally considered to be separate legal entities.⁴²² Thus, proof that a lo-

417. *Industrial Union of Marine Workers (Bethlehem Steel Co.)*, 130 N.L.R.B. 412 (1961).

418. *Id.* at 424 n.8; see also *Local 810, Int'l Bhd. of Teamsters (Russell Plastics Technology, Inc.)*, 235 N.L.R.B. 40, 46-47 (1978); *International Ass'n of Machinists (General Elec. Co.)*, 183 N.L.R.B. 1225, 1233 (1970); *UMW Dist. 2 (Solar Fuel Co.)*, 170 N.L.R.B. 1581, 1592 (1968), *enforced*, 418 F.2d 240 (3d Cir. 1969); *International Union of Elec. Workers (Sperry Rubber & Plastics Co.)*, 134 N.L.R.B. 1713, 1724 (1961).

419. *District 50, UMW (Tungsten Mining Corp.)*, 106 N.L.R.B. 903, 922 (1953).

420. *General Iron Corp.*, 224 N.L.R.B. 1180, 1191 (1976).

421. See *United Furniture Workers Local 472 (Colonial Hardwood Flooring Co.)*, 84 N.L.R.B. 563 (1949) (close relationship between local and the international, under the latter's constitution, was relied on in part by the Board in finding both units to be jointly responsible for acts of violence).

422. *United Mine Workers (Blue Diamond Coal Co.)*, 143 N.L.R.B. 795, 797 (1963).

cal union is legally responsible for acts of violence does not necessarily implicate the parent organization. Its responsibility must be separately proved.

Responsibility, of course, is proved if a personal agent of the national or international, operating generally within the scope of his assigned duties, participates or acquiesces in acts of violence.⁴²³ Responsibility of the national or international may also be predicated on the theory that the local union which was legally responsible for the violence was the agent of the national or international union. Although a local union will usually be considered the agent of the national or international only in the context of the local's negotiation or enforcement of the collective bargaining agreement with the employer,⁴²⁴ an agency of broader scope has been found in some cases. In the *Personal Products Corp.*⁴²⁵ case, for example, the trial examiner found that "the International duly constituted Local 1172, its admitted administrative agency, as its agent for the purpose of representing employees of the Company *and engaging in the various concerted activities* set forth below, instigated by the Local within the scope of said agency, and that it, as well as the Local, is responsible for such conduct."⁴²⁶ The concerted activities in question included various threats and the blocking of entrances into the plant.

In most cases, however, the national or international has been held liable on the theory that the strike and related conduct is a joint venture between it and the local union. For example, actual participation by an agent of the national or international in acts of violence has been held to render the parent union liable for the agent's misconduct and for the misconduct of the local union and its agents. The theory is that his partici-

423. See, e.g., *United Furniture Workers, Local 472 (Colonial Hardwood Flooring Co.)*, 84 N.L.R.B. 563, 583-85 (1949); *United Furniture Workers, Local 309 (Smith Cabinet Mfg. Co.)*, 81 N.L.R.B. 886, 889-91 (1949).

424. *Accord*, *United Mine Workers (Blue Diamond Coal Co.)*, 143 N.L.R.B. at 797 (local's agency limited to enforcement of the contract, and thus no responsibility for international's acts of violence unrelated to that function). *But see*, *NLRB v. International Longshoremen's Union*, 210 F.2d 581, 584-85 (9th Cir. 1954) (local found to be agent of the international in negotiating an illegal hiring hall contract).

425. *Textile Workers Union (Personal Products Corp.)*, 108 N.L.R.B. 743 (1954), *enforced in part*, 227 F.2d 409 (D.C. Cir. 1955), *cert. denied*, 352 U.S. 864 (1956).

426. 108 N.L.R.B. at 755 (emphasis added).

pation converts the strike into a common undertaking.⁴²⁷ A joint venture relationship has also been found to exist in a case where the international fully identified itself with the local in calling and conducting the strike, the strike was conducted for the purpose of protecting the interests of members of both units, and the international joined with the local in pleading certain affirmative defenses without differentiating itself in any way.⁴²⁸ The international can also be found liable on a joint venture theory if it jointly sponsors the strike by providing strike benefits.⁴²⁹ Finally, in one case, the Board relied on the fact that the international had urged the need for a "united front" among all its affiliate locals in conducting the strike against this employer. It had publicly endorsed the strike, it had used its official publication to solicit financial support for the local, and it had acknowledged in its answer to the unfair labor practice complaint that it was a party to the strike.⁴³⁰ Whether a national or international union and its local will be found to have engaged in a joint venture in conducting a strike is, thus, essentially a factual matter. However, it does not appear to take much to implicate the national or international under this theory.⁴³¹

III. REMEDIES FOR SECTION 8(B)(1)(A) VIOLATIONS

As the above discussion indicates, the Board and the courts have adopted a definition of restraint and coercion that is certainly broad enough to encompass most ordinary kinds of violent criminal or tortious conduct. In applying Section 8(b)(1)(A), they have construed the phrase, "in the exercise of the rights

427. *United Furniture Workers Local 472 (Colonial Hardwood Flooring Co.)*, 84 N.L.R.B. 563, 582-87 (1949); *Local 1150, United Elec. Workers (Cory Corp.)*, 84 N.L.R.B. 972, 977-78 (1949); *United Furniture Workers Local 309 (Smith Cabinet Mfg. Co.)*, 81 N.L.R.B. 886, 890-91 (1949).

428. *International Longshoremen's Union Local 6 (Sunset Line & Twine Co.)*, 79 N.L.R.B. 1487, 1513 (1948).

429. *United Rubber Workers Local 796 (Tennessee Wheel & Rubber Co.)*, 166 N.L.R.B. 165, 167 (1967).

430. *International Woodworkers (W.T. Smith Lumber Co.)*, 116 N.L.R.B. 507, 508 (1956), *enforced*, 243 F.2d 745 (5th Cir. 1957).

431. *But see Local 30, United Slate, Tile and Composition Roofers (Associated Builders & Contractors)*, 227 N.L.R.B. 1444, 1451-52 (1977) (failure of international to take corrective action does not render it liable); *National Union of Marine Cooks (Irwin-Lyons Lumber Co.)*, 87 N.L.R.B. 54, 57 (1949) (no sponsorship of the strike or participation in the misconduct by the longshoremen's union).

guaranteed in section 7," to include almost anything an employee might do in connection with his work or in his relationships with the union. They have also taken a broad but realistic view of union responsibility for the violence that occurs incident to unionization activities.

But legal prohibitions, and identification of conduct that falls within those prohibitions, is a *meaningful* exercise of sovereign power only to the extent that an effective sanction or remedy is provided. Otherwise, the entire process—from the legislative enactment itself, to the long and costly administrative trials that are conducted for the purpose of establishing the existence of a violation, to the ultimate review by already overburdened federal circuit courts of appeals—is simply an exercise in futility, "full of sound and fury, but signifying nothing."⁴³² The prohibition against union violence contained in section 8(b)(1)(A) comes perilously close to that. In the blunt words of one trial examiner, "the powers of the Board . . . are *inadequate* to cope with violence."⁴³³

Successive general counsels have attempted to obtain more effective remedies for labor union violence—only to be stymied by the recalcitrance of administrative law judges, the Board, or sometimes even the courts. In any event, the remedies that the Board does order, those it does not, and the parameters of the debate surrounding these various issues will be discussed below.

A. *The Board's Remedial Powers Generally*⁴³⁴

The statutory power of the Board to devise remedies for unfair labor practices is contained in section 10(c), which states that if the Board finds a violation of the statute then it:

shall state its findings of fact and shall issue and cause to be served on such person an order requiring such person to cease

432. Shakespeare, *Macbeth*, Act V., Sc. 5, line 19.

433. Taxicab Drivers Union Local 777 (Crown Metal Mfg. Co.), 145 N.L.R.B. 197, 205 (1963)(emphasis added), *enforced*, 340 F.2d 905 (7th Cir. 1965); *accord*, Local 612, Int'l Bhd. of Teamsters (Deaton Truck Line, Inc.), 146 N.L.R.B. 498, 506 & n.12 (1964) (listing of more effective remedies which the trial examiner, under Board precedent, found he lacked the power to order). See generally Note, *Strike Violence: The NLRB's Reluctance to Wield Its Broad Remedial Power*, 50 FORDHAM L. REV. 1371 (1982).

434. See generally D. McDOWELL & K. HUHN, NLRB REMEDIES FOR UNFAIR LABOR PRACTICES 6-15 (1976) [hereinafter cited as McDOWELL & HUHN].

and desist from such unfair labor practice, and to take such affirmative action including reinstatement of employees with or without back pay, as well effectuate the policies of this [Act]. . . .⁴³⁵

Through this broadly worded statutory mandate, Congress apparently intended to give the Board discretion to formulate such remedies as it, in the exercise of its expertise and experience in labor relations, should deem appropriate.⁴³⁶ The corollary of that broad discretion is that the courts of appeals should exercise extremely limited review over the Board's performance of its remedial functions.⁴³⁷

Since discretion is subject to abuse, the Board's remedial orders are by no means totally immune from judicial scrutiny. The claim most commonly made on appeal is that a particular Board order goes beyond one of the two broad constraints the courts have recognized: the order must consist only of that "which can fairly be said to effectuate the policies of the Act,"⁴³⁸ and it must be limited to the requirement of affirmative action that is purely "remedial, not punitive."⁴³⁹

One commentator has suggested that the first of these limitations simply means that the remedy in question must neither be in conflict with any one of the primary objectives of the statute nor attempt to achieve ends other than those contemplated by those objectives.⁴⁴⁰ The prohibition against "punitive" orders is, on the other hand, a bit more difficult to pin down.⁴⁴¹ It has been suggested that it is simply another term used to describe orders which attempt to achieve ends other than those contemplated by the statute.⁴⁴² Since the broad purpose of Board remedies is to dissipate the effects of the prohibited conduct, remedies which neither deprive the violator of the fruits of his illegal

435. Labor Management Relations Act § 10(c), 29 U.S.C. § 160(c)(1976).

436. See, e.g., *NLRB v. Seven-Up Bottling Co.*, 344 U.S. 344, 346 (1953); *Republic Aviation Corp. v. NLRB*, 324 U.S. 793, 800 (1945); *International Ass'n of Machinists v. NLRB*, 311 U.S. 72, 82 (1940).

437. See, e.g., *Phelps Dodge Corp. v. NLRB*, 313 U.S. 177, 194 (1941); *Amalgamated Local Union 355 (Russell Motors, Inc.) v. NLRB*, 481 F.2d 996, 1006 (2d Cir. 1973).

438. *Virginia Elec. & Power Co. v. NLRB*, 319 U.S. 533, 540 (1943).

439. *Consolidated Edison Co. v. NLRB*, 305 U.S. 197, 236 (1938).

440. McDowell & Huhn, *supra* note 434 at 9.

441. See Note, *NLRB Damage Awards*, 84 HARV. L. REV. 1670, 1679-83 (1971)(highly critical of the alleged remedial-punitive distinction).

442. McDowell & Huhn, *supra* note 434 at 12-13.

conduct nor make the victim whole have sometimes been considered punitive in nature.⁴⁴³ Similarly, remedies of a purely deterrent nature have been called punitive.⁴⁴⁴ Since an unfair labor practice is not a crime, the Supreme Court has suggested that it is inappropriate for the Board to compensate injuries allegedly suffered by the body politic.⁴⁴⁵ And finally, in one case, the Supreme Court apparently believed that the unfair labor practice was probably not the operative cause of the activity the Board sought to remedy. Consequently, the Court concluded that the remedy was punitive or confiscatory.⁴⁴⁶

Although judicial review of Board orders that allegedly go too far is thus necessarily limited, there is room for the courts to “modify”⁴⁴⁷ these orders by simply striking out the objectionable portions. When the converse issue arises—a Board order that allegedly does not go far enough—the reviewing and modifying powers of the courts are somewhat more circumscribed.

When the Board refuses to grant a remedy because it believes that it lacks statutory authority to do so, a question of law is raised over which the courts of appeals can and do exercise a relatively expansive review function.⁴⁴⁸ If the court disagrees with the Board’s interpretation of the law, then the appropriate judicial response is apparently to remand the case to the Board for it to decide, within the limits of its newly defined discretion, whether it will exercise the statutory power that the court has bestowed upon it.⁴⁴⁹ Similarly, the Supreme Court has said that “when a reviewing court concludes that an agency invested with broad discretion to fashion remedies has apparently abused that

443. See *Local 60, Carpenters v. NLRB*, 365 U.S. 651, 655 (1961).

444. See *Republic Steel Corp. v. NLRB*, 311 U.S. 7, 12 (1940).

445. *Id.* at 10.

446. See *Local 60, Carpenters v. NLRB*, 365 U.S. at 655-56.

447. Section 10(f) gives the appropriate federal court of appeals the power to review Board orders and “to make and enter a decree enforcing, modifying, and enforcing as so modified, or setting aside in whole or in part the order of the Board.” Labor Management Relations Act § 10(f), 29 U.S.C. § 160(f) (1976).

448. For example, in *Ex-Cell-O Corp.*, 185 N.L.R.B. 107 (1970), *enforced on other grounds*, 449 F.2d 1058 (D.C. Cir. 1971), the Board refused to advise an economic “make whole” remedy for employer bad faith bargaining on the grounds, *inter alia*, that it lacked the statutory authority to do so. 185 N.L.R.B. at 108-09. The District of Columbia Court of Appeals, on the other hand, engaged in a fairly exhaustive evaluation of this issue in the related case of *IUE v. NLRB* (*Tiidee Products, Inc.*), 426 F.2d 1243, 1251-53 (D.C. Cir. 1970), *cert. denied*, 400 U.S. 950 (1970).

449. See, e.g., *IUE v. NLRB*, 426 F.2d at 1253.

discretion by omitting a remedy justified in the court's view by the factual circumstances, remand to the agency for reconsideration, and not enlargement of the agency order, is ordinarily the reviewing court's proper course."⁴⁵⁰ Affirmative modification by a court would thus appear to be appropriate only in "the exceptional situation in which crystal clear Board error renders a remand an unnecessary formality."⁴⁵¹

It is against this background that Board orders in the section 8(b)(1)(A) context will be viewed.

B. Cease and Desist Orders

The most common remedy for an unfair labor practice of any kind is, of course, the cease and desist order. Although the party charged with an unfair labor practice may have already completed or stopped its illegal conduct by the time the Board issues its order, how the Board defines or describes what the guilty party is to "cease and desist" from is nevertheless an important issue. Board orders are not self-enforcing. If enforcement by a federal court of appeals is sought and obtained, the order of the Board becomes the order of the court. The order can then be enforced, if necessary, through contempt proceedings. It goes without saying that the broader the original cease and desist order, the greater the likelihood of a subsequent contempt citation. Since what a union might be required to do to purge itself of contempt could far exceed anything the Board could have originally required,⁴⁵² the exact scope of the cease and desist order is a matter of some significance.

In the section 8(b)(1)(A) context, there are four general levels of conduct from which a union may be ordered to cease and desist. At the narrowest level, the union will simply be ordered to cease and desist from the *specific conduct* which has

450. *NLRB v. Food Store Employees Local 347*, 417 U.S. 1, 10 (1974). If persistent, the Board usually will prevail. The *Tiidee* case is the classic confrontation over the "make whole" issue. On remand in *Tiidee*, the Board conceded its statutory power, but nevertheless again declared itself incapable of calculating such a remedy, ultimately forcing the court to acquiesce in the Board's refusal to grant additional relief. *Tiidee Products, Inc.*, 194 N.L.R.B. 1234 (1972), *enforced*, 502 F.2d 349 (D.C. Cir. 1974), *cert. denied*, 421 U.S. 991 (1975).

451. 417 U.S. at 8.

452. See text accompanying notes 619-29, *infra*.

been found to restrain or coerce *employees of a particular employer*. For example, in one case the union was ordered to “cease and desist from . . . [t]hreatening any employee of Frontier Transportation Company or the family of such an employee with physical injury because that employee refuses to strike or honor said Union’s picket line. . . .”⁴⁵³

In slightly broader terms, the union guilty of an unfair labor practice will also be ordered to “cease and desist from . . . *any like or related manner* [of] restraining or coercing employees in the exercise of the rights guaranteed them in Section 7 of the Act.”⁴⁵⁴ Cease and desist orders routinely use such language.

A third level of conduct from which a union may be ordered to cease and desist concerns the restraint and coercion, not only of the employees of the particular employer involved in the case, but also the employees if *any* employer. As one trial examiner explained it:

Unless successive and unending consent court decrees, each assuring only one employer freedom from this type of unlawful tactic by this Union, are to be accorded no further substantive meaning, it is time that the Respondent be effectively enjoined from committing unfair labor practices of this kind with respect to any and all other employers situated within its geographic area of jurisdiction.⁴⁵⁵

Shortly after the Taft-Hartley Act amendments, a broad, “of any employer” kind of cease and desist order against a union was approved by the Supreme Court in *IBEW, Local 501 v. NLRB*.⁴⁵⁶ In that case, the union had induced the employees of one subcontractor to strike. The union hoped to thereby cause the general contractor to stop doing business with another subcontractor, the one with whom the union had its primary dispute. This conduct is clearly declared illegal by section 8(b)(4)(A) of the amended Act and the Board ordered the union to cease and desist from inducing *either* the employees of this

453. General Teamsters, Local 959 (Frontier Transportations Co.), 248 N.L.R.B. 743, 746 (1980).

454. *Id.* (emphasis added).

455. Teamsters Local 327 (Greer Stop Nut Co.), 160 N.L.R.B. 1919, 1923 (1966). In that case, however, the Board found the order to be inappropriate because the facts did not establish the necessary “proclivity” on the union’s part to violate the act. *Id.* at 1920.

456. 341 U.S. 694 (1951).

particular subcontractor or "any employer."⁴⁵⁷ The union challenged the order as being too broad but the Court affirmed. It noted that to do otherwise would expose the primary employer to exactly the same kind of unlawful pressure from this union, albeit through other "comparable channels"⁴⁵⁸—namely, through anyone else who might also happen to be doing business with him directly or indirectly.⁴⁵⁹

Similar attempts by the Board to issue this kind of broad order in section 8(b)(1)(A) union violence cases were initially met with disfavor by the courts. In *Communications Workers v. NLRB*,⁴⁶⁰ the Supreme Court explained that the union agents "were not found to have engaged in violations against the employees of any employer other than Ohio Consolidated and we find neither justification nor necessity for extending the coverage of the order generally by the inclusion therein of the phrase 'any other employer.'"⁴⁶¹ The Court also explained that the mere fact that employees loaned from other telephone companies "were included within the ambit of petitioners' coercive acts plainly does not evidence such a generalized scheme against all telephone employers, for it was only the employment of such employees at the struck plant that brought them within the scope of the union's activities."⁴⁶²

The Supreme Court has thus suggested that the "of any employer" order is appropriate only when the circumstances or objectives of the violence against the employees of one employer make it likely that similar violence will be directed against the employees of other employers unless restrained.

The classic example arose in *United Mine Workers, District 31 (M & T Coal Co.)*,⁴⁶³ in which the union was found guilty of assorted assaults, threats, mass picketing, and the blocking of

457. *Id.* at 698, 705.

458. *Id.* at 705-06.

459. The court also suggested the same justification for a broad order in the case of a secondary boycott. In *NLRB v. Brewery & Beer Distrib. Drivers Local 830*, 281 F.2d 319 (3d Cir. 1960), the court suggested that "the danger of the occurrence of the prohibited conduct is much wider than inducements confined to employees of the specifically mentioned secondary employers." *Id.* at 323.

460. 362 U.S. 479 (1960)(per curiam).

461. *Id.* at 480.

462. *Id.* at 481. *Accord* *NLRB v. Taxicab Drivers Union Local 777*, 340 F.2d 905, 909 (7th Cir. 1964); *Highway Truck Drivers v. NLRB*, 273 F.2d 815 (D.C. Cir. 1959).

463. 129 N.L.R.B. 146 (1960), *enforced*, 299 F.2d 441 (D.C. Cir. 1962).

ingress and egress at the mine sites of five different coal companies. The union was simultaneously engaged in organizational efforts at four other mines, and its ultimate goal was to organize all nonunion mines in the area. The Board concluded that “[i]n view of these facts, . . . we believe that the conduct of the Respondents evidences . . . a generalized scheme against all nonunion mines within the jurisdiction of District 31 which can be remedied only by the entry of a broad order.”⁴⁶⁴ The court of appeals agreed.⁴⁶⁵ In sum, given the scope of the union’s proven misconduct (against the employees of five different employers) and its ultimate objective (unionization of all the mines within its jurisdiction), it was likely that similar violence against other employees would occur unless it too was covered by the restraining order.

After *M & T Coal Co.*, the doctrine gradually evolved into one whereby a likelihood of recurring violence is identified primarily by reference to a somewhat broader concept of the union’s so-called “proclivity” to engage in that particular kind of misconduct.⁴⁶⁶ The necessary proclivity can be established by reference to prior cases of similar misconduct by the same union, or sometimes simply by reference to the outrageous facts of the case in which the broad order is being issued.⁴⁶⁷ Where the prior violation had occurred some fifteen years earlier, however, the Board said that “in view of the length of time that has elapsed since the last previous Board adjudication of unlawful conduct,”⁴⁶⁸ the broad order was not justified. Furthermore, the Board has held that an administrative law judge cannot base a finding of proclivity on prior cease and desist orders enforced

464. *Id.* at 149.

465. 299 F.2d at 444.

466. *See, e.g.*, International Bhd. of Teamsters Local 327 (Det. Distrib. Co.), 201 N.L.R.B. 787, 792 (1973); Teamsters Local 327 (Coca-Cola Bottling Works of Nashville), 184 N.L.R.B. 84, 96 (1970); Teamsters Local 327 (Hartmann Luggage Co.), 173 N.L.R.B. 1403, 1407 (1968), *remanded*, 419 F.2d 1282 (6th Cir. 1970); Teamsters Local 327 (Greer Stop Nut Co.), 160 N.L.R.B. 1919, 1923 (1966); *accord* Local 30, United Slate, Tile and Composition Roofers (Kitson Bros., Inc.), 228 N.L.R.B. 652, 653 (1977) (the word “proclivity” was not actually used, but the justification advanced for the issuance of a broad order was essentially the same).

467. Union Nacional de Trabajadores (Jacobs Constructors Co.), 219 N.L.R.B. 405, 411-12 (1975), *enforced*, 540 F.2d 1 (1st Cir. 1976), *cert. denied*, 429 U.S. 1039 (1977).

468. Local 810, Steel Fabricators (Scales Air Compressor Corp.), 200 N.L.R.B. 575, 575 n.3 (1972).

through consent decrees containing nonadmission clauses.⁴⁶⁹

In *NLRB v. Teamsters, Local 327*,⁴⁷⁰ the Sixth Circuit generally sustained the Board's proclivity justification for cease and desist orders covering the employees of "any other employer,"⁴⁷¹ but cautioned that such orders would have to satisfy the normal requirements of specificity. The order in that case did not:

First, this order is addressed to mortal human beings, yet it has no limitation in time. Second, the order is both too broad and too vague in relation to persons expected to obey it⁴⁷² (presumably on pain of contempt proceedings). Third, the order does not define the jurisdiction of Local 327 and thus it provides no means of defining the people for whom protection is sought.⁴⁷³

These requirements, however, have not posed any insurmountable obstacles to the Board. The jurisdiction of the local union can usually be defined geographically with some degree of precision.⁴⁷⁴ The Board has also simply identified it as "the area in which Respondent Local purports to represent employees. . . ."⁴⁷⁵ The "successors and assigns" language has been dropped from orders, although as one administrative law judge put it, "I cannot help but believe, . . . that the Sixth Circuit overlooked the limited meaning of 'successors and assigns' and its implicit presence in limited form anyway in enforcement orders, . . . [thus] making the change of little or no significance."⁴⁷⁶ The requirement as to time has simply been ignored. As noted by one administrative law judge, "[i]t seems to me that

469. *Teamsters Local 327 (Greer Stop Nut Co.)*, 160 N.L.R.B. 1919, 1920 (1966).

470. 419 F.2d 1282, 1284 (6th Cir. 1970); *see also* *NLRB v. Teamsters, Local 327*, 432 F.2d 933 (6th Cir. 1970).

471. 419 F.2d at 1283-84.

472. The reference here is to the fact that the order went not only to the union and its agents but also to its "successors and assigns." *Id.* at 1283.

473. *Id.*

474. *See, e.g., International Bhd. of Teamsters Local 327 (Det Distrib. Co.)*, 201 N.L.R.B. 787, 788 (1973); *Union de Tronquistas Local 901 (Hotel La Concha)*, 193 N.L.R.B. 591, 599 (1971); *Teamsters Local 327 (Coca-Cola Bottling Works of Nashville)*, 184 N.L.R.B. 84 (1970).

475. *Local 30, United Slate, Tile and Composition Roofers (Kitson Bros., Inc.)*, 228 N.L.R.B. 652, 658 (1977).

476. *Union De Tronquistas Local 901 (Hotel La Concha)*, 193 N.L.R.B. 591, 598 n.5 (1971).

a time limitation is something too difficult to tailor in advance, but must be determined by the Respondent's future conduct."⁴⁷⁷

In the fourth and broadest kind of cease and desist order, the Board orders a union to cease and desist from restraining employees of the charging party (and of any other employers, if the facts warrant it), not only in the ways *specifically* named, but also in any other manner. Although broad orders of this kind are certainly not unique to section 8(b)(1)(A) violations, the courts have generally viewed them with caution.⁴⁷⁸ In one case, for example, the District of Columbia Circuit Court of Appeals refused to enforce an order requiring the union to cease and desist from restraining or coercing employees in any manner. It felt that "peaceful, valid activities should not be inhibited by a cease and desist order which, though its purpose is to reach only illegal conduct, is framed so broadly as to cause petitioners to refrain from that which is legal for fear of violating the order or court decree enforcing it."⁴⁷⁹ The Board will nevertheless issue such an order under appropriate circumstances.

In the past, the Board seemed to focus on one of two somewhat overlapping criteria. In some cases, the Board has predicated a broad order on the fact that the violation went "to the very heart of the Act."⁴⁸⁰ Although this criteria was occasionally used in the section 8(b)(1)(A) union violence context,⁴⁸¹ the Board has generally used the same test that it employs in evaluating the propriety of an "any employer" remedial order. That approach focuses more on the union's apparent disregard for statutory rights *in general* rather than on the rights being violated in the immediate case.⁴⁸² In *Hickmott Foods, Inc.*,⁴⁸³ the Board recently abandoned the "heart of the Act" analysis altogether—in violence cases and elsewhere. It stated that an "in any manner" cease and desist order would be warranted "only

477. Teamsters Local 327 (Coca-Cola Bottling Works of Nashville), 184 N.L.R.B. 84, 96 n.14 (1970).

478. See generally McDOWELL & HUHNS, *supra* note 434 at 19-24.

479. United Mine Workers v. NLRB, 299 F.2d 441, 445 (D.C. Cir. 1962).

480. See *Hickmott Foods, Inc.*, 242 N.L.R.B. 1357 (1979), and cases cited at 1357 n.3.

481. See, e.g., Pipeline Local 38 (Hancock-Northwest, J.V.), 247 N.L.R.B. 1250, 1263 (1980) (ALJ's decision); Centac Corp., 179 N.L.R.B. 313, 322 (1969).

482. See, e.g., Pipeline Local 38 (Hancock-Northwest, J.V.), 247 N.L.R.B. 1250, 1252 (1980), *enforced*, 108 L.R.R.M. 2816 (D.C. Cir. 1981).

483. 242 N.L.R.B. 1357 (1979).

when a respondent is shown to have a proclivity to violate the Act, or has engaged in such egregious or widespread misconduct as to demonstrate a general disregard for the employees' fundamental statutory rights."⁴⁸⁴ Thus, just as an "any other employer" order can be justified by reference to the probability of the union expanding the scope of its *victims*, the "in any other manner" order has been justified by reference to the probability of the union expanding the scope or nature of its *misconduct*.⁴⁸⁵ Evidence of the latter proclivity can be found in the seriousness and extent of the proven misconduct, in the immediate case or in other cases.⁴⁸⁶ However, the Board has held that neither settlement agreements⁴⁸⁷ nor administrative law judge decisions to which exceptions are not taken⁴⁸⁸ can be relied on as evidence of a proclivity to violate the Act.

C. Posting Notices

In addition to requiring that a respondent cease and desist from further violations of the Act (however broadly defined they may be), Board orders also traditionally require that signed notices of compliance be posted at appropriate places. This includes the union's "business office and meeting halls . . . in conspicuous places, including all places where notices to members are customarily posted."⁴⁸⁹ Furthermore, the union is required

484. *Id.* Thus, in *Local Lodge 5, Int'l Bhd. of Boilermakers (Regor Constr. Co.)*, 249 N.L.R.B. 840 (1980), even though the administrative law judge viewed the union violence as "serious and striking at the heart of the act," *id.* at 851, he refused to issue a broad order because the prior cases involved either the International Union or other locals, and he felt that those violations did not show a proclivity for violence by this particular local.

485. *See Teamsters Local 327 (Hartmann Luggage Co.)*, 173 N.L.R.B. 1403 n.1 (1968) (broad order denied because facts of the case did not rise to the level required by this test), *remanded on other grounds*, 419 F.2d 1282 (6th Cir. 1970).

486. In *Hickmott Foods, Inc.*, 242 N.L.R.B. 1357 (1979), the Board noted that where "violations of the Act are proved and it can be further shown that a respondent, either previous to or concurrently with the [violations thus proved], engaged in other severe conduct violative of [the Act], a broader order may be warranted." *Id.* at 1357.

487. *Local 248, Meat & Allied Food Workers (Milwaukee Independent Meat Packers Ass'n)*, *enforced*, 84 Lab. Cas. (CCH) ¶ 10826 (7th Cir. 1978), 222 N.L.R.B. 1023 (1976) (broad order nevertheless justified in light "of the extensive pattern of serious strike-associated misconduct and the Respondent's failure to take any serious consequential steps to stop or curtail such activity. . . ."); *Local 612, Int'l Bhd. of Teamsters (Deaton Truck Line, Inc.)*, 146 N.L.R.B. 498, 506 (1964).

488. *Broadway Hosp., Inc.*, 244 N.L.R.B. 341, 341 n.7 (1979).

489. *See, e.g., General Teamsters Local 959 (Frontier Transp. Co.)*, 248 N.L.R.B.

to supply copies for the company to post on its employee bulletin boards, provided the “company is willing to post them.”⁴⁹⁰ On the other hand, a broader dissemination of the union’s *mea culpa* is sometimes required. When, for example, the union violence has had a pervasive effect on a widely dispersed group of employees, the Board has required the union to mail copies of its notice either to all of its members or to all of the employees of the affected employers.⁴⁹¹

An additional requirement that the union arrange to have its notice published in a newspaper of general circulation has had a more difficult time gaining acceptance.⁴⁹² In *NLRB v. Union Nacional de Trabajadores*,⁴⁹³ however, the court sustained both mailing and publication requirements on the following basis:

The Board clearly has the power to fashion its orders in a manner that will insure that their contents are communicated to all employees whose rights are affected. Widespread communication is aimed at counteracting the coercive effects of the § 8(b)(1)(A) violations. . . . Here, where many of the victims of the unlawful Union activities were not Union members, the remedy of ordering merely that copies of the notices be posted at the Union offices and meeting places would plainly be inadequate. The mailing requirement is an appropriate device to help insure that the victims of the Union’s wrongdoing learn of the Board’s actions.

The further requirement that the notices be published in all newspapers of general circulation helps insure that all interested persons will receive notice. . . . Moreover, where the vio-

743, 746 (1980).

490. *Id.*

491. See, e.g., Pipeline Local 38 (Hancock-Northwest, J.V.), 247 N.L.R.B. 1250 (1980), *enforced*, 108 L.R.R.M. 2816 (D.C. Cir. 1981); Local 248, Meat & Allied Food Workers (Milwaukee Indep. Meat Packers Assoc.), *enforced*, 84 Lab. Cas. (CCH) ¶ 10826 (7th Cir. 1978), 222 N.L.R.B. 1023 (1976); International Bhd. of Teamsters Local 327 (Det Distrib. Co.), 201 N.L.R.B. 787 (1973); Teamsters Local 327 (Whale, Inc.), 178 N.L.R.B. 422 (1969), *enforced in part*, 432 F.2d 933 (6th Cir. 1970).

492. The following cases rejected the publication remedy: *United Mine Workers v. NLRB*, 299 F.2d 441, 445 (D.C. Cir. 1962); *Truck Drivers Local 705 (Associated Transp., Inc.)*, 209 N.L.R.B. 292 (1974), *enforced*, 532 F.2d 1169 (7th Cir.), *cert. denied*, 429 U.S. 1022 (1976); *Teamsters Local 327 (Coca-Cola Bottling Works of Nashville)*, 184 N.L.R.B. 84, 96 (1970); *Teamsters Local 327 (Whale, Inc.)*, 178 N.L.R.B. 422, 427 (1969), *enforced in part*, 432 F.2d 933 (6th Cir. 1970).

493. 540 F.2d 1 (1st Cir. 1976), *cert. denied*, 429 U.S. 1039 (1977).

lations are flagrant and repeated, the publication order has the salutary effect of neutralizing the frustrating effects of persistent illegal activity by letting in "a warming wind of information and, more important, reassurance."⁴⁹⁴

Finally, where the perpetrator of the violence is a particular union official, the Board has at times specifically required him to sign the notices.⁴⁹⁵

D. Remedies Which Affect the Union's Bargaining Status

A union that has been found guilty of section 8(b)(1)(A) violence may find its status as a bargaining representative affected in a variety of ways. First, if the violence occurred during the pendency of a representation election which the union won, the Board may refuse to certify the union as the winner and order a new election. The Board will take this action in the exercise of its section 9 powers to regulate the election process, whenever the conduct at issue has violated the so-called "laboratory conditions." Conduct violates the laboratory conditions when it interferes with the free and untrammelled choice of the employees in the selection of a bargaining representative, whether or not such conduct rises to the level of an unfair labor practice.⁴⁹⁶ Of course, if the conduct does in fact restrain or coerce employees in the exercise of their section 7 rights, that constitutes grounds for setting aside the election almost as a matter of course.⁴⁹⁷

The matter becomes a bit more complicated, however, when *both* the employer and the union engage in unfair labor practices or other disruptive conduct in an election. In a nutshell, the law is this: if the employer's unfair labor practices have so undermined the union's majority strength and so tainted the atmosphere with coercion that a fair and free election (or re-election) is no longer possible, then the Board may simply order the employer to bargain with the union rather than proceed with an election (or re-election); however, if the union's acts of violence

494. 540 F.2d at 11-12.

495. See, e.g., *Teamsters Local 695 (Wisconsin Supply Corp.)*, 204 N.L.R.B. 866 (1973); *General Truckdrivers, Local 5 (Ryder Truck Lines, Inc.)*, 161 N.L.R.B. 493, 504 (1966), *enforced*, 389 F.2d 757 (5th Cir. 1968).

496. See *General Shoe Corp.*, 77 N.L.R.B. 124, 126 (1948).

497. See *Sindicato Puertorriqueno de Trabajadores (Cayey Indus., Inc.)*, 184 N.L.R.B. 538, 546 (1970).

and intimidation outweigh the employer's unfair labor practices, then the Board may withhold the issuance of a bargaining order in favor of that union. The full meaning and significance of this legal principle can be understood only against its historical background.

In *Herbert Bernstein (d/b/a Laura Modes Co.)*,⁴⁹⁸ a union claiming to represent a majority of employees demanded that the employer recognize and bargain with it. The employer requested a "few days" for consultation with its attorney, and the union agreed. In the meantime, the employer engaged in illegal interrogation of employees, threatened reprisals if the employees continued their support of the union, and evidenced an intent to never recognize or bargain with the union. Subsequently, several union agents invaded the employer's premises, viciously assaulted him, and "pushed around" a female office employee. Section 8(b)(1)(A) charges were brought against the union and it agreed to a settlement. The employer, however, was found guilty of illegal restraint, interference, and coercion under section 8(a)(1). The employer was also found guilty of failure to recognize and bargain with the union in violation of section 8(a)(5) because he lacked a good faith doubt of the union's majority status. At the time of the case, the normal remedy for a section 8(a)(5) violation of this kind would have been an affirmative order requiring the employer to recognize and bargain with the union. In the words of the Board:

We do not, however, deem it appropriate to give the Charging Union the benefit of our normal affirmative bargaining order in the circumstances of this case. For we cannot, in good conscience, disregard the fact that, . . . the Union evidenced a total disinterest in enforcing its representation rights through the peaceful legal process provided by the Act in that it resorted to and/or encouraged the use of violent tactics to compel their grant. . . . We recognize of course that the employees' right to choose the Union as their representative survives the Union's misconduct. But we believe it will not prejudice the employees unduly to ask that they demonstrate their desires anew in an atmosphere free of any possible trace of coercion.⁴⁹⁹

498. 144 N.L.R.B. 1592 (1963).

499. *Id.* at 1596.

The Board thus withheld its bargaining order until the union could establish its majority status through a Board-conducted election.

In the context of its origin, the *Laura Modes* doctrine is relatively uncomplicated. If it is possible that a union obtained the authorization cards supporting its claim of majority status by violence or threats of violence, or if it is possible that the union's violence caused previously consenting employees to change their minds about representation, then court-ordered bargaining is unwarranted. Despite the lack of a subjective good faith doubt on the employer's part about the union's majority status, it makes sense to withhold the benefit of a bargaining order from such a union and instead require it to establish its claim through the preferred and more accurate processes of a Board-conducted election. That presupposes, of course, that the employer's unfair labor practices have not been so extensive as to make a fair and free election impossible. Where that occurs, an exception was soon recognized. The Second Circuit Court of Appeals put it this way:

It is exceedingly hard to believe that Congress meant to authorize the Board to require bargaining with a union having a bare card-count majority which has attempted to increase this or to enforce its claim to representation by hitting other employees or the employer on the head. . . . *The only cases where arguably a union's resort to serious violence to enforce its demands might be disregarded would be when the employer's conduct has rendered a fair election impossible.*⁵⁰⁰

That exception to the *Laura Modes* defense has become very important because of the Supreme Court's subsequent decision on the propriety of Board bargaining orders generally. In *Linden Lumber Div., Summer & Co. v. NLRB*⁵⁰¹ the Supreme Court held that an employer's section 8(a)(5) duty to recognize and bargain with a union is not activated by a mere showing that the union possesses authorization cards from a majority of the employer's employees, and that a bargaining order is normally appropriate only under the circumstances previously

500. *NLRB v. United Mineral & Chem. Corp.*, 391 F.2d 829, 841 (2d Cir. 1968)(emphasis added).

501. 419 U.S. 301 (1974).

spelled out by the Court in *NLRB v. Gissel Packing Company*.⁵⁰² In *Gissel*, the Court held that when an employer engaged in unfair labor practices that have a tendency to undermine the union's majority strength *and make the election or new election impossible*, the Board may issue a bargaining order as a remedy to those unfair labor practices.⁵⁰³ This, however, creates an anomaly. Since the *Laura Modes* defense to a bargaining order apparently does *not* apply where the employer has committed unfair labor practices of this kind, and since under *Gissel* a bargaining order will be issued only where these kinds of unfair labor practices have occurred, it would appear that the *Laura Modes* defense has no further application or vitality in a bargaining order case of this kind.

However, the *Laura Modes* defense continues to be recognized as a defense to a *Gissel* bargaining order, though the rationale for its continued application is a bit strained. In the typical *Gissel* bargaining order situation, an employer has engaged in unfair labor practices which make a fair and free election impossible. That unfortunate state of affairs is certainly not corrected by the fact that the union has also engaged in coercive misconduct. As the Board put it in *Donelson Packing Co.*:⁵⁰⁴

Union unfair labor practices arising in the same situation [where the employer has also engaged in them] can hardly be said to detract from the coercive atmosphere in which an election must be run. In the minds of prospective voters, misdeeds by competing parties do not erase or neutralize each other, as an alkali neutralizes an acid. Indeed, such conduct by a union, where found, compounds rather than nullifies employer misconduct, and minimizes rather than improves the likelihood that an election will produce a free and untrammelled employee choice.⁵⁰⁵

For this reason the approach used by the Board in applying the *Laura Modes* defense in a *Gissel* bargaining order context "is one of a general balancing of the equities rather than a cali-

502. 395 U.S. 575 (1969).

503. *Id.* at 614. See generally, Note, *The Gissel Bargaining Order, the NLRB, and the Courts of Appeals: Should the Supreme Court Take a Second Look?*, 32 S.C.L. REV. 399 (1980).

504. 220 N.L.R.B. 1043 (1975), *enforced*, 569 F.2d 430 (6th Cir. 1978).

505. *Id.* at 1060.

brated measuring of the impact upon voters, point and counterpoint, of the various acts of coercion and interference which have occurred on all sides.”⁵⁰⁶

There is, of course, no fixed formula for determining exactly where this “balance of equities” should be struck. The presumption, however, seems to be against the employer. The more serious his unfair labor practices, the less likely it is that the Board will view the case as one in which the “extraordinary and unusual” *Laura Modes* defense will be recognized.⁵⁰⁷ Moreover, the union misconduct itself must at least be actionable under section 8(b)(1)(A)⁵⁰⁸ and also be of a fairly egregious nature before it will trigger the application of the *Laura Modes* defense. For example, in *Donovan v. NLRB*,⁵⁰⁹ both the Board and the Second Circuit Court of Appeals held that a bargaining order should be issued even though the union and its agents had engaged in the following misconduct:

forcibly entering the employer's premises; following nonstriking employees to and from work; repeatedly threatening them with physical harm and property damage; calling in a bomb scare to the employer's nursing home; mass picketing, blocking ingress and egress of nonstrikers, and banging on cars; kicking a car, cursing and threatening management; attempting to run a company representative off the road; throwing small rocks and pebbles at a supervisor's car; assaulting a nonstriker and damaging his property; threatening, following, and harrasing management representatives attempting to enter and leave the facility; and even before the strike, repeatedly attempting to enter the nursing home without permission.⁵¹⁰

506. *Id.*

507. *General Iron Corp.*, 224 N.L.R.B. 1180, 1194 (1976) (in addition to unfair labor practices, the employer “engaged in further provocations by resorting to gross physical violence against Local 455 officials.”).

508. *Delchamps, Inc.*, 244 N.L.R.B. 366, 378 n.17 (1979), *enforced*, 653 F.2d 225 (5th Cir. 1981).

509. 520 F.2d 1316 (2d Cir. 1975), *cert. denied*, 423 U.S. 1053 (1976).

510. The trial examiner summarized these forms of misconduct in *General Iron Corp.*, 224 N.L.R.B. 1180, 1195 (1976). *See also* *Pace Oldsmobile, Inc.*, 256 N.L.R.B. No. 111 (1981); *Martin Arsham Sewing Co.*, 244 N.L.R.B. 918 (1979); *International Union of Operating Eng'rs (Oklahoma Osteopathic Hosp.)*, 238 N.L.R.B. 1113, 1114 n.5 (1978), *enforced*, 618 F.2d 633 (10th Cir. 1980); *Philadelphia Ambulance Serv., Inc.*, 238 N.L.R.B. 1070 n.6 (1978); *Maywood Plant of Grede Plastics*, 235 N.L.R.B. 363, 363-66 (1978), *enforced in part*, 628 F.2d 1 (D.C. Cir. 1980); *Paramount Gen. Hosp., Inc.*, 223 N.L.R.B. 1017 (1976), *enforced*, 81 Lab. Cas. (CCH) ¶ 13305 (D.C. Cir. 1977); *Triumph*

On the other hand, in *NLRB v. United Mineral & Chemical Corp.*,⁵¹¹ there were numerous threats of physical violence. An automobile carrying nonstriking employees was stoned; several of these employees were removed from cars and beaten up. Stones and tomatoes were thrown, and an assault on the owner resulted in a fractured leg and his incapacitation for five months. This union misconduct was deemed serious enough to warrant the withholding of a bargaining order.⁵¹²

Beyond comparing the seriousness of the union's misconduct with that of the employer in deciding whether to issue a bargaining order in the face of a *Laura Modes* defense, the Board also looks for evidence of the union's general willingness to use the orderly processes of the law. In *United Mineral & Chemical Corp.*,⁵¹³ for example, the Board noted that "[u]nion evidenced a total disinterest in enforcing its representation rights through the peaceful legal process provided by the Act in that it resorted to and/or encouraged the use of violent tactics to compel their grant."⁵¹⁴ Similarly, in *Joseph H. Bliss*,⁵¹⁵ the trial examiner noted that the record "presents a sordid picture of disregard of the law, violence, and misconduct, and their failure to compel or seek recognition by following through on the normal procedures of Board action available to them under the law."⁵¹⁶

Finally, although the "agency" requirement obviously must be satisfied in order for there to be a section 8(b)(1)(A) violation, the Board seems to require an even higher degree of official union participation in the *Laura Modes* setting. In *Highland Plastics, Inc.*,⁵¹⁷ the Administrative Law Judge noted that "the direct participation of Union officials in violent acts or, at the very least, their presence and acquiescence when significant vio-

Army Center, 222 N.L.R.B. 627, 633 (1976), *enforced*, 571 F.2d 462 (9th Cir. 1978); Black Angus of Lauderdale, 213 N.L.R.B. 425, 434 (1974); Federal Prescription Serv., Inc., 203 N.L.R.B. 975, 999 (1973), *enforced in part*, 86 L.R.R.M. 2185 (8th Cir. 1974).

511. 391 F.2d 829 (2d Cir. 1968).

512. *Id.* at 839 n.15. See also *NLRB v. World Carpets*, 463 F.2d 57 (2d Cir. 1972).

513. 155 N.L.R.B. 1390 (1965), *enforced*, 391 F.2d 829 (2d Cir. 1968).

514. *Id.* at 1396.

515. 174 N.L.R.B. 737 (1969).

516. *Id.* at 741. See also *International Union of Operating Eng'rs Local 948 (Oklahoma Osteopathic Hosp.)*, 238 N.L.R.B. 1113, 1121-22 (1978), *enforced*, 618 F.2d 633 (10th Cir. 1980); *Pacific Abrasive Supply Co.*, 182 N.L.R.B. 329, 331 (1970).

517. 256 N.L.R.B. 146 (1981).

lence occurs is an essential factor to justify the extraordinary remedy of withholding an otherwise appropriate bargaining order."⁵¹⁸

Those, then, are the factors the Board and the courts take into account in applying the *Laura Modes* defense in the *Gissel* bargaining order context—i.e., where union violence is relied on as a grounds for denying that particular remedy for employer unfair labor practices. The *Laura Modes* doctrine, however, also recognizes union violence as a possible defense to a straightforward "refusal to bargain" claim.⁵¹⁹ In *Union Nacional de Trabajadores*,⁵²⁰ for example, the union had won the election and had been certified as the collective bargaining representative. But negotiations between the union and the employer were marked with threats and acts of violence by the union. The employer refused to meet further with the union until the violence ended. Assurances were given that it would not recur. Subsequently, the employer was charged with an illegal refusal to bargain. Relying on the *Laura Modes* doctrine, the Board held that the refusal was justified. The Board found that "[t]he record clearly establishes that . . . the Union engaged in violence and made threats which were unprovoked, pervasive in character, and destructive of an harmonious bargaining relationship. We would not expect or require an employer to sit down and bargain with a union guilty of such misconduct absent adequate assurances against continuation thereof."⁵²¹ Again, however, the union violence must be fairly egregious before it will operate as a

518. *Id.* at 163.

519. In the *Gissel* context, there is no underlying section 8(a)(5) refusal-to-bargain violation, and the bargaining order is simply a remedy for the employer's section 8(a)(1) (restraint, interference, and coercion of employees) and section 8(a)(3)(discrimination) violations. *Linden Lumber Div., Summer & Co. v. NLRB*, 419 U.S. 301 (1974). A non-*Gissel* bargaining order may, however, also be issued where an employer clearly does have a section 8(a)(5) bargaining duty which has been breached, subject, of course, to the availability of the *Laura Modes* defense.

520. 219 N.L.R.B. 862 (1975), *enforced in part*, 540 F.2d 1 (1st Cir. 1976), *cert. denied*, 429 U.S. 1039 (1977).

521. *Id.* at 863. *See also* *Broadway Hosp., Inc.*, 244 N.L.R.B. 341, 355 (1979); *Dow Chem. Co.*, 216 N.L.R.B. 82 (1975); *Allou Distrib., Inc.*, 201 N.L.R.B. 47 (1973) (employer illegally withdrew recognition from incumbent union, refused to bargain, and caused a decertification petition to be filed; but because of the union's own violations of section 8(b)(1)(A) in trying to coerce employees to withdraw the petition, the Board opted to order an election rather than issue a bargaining order against the employer).

defense to a section 8(a)(5) refusal-to-bargain charge.⁵²²

In *Homer Laughlin China*,⁵²³ another section 8(b)(1)(A) remedy affecting the bargaining status of an incumbent union was rejected. The employer argued for an exception to the “contract bar” doctrine:⁵²⁴ if the contracting union has been found guilty of violence, then its contract with the employer should not be recognized as a bar to holding a decertification election. The trial examiner, however, balanced the “minor” nature of the union violence against the general statutory policy of promoting stability in bargaining relationships reflected in the “contract bar doctrine.” He concluded that an exception was not warranted under the facts of the case.⁵²⁵ Nevertheless, the possibility is left open that such a remedy might indeed be appropriate in cases of more serious union violence.

That possibility is certainly suggested by the extreme action taken by the Board against the infamous Union Nacional de Trabajadores. In the *Carborundum Company*⁵²⁶ case, as a part of its remedial order against extensive and serious violence by this union, the Board ordered that the union be decertified as the collective bargaining representative. The Board further denied it the right to even invoke the statutory processes in aid of its demand for renewed recognition until the coercive effects of its violence were dissipated and another election was held. The factual predicate of this particular remedy was the union’s total disregard for the peaceful processes of the statute and the Board’s authority in enforcing them, the union’s use of violent self-help measures, and the resulting destruction of any hope of constructive bargaining or effective representation by such a

522. The Board also refused to recognize the *Laura Modes* defense in the following cases: *Condon Transp., Inc.*, 211 N.L.R.B. 297, 303 (1974); *J.C. Penney Co.*, 205 N.L.R.B. 1043, 1047 (1973), *enforced*, 86 L.R.R.M. 2152 (3d Cir. 1974); *Ramona’s Mexican Food Prod., Inc.*, 203 N.L.R.B. 663, 685 (1973), *enforced*, 531 F.2d 390 (9th Cir. 1975); *Quintree Distributors, Inc.*, 198 N.L.R.B. 390, 404-05 (1972).

523. *International Bhd. of Pottery Workers (Homer Laughlin China, Inc.)*, 217 N.L.R.B. 25 (1975).

524. Under this doctrine, “the Board will dismiss as untimely an election petition which is filed during the term of a collective bargaining agreement (having a definite termination date) which has a duration less than three years, or which is filed during the first three years of an agreement of longer fixed duration.” R. GORMAN, *LABOR LAW* 54 (1976).

525. 217 N.L.R.B. at 29.

526. *Union Nacional de Trabajadores (Carborundum Co.)*, 219 N.L.R.B. 862 (1975), *enforced in part*, 540 F.2d 1 (1st Cir. 1976), *cert. denied*, 429 U.S. 1039 (1977).

union.⁵²⁷ In short, it seems that the Board was simply outraged at the union's abuse of its certification status and was determined to revoke it.

On appeal, that part of the remedy was allowed to stand, but only because the First Circuit found that it lacked jurisdiction to directly review a decertification order.⁵²⁸ The court did, however, proffer some gratuitous comments about the general propriety of this kind of order. Noting the extreme importance of the majority's right to be represented by the union duly selected by them in a prior Board-conducted election, the court suggested that "a decertification order is an extreme measure and should be entered only when the Board has first demonstrated that there are no equally effective alternative means of promoting the objectives of the Act."⁵²⁹ More specifically, the court suggested that if the issue were to arise again, the Board should perhaps be more analytical in its approach:

First, it should consider the effect of the Union's misconduct *at the Carborundum plant* on the operation of the representational and collective bargaining processes. If it finds that constructive bargaining is not feasible, it should then consider whether the objectives of the Act could be promoted equally well either by an order excusing the employer of his bargaining obligations until the Union has provided adequate assurances that the misconduct will not recur or by normal § 8(b)(1)(A)

527. The Board suggested that this union:

has evinced an intent to bypass the peaceful methods of collective bargaining contemplated in the Act. . . . It has consistently exhibited an utter disregard for the orderly and lawful processes available under the Act, and has instead deliberately resorted to self-help through violence. This Union . . . evidence[s] a total disinterest in furthering the Act's policies of promoting collective bargaining and industrial peace. Indeed, it has infected the bargaining process.

While we recognize the importance of the right of employees to be represented by their duly selected bargaining representative, we cannot continue to certify as a qualified bargaining representative a labor organization such as the Respondent Union which does not lawfully pursue its representation rights and is openly defiant of the authority of the Board and the teaching and purposes of the Act. Due to the atmosphere of fear and coercion generated by the Union's unlawful conduct, no constructive bargaining on behalf of the employees it represents is feasible. Thus, this [u]nion has corrupted and frustrated the representative scheme of bargaining envisaged by the Act.

219 N.L.R.B. at 863-64.

528. 540 F.2d at 12-13.

529. *Id.* at 13.

remedies. At this point, it will be proper to consider the evidence of the Union proclivity for unlawful conduct since it is relevant as to the likelihood that less drastic measures will be effective. We emphasize that, because of the important employee interests that are at stake the focus should be on promoting peaceful collective bargaining and not on fashioning sanctions to deter Union misconduct. We recognize that the two may often be hard to separate.⁵³⁰

However, the circumstances under which decertification might be an appropriate remedy for section 8(b)(1)(A) violations, and the analytical framework for dealing with that issue, have not been litigated to any further extent.

E. Back Pay Awards

In *Phelps Dodge Corp. v. NLRB*,⁵³¹ the Supreme Court suggested that “[m]aking the workers whole for losses suffered on account of an unfair labor practice is part of the vindication of the public policy which the Board enforces.”⁵³² Nevertheless, the Board and the courts have always recognized some limits on the kinds of monetary awards that the Board, as an administrative agency, is empowered to order. In the section 8(b)(1)(A) context, the Board has consistently refused to order unions to compensate employees who have incurred hospital or medical expenses as a result of union violence.⁵³³ It has likewise refused to order monetary awards covering union damage to company property and equipment.⁵³⁴ This refusal is apparently consistent with legislative history which suggests that the Board was not intended to have the general power to award damages in the conventional or common-law sense of the word; remedies of that kind were left to the discretion of the courts.⁵³⁵ Indeed, in listing the reme-

530. *Id.* at 15 (emphasis in the original).

531. 313 U.S. 177 (1941).

532. *Id.* at 197.

533. Local 612, Int'l Bhd. of Teamsters (Deaton Truck Line, Inc.), 146 N.L.R.B. 498, 506 n.12 (1964); Operating Eng'rs Local 513 (Long Constr. Co.), 145 N.L.R.B. 554, 562-63 (1963).

534. Local 30, United Slate, Tile and Composition Roofers (Associated Builders & Contractors, Inc.), 227 N.L.R.B. 1444 (1977).

535. See LEGIS. HIST. LMRA at 1371; National Maritime Union (Texas Co.), 78 N.L.R.B. 971, 989-90 (1948), *enforced*, 175 F.2d 686 (2d Cir. 1949), *cert. denied*, 338 U.S. 954 (1950), *overruled on other grounds*, 119 N.L.R.B. 307, 308 n.3 (1957).

dies that would be available for a section 8(b)(1)(A) violation, Congressman Landis specifically referred to a "possible *suit* for damages"⁵³⁶—thus suggesting a judicial rather than an administrative source of that particular remedy.

The impropriety of back pay awards, however, is not so clear. That award consists of back pay to employees who have lost work because of the union's violent misconduct—either because of a disabling injury or the simple inability of the employee to get into the plant. Despite the strong and cogently reasoned dissents of several Board members over the years, the Board has consistently refused to grant such relief.⁵³⁷ The courts of appeals have, sometimes reluctantly, acquiesced in this policy.⁵³⁸ The Board's reasons for the policy warrant careful scrutiny, because this is one remedy, unlike those discussed above, that is likely to be taken seriously by unions bent on violating the Act.

Initially the Board took the position that it simply lacked the statutory power to award back pay to employees who lost

536. LEGIS. HIST. LMRA at 905 (emphasis added).

537. Union Nacional de Trabajadores (Macal Container Corp.), 219 N.L.R.B. 429, 430 (1975), *enforced*, 540 F.2d 1 (1st Cir. 1976), *cert. denied*, 429 U.S. 1039 (1977); Union Nacional de Trabajadores (Catalytic Indus. Maint. Co.), 219 N.L.R.B. 414 (1975), *enforced*, 540 F.2d 1 (1st Cir. 1976), *cert. denied*, 429 U.S. 1039 (1977); Union Nacional de Trabajadores (Jacobs Constr. Co.), 219 N.L.R.B. 405 (1975), *enforced*, 540 F.2d 1 (1st Cir. 1976), *cert. denied*, 429 U.S. 1039 (1977); Union de Tronquistas Local 901 (Lock Joint Pipe & Co.), 202 N.L.R.B. 399 (1973); Local 235, Lithographers Union (Henry Wurst, Inc.), 187 N.L.R.B. 490, 491 n.5 (1970); United Steelworkers (Inspiration Consol. Copper Co.), 174 N.L.R.B. 189 (1969); UMW (Blue Diamond Coal Co.), 143 N.L.R.B. 795 (1963); Local 983, United Bhd. of Carpenters (Burke Co.), 115 N.L.R.B. 1123 (1956); UMW, District 31 (Bitner Fuel Co.), 92 N.L.R.B. 953, 955 n.5 (1950), *enforced*, 190 F.2d 251 (4th Cir. 1951); UMW (West Ky. Coal Co.), 92 N.L.R.B. 916, 921 (1950), *enforced*, 195 F.2d 961 (6th Cir.), *cert. denied*, 344 U.S. 920 (1952); Local 150, United Elec. Workers (Cory Corp.), 84 N.L.R.B. 972, 1014 (1949); United Furniture Workers Local 472 (Colonial Hardwood Flooring Co.), 84 N.L.R.B. 563, 565 (1949); International Union, UAW (North Elec. Mfg. Co.), 84 N.L.R.B. 136, 157 (1949).

538. *Drobena v. NLRB*, 612 F.2d 1095, 1098 (8th Cir. 1980), ("It is not too much to say that the members of this panel of this court do not think highly of the Board's policy that has been described as that policy applies to the alleged facts of this case"), *cert. denied*, 449 U.S. 821 (1980); *United Ass'n of Journeymen of Plumbing v. NLRB*, 553 F.2d 1202, 1205-06 (9th Cir. 1977); *NLRB v. Oil Workers Union*, 476 F.2d 1031, 1037 (1st Cir. 1973); *National Cash Register Co. v. NLRB*, 466 F.2d 945, 966 (6th Cir.) ("[W]e entertain doubts about the validity of the *Colonial Hardwood* rule. . ."), *cert. denied*, 410 U.S. 966 (1972). In *UAW v. Russell*, 356 U.S. 634, 641 n.5 (1958), the Supreme Court noted the Board's policy and acknowledged petitioner's argument that the Court's more recent decisions mandating broad remedial relief for unfair labor practices superceded the policy, but found it unnecessary to pass on the issue in that case.

work because of union violence. In the first case in which the matter was raised, the trial examiner treated it as merely another claim for "money damages," which Congress did not give the Board the power to assess.⁵³⁹ Clearly, as is implicit in the wording of the statute itself, an unqualified characterization of back pay in those terms is unwarranted.

Accordingly, the Board predicated its "lack of power" argument on a slightly narrower basis. Section 10(c) of the statute authorizes the Board to order parties who have been found guilty of an unfair labor practice "to take such affirmative action including reinstatement of employees with . . . back pay, as will effectuate the policies of this Subchapter: *Provided*, that where an order directs reinstatement of an employee, back pay may be required of the employer or labor organization, as the case may be, responsible for the discrimination suffered by him. . . ."⁵⁴⁰ From this language the Board concluded that a back pay award was appropriate *only* when an employee had been illegally discharged and was being reinstated, and that a union was liable for such back pay only when that union had *caused* the discharge in violation of section 8(b)(2).⁵⁴¹ By necessary implication, a back pay award against a union was not authorized when the loss of work was merely the result of a section 8(b)(1)(A) violation rather than a unioninduced discharge.⁵⁴²

Such a literal and narrow reading of section 10(c) was grossly inconsistent with both its own and the Supreme Court's prior decision in *Phelps Dodge Corp. v. NLRB*.⁵⁴³ In *Phelps*, the Board had required the company to hire and make whole for their loss of earnings persons whom the company had discriminatorily refused to *hire*. The company argued that a literal reading of the statute authorized a back pay order only in conjunction with a *reinstatement* order. Since the persons in question had never been employed by the company, the make whole remedy was inappropriate. The Supreme Court rejected this

539. International Union, UAW (North Elec. Mfg. Co.), 84 N.L.R.B. 136, 157 (1949).

540. Labor Management Relations Act § 10(c), 29 U.S.C. § 160(c)(1976).

541. Labor Management Relations Act § 8(b)(2), 29 U.S.C. § 158(b)(2)(1976). This section prohibits a union from causing or attempting to cause an employer to discriminatorily encourage or discourage union activity in violation of section 8(a)(3).

542. See United Furniture Workers Local 472 (Colonial Hardwood Flooring Co.), 84 N.L.R.B. 563, 565-66 (1949).

543. 313 U.S. 177 (1941).

interpretation:

To attribute such a function to the participial phrase introduced by "including" is to shrivel a versatile principle to an illustrative application. We find no justification whatever for attributing to Congress such a casuistic withdrawal of the authority which, but for the illustration, it clearly has given the Board. The word "including" does not lend itself to such destructive significance.⁵⁴⁴

The same kind of narrow reading of section 10(c) was the basis of the Board's asserted lack of power to award back pay as a remedy for section 8(b)(1)(A) violence cases in *West Kentucky Coal*.⁵⁴⁵ Member Reynolds registered the first of several strong dissents to this policy. He argued that the Board had the broad power to "take whatever affirmative action it believes will effectuate the policies of the Act."⁵⁴⁶ That power included a back pay award against a union that "through the exercise of illegal coer-

544. *Id.* at 189. Subsequently, in *Radio Officers v. NLRB*, 347 U.S. 17 (1954), the Supreme Court made clear that a reinstatement order is not a precondition to the award of back pay against a union. In *Radio Officers*, a union had caused the employer not to hire someone, and only the union was charged with an unfair labor practice. The union was found guilty and ordered to reimburse the person for the wages he would have received but for the unfair labor practice. Since the employer was not joined in the complaint, no reinstatement order was issued. In response to the union's argument that back pay was available only as an incident to a reinstatement order, the Supreme Court stated that the authority conferred by section 10(c) was:

not to limit, but merely to illustrate, the general grant of power to award affirmative relief. . . . The purpose of Congress . . . was not to limit the power of the Board to order back pay without ordering reinstatement but to give the Board power to remedy union unfair labor practices comparable to the power it possessed to remedy unfair labor practices by employers.

Id. at 54. In nonsection 8(b)(1)(A) contexts, the Board has retreated from its original insistence that a back pay award is appropriate only as an adjunct to a reinstatement order remedying an illegal discharge. In *Graves Trucking, Inc.*, 246 N.L.R.B. 344 (1979), *enforced as modified*, 111 L.R.R.M. 2862 (7th Cir. 1982), an employer physically assaulted an employee, rendering him unfit to work. In ordering back pay but no reinstatement, the Board noted that "while Nash [the employee] was never discharged per se, he suffered the monetary consequence of discharge without the physical capacity to mitigate his loss." *Id.* at 345. The same would be true if a union agent had committed the assault.

545. *UMW (West Ky. Coal Co.)*, 92 N.L.R.B. 916 (1950), *enforced*, 195 F.2d 961 (6th Cir. 1952).

546. 92 N.L.R.B. at 922. The proviso quoted in the text accompanying note 542 *supra* was not in the statute at the time section 10(c) was being construed by the Supreme Court in *Phelps Dodge*, although as Member Reynolds noted, it "is likewise merely illustrative of the Board's power, it follows that the proviso does not delimit the Board's remedial power." *Id.*

cive tactics which rendered civil authority helpless, caused a temporary hiatus in the tenure of employment of the employees . . . thereby causing them a loss in pay.”⁵⁴⁷ On the question of the Board’s *power* to grant such relief, Member Reynolds clearly seems correct. Section 10(c) *specifically* authorizes back pay as the obvious ancillary to a reinstatement order. Furthermore, the broader concept of “affirmative action” would also seem to authorize the back pay remedy in other situations.

Coincident with the Board’s assertion of lack of power has been its alternative assertion that granting such relief would not in fact effectuate the purposes and policies of the Act. In recent years it has increasingly justified its position on that basis.⁵⁴⁸

Although the Board has never clearly articulated its basis for this, it apparently sees some intrinsic difference between an employee’s loss of work occasioned by section 8(b)(2) “discrimination” and a loss of work occasioned by section 8(b)(1)(A) coercion. In *Colonial Hardwood*, for example, the Board noted that:

[a]n award of back pay [in the latter situation] would be in the nature of *damages* to the employee for an *interference with his right of ingress to the plant*, as contrasted with compensation to him for *losses in pay* suffered by him because of *severance of or interference with the tenure or terms of the employment relationship between him and his employer* in the ordinary case in which back pay is awarded. . . .⁵⁴⁹

That linguistic distinction is without a substantive difference. It is obvious that when an employee has been coerced into supporting a strike, the union’s “interference with his right of in-

547. *Id.* at 925-26.

548. See *Drobena v. N.L.R.B.*, 612 F.2d 1095, 1097 (8th Cir.), *cert. denied*, 449 U.S. 821 (1980).

549. 84 N.L.R.B. at 565-66 (emphasis added). The trial examiner in that case drew a distinction on the basis that a “[d]iscriminatory discharge clearly operates as a continuing exclusion from further employment by the particular employer with a resulting loss of earnings,” a loss which the employee has no way of avoiding until a Board order of reinstatement is obtained. On the other hand, “[e]xclusion from work in a plant by a striking labor organization on a particular occasion may or may not have such a continuing effect,” since “employees physically excluded from work by a labor organization may immediately secure entrance to the plant with such protection as may be needed, through the police.” *Id.* at 589. Apart from its gross overestimation of the adequacy of police protection in cases of this kind, this distinction fails for apparently expecting employees to risk life and limb resorting to a form of self-help vindication of section 7 rights. The Board, fortunately, did not proceed on that basis.

gress to the plant" also causes a "severance of or interference with the tenure or terms of the employment relationship between him and his employer." Indeed, the back pay award serves only to compensate him for that severance rather than for the antecedent and independent interference with his right of access—interference for which he may still be entitled to compensatory damages in a common-law tort action.⁵⁵⁰

Put differently, from the perspective of the employee who has lost work because of his unwillingness to support the union, it is immaterial whether the loss results from a union-induced discriminatory discharge or union-sponsored violence. The Supreme Court has said that one central "policy of the Act is to insulate employees' jobs from their organization rights."⁵⁵¹ Sections 8(a)(3) and 8(b)(2) effectuate that policy by protecting employees against employer and union discrimination which cause interference with the employee's job. The remedy is a back pay order. But as the Supreme Court noted in *Scofield v. NLRB*,⁵⁵² section 8(b)(1)(A) is a part of that very same protective web. Indeed, its primary purpose is to prevent *coercive* interference with the employee's right to work and hold a job.⁵⁵³ If loss of wages is the consequence of any form of illegal interference, the employee should be made whole regardless of whether it is union discrimination or union coercion that is the ultimate cause. On the question of the appropriate remedy for the interference, it simply should not make that much difference which subsection of the statute the case happens to fall under.

This is especially true in light of the liberality the Board has shown in finding section 8(b)(2) violations. In one early case,

550. The Board clearly recognized this in *Graves Trucking, Inc.*, 246 N.L.R.B. 344 (1979), *enforced as modified*, 111 L.R.R.M. 2862 (7th Cir. 1982). In *Graves Trucking*, the Board noted that "contrary to Respondent's suggestion, such a monetary award [back pay to compensate an employee for lost work caused by an employer assault] is not reparation for the physical injury suffered by Nash, but a necessary remedy to vindicate the purposes of the Act." *Id.* at 345. The Board recognized other forums in which the employee could recover damages for personal injuries. *Id.* at 345 n.8.

551. *Radio Officers Union v. NLRB*, 347 U.S. 17, 40 (1954).

552. 394 U.S. 423, 428-30 (1969).

553. Indeed, the emphasis in *Scofield* upon the protection of job rights as the primary purpose of the section 8(b)(1)(A) prohibitions led the Sixth Circuit to cast doubt on the continued validity of the *Colonial Hardwood* doctrine. *National Cash Register Co. v. NLRB*, 466 F.2d 945, 965 n.20 (6th Cir.), *cert. denied*, 410 U.S. 966 (1972).

Randolph Corporation,⁵⁵⁴ two employees were threatened off the job by union agents. The Board found that the employer was aware of this and therefore guilty of a “constructive discharge” in violation of section 8(a)(3) “by failing to disavow such expulsion of these employees from the plant.” Since it was all caused by the union, the union was guilty of a section 8(b)(2) violation as well. The Board called for a make whole award of lost wages for which the employer and the union were jointly and severally liable. The Seventh Circuit Court of Appeals refused to accept the Board’s “constructive discharge” theory, apparently because of the obvious inequity of making the employer even partially liable in such a situation.

After the Supreme Court held that it was not necessary to allege a section 8(a)(3) violation or join the employer in order to proceed against a union for a section 8(b)(2) violation,⁵⁵⁵ the Board was able to continue its expansive reading of section 8(b)(2) without implicating an otherwise innocent employer in the violation. For example, in the *Stuart Wilson*⁵⁵⁶ case, several employees had been laid off from work and sent home by the employer because of threats of union violence against them if they continued working. The Board held that it was not necessary for the General Counsel to show that the union made an express demand or request that the employer get rid of these employees since the conduct which violated section 8(b)(1)(A) was obviously directed toward that end.⁵⁵⁷ The Board likewise held that “the Act does not require a showing of discharge or complete separation from employment to establish discrimination under Section 8(b)(2). . . .”⁵⁵⁸ The union was required to make these employees whole for their loss of wages.

To be sure, the employees’ loss of pay in *Radio Officers* was caused by the union *working through the employer*—which satisfies at least the formal requirements of a section 8(b)(2) violation. But it seems clear that the employer participation and the section 8(b)(2) violation itself were merely incidental to the real

554. 89 N.L.R.B. 1490 (1950), *enforcement denied in relevant part*, 187 F.2d 298 (7th Cir. 1951).

555. *Radio Officers Union v. NLRB*, 347 U.S. 17 (1954).

556. *Local 212, Int’l Bhd. of Teamsters (Stuart Wilson, Inc.)*, 200 N.L.R.B. 519 (1972).

557. *Id.* at 522.

558. *Id.* at 521.

cause of the loss—namely, the illegal threats comprising the section 8(b)(1)(A) violation.⁵⁵⁹ It is thus not at all clear why employer “involvement” should be absolutely required in establishing union liability for back pay to employees who lost work because of such violence.

The remote or indirect participation of employers in the exclusive union hiring hall cases further demonstrates the almost fictional nature of this requirement in a section 8(b)(2) context and the lack of any *significant* factual difference between a violation of section 8(b)(2) and section 8(b)(1)(A). If a prospective employee visits an exclusive hiring hall but is violently thrown out because of his non-membership in the union, then section 8(b)(1)(A) is violated.⁵⁶⁰ Yet no back pay remedy would be currently available on that basis alone. On the other hand, even though the employer is involved only to the extent that it was a party to the contract giving the union the otherwise legal power to act as the employer’s exclusive hiring agent, the discriminatory nature of the union’s conduct will cause it to be treated as a section 8(b)(2) violation. Then the union will be required to

559. Indeed, the Board dropped the requirement of a section 8(b)(2) joinder altogether in a section 8(b)(1)(A) case *not involving violence*. In *Warehouse Union Local 860 (The Emporium)*, 236 N.L.R.B. 844 (1978), *enforced*, 652 F.2d 1022 (D.C. Cir. 1981), the union negotiated a collective bargaining agreement including terms that caused the employer to close a portion of his operation. The union’s prior knowledge of this possibility and its failure to advise the employees that this might occur was found to be a breach of the duty of fair representation and therefore a violation of section 8(b)(1)(A). The administrative law judge held as follows:

It is recognized that an 8(b)(2) violation is not alleged. It is further recognized that the record does not show a direct causal relationship between Respondent’s 8(b)(1)(A) violation and the loss of jobs suffered by clerical employees. Finally, there is no way to know whether, had they been given by Respondent the information they were entitled to, the clerical employees would have adopted an all-or-nothing bargaining position, although such is most unlikely and unnatural. Nonetheless, those employees were entitled to make their own decision, and they were deprived of that right by Respondent’s knowledgeable silence. Under such circumstances, the employees’ plight was Respondent’s intentional creation, and equity demands that Respondent remedy that dereliction. Consequently, it will be recommended that Respondent make whole all SB-4 clerical employees who lost their jobs on October 15, 1977, as a result of Respondent’s unfair labor practices.

Id. at 851.

560. *Cf. Piledrivers Local 438 (Ernest Constr. Co.)*, 234 N.L.R.B. 1301 (1978); *IBEW Local 1547 (M & M Elec. Co.)*, 225 N.L.R.B. 331 (1976), *enforced*, 96 L.R.R.M. 3413 (D.C. Cir. 1977); *Local 138, Int’l Union of Operating Eng’rs*, 123 N.L.R.B. 1393 (1959), *enforced*, 293 F.2d 187 (2d Cir. 1961).

make the employee whole for any loss of pay he may have suffered as a result of its unlawful conduct.⁵⁶¹ The availability of the remedy thus turns more on which section the conduct is conceptualized under than on any material fact.

The critical factual similarity between a section 8(b)(2) violation and a section 8(b)(1)(A) violation is that union conduct causes a loss of work for the employee victims. The factual difference is that a section 8(b)(2) violation apparently requires some degree of employer participation, however remote, while section 8(b)(1)(A) does not. It would seem, however, that insofar as a make whole or back pay remedy is concerned, the similarity is far more significant than the difference. Therefore, this remedy should be available regardless of which section of the statute happens to be applicable. The Board's rather facile presumption of some intrinsic difference between section 8(b)(2) and section 8(b)(1)(A) violations in issuing back pay orders is totally without basis.

Apart from the dubious distinction between "discriminatory" and "coercive" interference with an employee's work opportunities, the Board has advanced other so-called "policy" reasons for its refusal to ever include back pay as a remedy for a section 8(b)(1)(A) violation. Several of those reasons were rather neatly cataloged by the Board in the *Long Construction Company*⁵⁶² case.

First, the Board noted that the "cease-and-desist order, in conjunction with the utilization of the contempt procedures provided in the Act, is well designed to prevent the recurrence of the unfair labor practices and to vindicate public rights."⁵⁶³ The Board's reasoning here is highly questionable. It is wrong in its factual premises. Even a casual reading of section 8(b)(1)(A) cases will reveal a high degree of recidivism among certain unions. The Board itself has recognized that fact through its "propensity for violence" test in issuing broader (but equally hollow,

561. See *Printing Pressmen Local 284 (Las Vegas Sun, Inc.)*, 230 N.L.R.B. 1104, 1104 & n.3 (1977).

562. *International Union of Operating Eng'rs Local 513 (Long Constr. Co.)*, 145 N.L.R.B. 554 (1963).

563. *Id.* at 556. On the contrary, Member Kennedy correctly noted that "[a] notice is no substitute for lost wages." *Union Nacional de Trabajadores (Catalytic Indus. Maint. Co.)*, 219 N.L.R.B. 414, 417 (1975), *enforced*, 540 F.2d 1 (1st Cir. 1976), *cert. denied*, 429 U.S. 1039 (1977).

insofar as the already injured employees are concerned) cease and desist orders.⁵⁶⁴ The Board's assertion also flies in the face of repeated observations by its own trial examiners and administrative law judges that cease and desist orders and the other standard remedies are totally inadequate as a response to the problem of labor union violence.⁵⁶⁵

A remedy such as a cease and desist order, which is designed only to "prevent the recurrence of the unfair labor practices,"⁵⁶⁶ may be a fair and intelligent way for the law to deal with conduct of previously uncertain illegality that caused no demonstrable harm to anyone. However, such a remedy is inadequate when patently illegal conduct has caused a tangible injury of the kind the labor statute was designed to prevent. Here, a command to cease and desist is obviously necessary and important,⁵⁶⁷ but the primary objectives of the remedial order in such a situation should be restoration, compensation, and correction of the injury. It would certainly include the payment of lost wages when employees have been unable to work because of a union's section 8(b)(1)(A) violence. As the Supreme Court noted, back pay is "a reparation . . . designed to vindicate the public policy of the statute by making the employees whole for losses suffered on account of an unfair labor practice."⁵⁶⁸ The Board has certainly recognized and implemented that policy insofar as equivalent employer unfair labor practice violence is concerned. In *Graves Trucking, Inc.*,⁵⁶⁹ a supervisor became so annoyed by an employee's exercise of protected rights that he grabbed the employee around the neck and violently choked him, causing injuries which kept this employee from work. Nowhere in that case did the Board suggest its *Long* rationale that a mere cease and desist order would be "well designed to prevent the recurrence of the unfair labor practices and to vindicate

564. See text accompanying notes 466-88, *supra*.

565. See, e.g., Local 612, Int'l Bhd. of Teamsters (Deaton Truck Line), 146 N.L.R.B. 498, 506 & n.12 (1964); Taxi-cab Drivers Local 777 (Crown Metal Mfg. Co.), 145 N.L.R.B. 197, 205 (1963), *enforced*, 340 F.2d 905 (7th Cir. 1965).

566. 415 N.L.R.B. at 556.

567. See text accompanying notes 452-88, *supra*.

568. NLRB v. J.H. Rutter-Rex Mfg. Co., 396 U.S. 258, 263 (1969).

569. 246 N.L.R.B. 344 (1979), *enforced as modified*, 111 L.R.R.M. 2862 (7th Cir. 1982).

public rights.”⁵⁷⁰ On the contrary, the Board concluded that this kind of unfair labor practice was more appropriately remedied by a back pay order. It noted that:

Like other Board remedies, backpay is intended to dispel the effect of unlawful conduct, whether in response to protected concerted activities or union activities, by restoring discriminatees as nearly as possible to the economic position they would have enjoyed in the absence of the unlawful conduct.

. . . The only way to restore Nash [the choked employee] as nearly as possible to the economic position he would have obtained, but for Respondent’s unlawful conduct, is to make him whole for compensation lost as a result of Respondent’s unfair labor practice. . . . Were we to withhold backpay in these circumstances we would allow Respondent to escape all liability for the loss of wages Nash suffered because of factors Respondent unlawfully caused. Such a result would clearly be contrary to the remedial purposes of the Act.⁵⁷¹

Secondly, the Board gave another reason in *Long* for denying back pay to employees who lose work because of union violence:

to the extent that the Board has power to award backpay to employees injured by Respondent’s violent conduct, such power derives from the effect of such conduct on the employee’s employment relationship; yet the employee’s loss of pay may be only a small part of the total required to make him whole, which total may well include medical expenses as well as compensation for physical injury and pain and suffering.⁵⁷²

If all that verbiage makes any sense at all, it seems only to say that because the Board cannot award common law tort damages and thus fully compensate an employee for his physical injuries, it also cannot restore to the employee the wages he lost as a consequence of these injuries and the union’s coercive interference with his right to work. That is simply a *non sequitur* of classical dimensions. To say the least, such fallacious reasoning did not deter the Board in the *Graves* case from issuing a back pay order against an employer whose violent unfair labor prac-

570. 145 N.L.R.B. at 556.

571. 246 N.L.R.B. at 345.

572. 145 N.L.R.B. at 556.

tice kept an employee from working—even though the physical injury itself was left uncompensated under the Board order.⁵⁷³

The third justification advanced by the Board in *Long* was:

to the extent that satisfaction of individual claims which are primarily private in nature may also serve to further the public interest in obtaining the peaceful resolution of labor disputes, such interest is equally well served by the individual's resort to those remedies traditionally used to process claims resorting from another's tortious conduct.⁵⁷⁴

To begin with, one must note that the Board's refusal to award back pay is not limited to situations of coercive interference with a single employee's right to work. Those cases might perhaps be accurately characterized as merely involving "individual claims which are primarily private in nature."⁵⁷⁵ Rather, the Board has refused to provide this remedy even in cases where the union violence is so massive as to border on civil riot.⁵⁷⁶ This suggests that the Board's overall policy in this regard is not really predicated on this third justification at all.

Furthermore, the Board's argument simply proves too much. If no significant public interest is served by a Board-ordered back pay award in one of the "individual claims" cases, then why is there not a similar lack of public interest in all the other remedies as well, or, indeed, a lack of interest in recognizing such union conduct as a section 8(b)(1)(A) violation at all? If carried to its logical conclusion, the Board's argument would seem to suggest a form of reverse preemption. State remedies would become the exclusive source of relief in "individual claims" cases. That result, however, is clearly inconsistent with the intent of Congress. Congress was obviously aware that much of the union violence that it was proscribing under section 8(b)(1)(A), whether directed at single individuals or whole groups of employees, was already actionable under state law.⁵⁷⁷

573. 246 N.L.R.B. 344 (1979), *enforced as modified*, 111 L.R.R.M. 2862 (7th Cir. 1982).

574. 145 N.L.R.B. at 556.

575. *Id.*

576. See *supra* note 537 and cases cited therein (particularly the *Union Nacional de Trabajadores* cases).

577. Indeed, because conduct made illegal by section 8(b)(1)(A) already was actionable under state common and/or criminal laws, some authorities opposed the Taft-Hartley Act amendments, arguing that state remedies should remain the exclusive sources of re-

Congress, however, was also apparently of the view that the public interest in labor peace was not adequately served by the mere fact that state court relief was available to employees who might choose to pursue it. Although the legislative history is silent on this, one may surmise that this was because too few employees had the resources and stamina to vigorously prosecute a complicated and time-consuming tort action against a labor union. Thus, Congress recognized that the public interest in stopping these sometimes isolated but persistently recurring instances of union violence required public prosecution of the claims through the agency of the National Labor Relations Board.

The process of prosecution is of course complicated and costly. It requires investigation of the alleged violation, issuance of a complaint, an oftentimes lengthy hearing before an administrative law judge, and ultimate review by a panel of the Board itself. It is a travesty of justice, a virtual waste of precious administrative resources, and serves neither the interests of the public nor the affected employee to go through that elaborate process at the public expense, find that a labor union has in fact interfered with an employee's right to earn a living, and then deny that employee any recoupment of his monetary losses on the grounds that he should relitigate the issues in state court.⁵⁷⁸

Next in the *Long Construction Co.* case catalog of reasons why the make whole remedy is inappropriate in section 8(b)(1)(A) cases is the Board's assertion that "the numerous and complicated factual questions involved in settling such claims are not such questions as fall within the Board's special expertise, but do fall within the special competence of judge and jury. . . ."⁵⁷⁹ That is utter and complete nonsense. There is probably no tribunal in the world with greater expertise in dealing with back pay issues than the National Labor Relations Board. As the Board itself recognized in the *Graves Trucking* case, "[a] back pay order is one of the remedial devices adopted to attain just results in diverse, complicated situations" and "[t]he Board has thus employed the back pay remedy in multifarious circumstances."⁵⁸⁰ Although a back pay order can be a

lief. See, e.g., LEGIS. HIST. LMRA at 373-74, 1191-93.

578. *Accord*, McDOWELL & HUHN, *supra* note 434 at 99-100 (1976).

579. 145 N.L.R.B. at 556.

580. 246 N.L.R.B. at 345. Despite its familiarity with back pay awards, the Board

complex remedy, the Board has developed a wide array of principles, doctrines, rules, and formulae over the years that are designed to deal with the various kinds of back pay issues that arise.⁵⁸¹ There is absolutely no reason why this body of established law could not be used in the section 8(b)(1)(A) context in the same way it is used in other cases where back pay is an appropriate remedy.

Undoubtedly, it may be difficult to determine exactly which employees are honestly entitled to a back pay award in some cases. As one trial examiner noted, "it is impossible to determine from the record which employees remained away from work in response to peaceful persuasion by pickets, which, as a consequence of restraint and coercion, and which, for reasons unconnected with the strike."⁵⁸² The Board, however, is constantly faced with factual determinations of equal or greater difficulty and complexity. It has always managed to devise evidentiary tests for coping with such matters. Indeed, one rule that could be applied in section 8(b)(1)(A) cases, stated by the Sixth Circuit, is that "once an initial showing of substantial and widespread coercion is made, it is incumbent on the union or employer, as the case may be, to come forward with evidence that specific employees were not coerced."⁵⁸³ In a section 8(b)(1)(A) union violence case, the specific indicia or evidence of non-coercion (or of coercion, should the above presumption be inapplicable in a given situation) required could be worked out on a case-by-case basis without a great deal of difficulty on the Board's part.

The fifth and final justification advanced by the Board in the *Long Construction Co.* case for refusing to recognize back pay awards as a legitimate part of a section 8(b)(1)(A) remedial order was that "our exercise of such authority as may reside in

argued in *Drobena v. NLRB*, 612 F.2d 1095, 1098 (8th Cir.), *cert. denied*, 449 U.S. 821 (1980), "that computation and enforcement of such awards [as a remedy to section 8(b)(1)(A) violations] would unduly tax the facilities of the Board. . . ."

581. See generally *McDOWELL & HUH*, *supra* note 434 at 81-99 (1976); *Parker, Monetary Recovery Under the Federal Labor Statutes*, 45 *TEX. L. REV.* 881, 882-94 (1967).

582. *Local 1150, United Elec. Workers (Cory Corp.)*, 84 N.L.R.B. 972, 1014 (1949); see *Union Nacional de Trabajadores (Catalytic Indus. Maint. Co.)*, 219 N.L.R.B. 414 (1975), *enforced*, 540 F.2d 1 (1st Cir. 1976), *cert. denied*, 429 U.S. 1039 (1977).

583. *National Cash Register Co. v. NLRB*, 466 F.2d 945, 969 (6th Cir. 1972).

the Board to award compensatory relief might well exert an inhibitory effect on the exercise of State authority, and would, in any event, complicate and confuse the issue, to the possible detriment of the employees whose rights we seek to protect.”⁵⁸⁴ The Board’s theory of an “inhibitory effect” is, however, based on pure conjecture; indeed, it seems contrary to the more common experience of state courts, being happily oblivious to the witty diversities of federal labor law and the subtle nuances of the preemption doctrine.⁵⁸⁵ It is difficult to see why the Board could not deal with the alleged complication and confusion in the same way it tackles other knotty problems. In the *Graves* case, for example, the injured employee had received workmen’s compensation, and the Board merely noted that “to the extent that this award was in replacement for lost wages, it shall be deducted from his gross back pay.”⁵⁸⁶ That computation would surely have been no more complicated or confusing had the assault been by a union agent rather than the employer. Thus, this complication factor cannot explain or justify the Board’s refusal to issue a back pay award against a union under similar circumstances. Finally, it would seem obvious that the real and immediate loss an employee suffers as a consequence of the Board’s refusal to issue back pay awards in section 8(b)(1)(A) cases far outweighs a merely “possible detriment” that might flow from highly speculative inhibitions and confusions envisioned by the Board.

The reasons listed in the *Long Construction Company* case are so patently specious that the Board subsequently found it necessary to advance an entirely different policy justification for its refusal to award back pay in section 8(b)(1)(A) cases. In *Lock Joint Pipe & Company*⁵⁸⁷ the Board refused to impose back pay liability on a union. It first reviewed the remedies for union violence that are available, including the usual cease and desist order, section 10(j) injunctions, possible contempt actions, and the denial of a bargaining order. The Board then continued:

To do more, in our opinion, runs the risk of inhibiting the right of employees to strike to such an extent as to substan-

584. 145 N.L.R.B. at 556.

585. Cf. HAGGARD, COMPULSORY UNIONISM, THE NLRB, AND THE COURTS 172 (1977).

586. 246 N.L.R.B. at 345 n.11.

587. *Union de Tronquistas (Lock Joint Pipe & Co.)*, 202 N.L.R.B. 399 (1973).

tially diminish that right. For the misconduct of a few pickets may be sufficient to find the union in violation of Section 8(b)(1)(A) and enough to intimidate many employees. The Board would then be required, under the logic of our dissenting colleagues, to seek backpay for all intimidated employees. Faced with this financial responsibility, few unions would be in a position to establish a picket line. In our opinion, union misconduct of this nature, while serious, does not warrant the adoption of a remedy so severe as to risk the diminution of the right to strike, a fundamental right guaranteed by Sections 7 and 13 of the Act.⁵⁸⁸

If the reasons listed in *Long Construction Company* are disturbing for their total lack of cogency, the justification advanced in *Lock Joint Pipe* is doubly disturbing because of the insight it provides to the Board's values and priorities. The decision warrants close analysis.

The place to begin is the Board's conception of what the protected activity of going on strike really means. In another part of the decision, the Board made explicit its assumption that going on strike and picketing, in the statutory sense, *necessarily* entail the strong possibility that unpreventable (by union officials) violence will occur. The Board stated that:

The extension of backpay liability to a situation where, as here, only picket line misconduct has occurred involves important considerations going to the heart of the right to strike under Sections 7 and 13 of the Act. Those sections of the Act have been called the safety valves of labor management relations. Emotions run high among those for and those against the union. Regrettably, sometimes there is violence and the threat of violence.⁵⁸⁹

If the protected right to strike includes conduct and activities

588. *Id.* at 400.

589. *Id.* at 399. The Board, however, has not limited its refusal to award back pay merely to "those occasional situations in which tempers flare on the picket line and strikers momentarily engage in what has been euphemistically referred to as 'mere animal exuberance.'" The Board has in addition refused to grant back pay even against, "a labor organization which denounces the laws applicable to its conduct and which systematically threatens the lives of any and all individuals who dare to act in any manner contrary to its self-interest." *Union de Trabajadores (Catalytic Indus. Maint. Co.)*, 219 N.L.R.B. 414, 420 (1975) (Member Kennedy, dissenting), *enforced*, 540 F.2d 1 (1st Cir. 1976), *cert. denied*, 429 U.S. 1039 (1977).

having this “regrettable” propensity for violence, then there is an internal inconsistency in the statute. What is encompassed by the protections of some parts of the statute is prohibited by other parts. To resolve this inconsistency, the Board decided to achieve a balance. It did this by recognizing that the violence associated with strikes is an unfair labor practice but also by withholding any remedy for the violation that might jeopardize the financial solvency of labor organizations and their willingness to establish picket lines.⁵⁹⁰

Accepting at face value the Board’s conception of what the rights to strike and picket really mean, and the statutory inconsistency that this conception entails, the balance that the Board reached is nevertheless subject to criticism. It could be argued that the right of an individual to be free from acts of physical aggression in the pursuit of his livelihood is far more fundamental and morally significant than the right of other employees to band together for the purpose of economically coercing their employer.⁵⁹¹ It is a curious distortion of values to leave violations of the former right unvindicated (as far as the employee is concerned) due to a speculative fear that the remedy might somehow “chill” the exercise of the latter right.

An alternative balance would leave the statutory right to strike and picket fully protected against both employer interference and any tendencies of the law to render the *purely* peaceful aspects of it affirmatively illegal. But it would also make the unions engage in these violence-prone activities “at risk,” at least to the extent of being held responsible when the activities do in fact become violent and cause employment-related injuries to individuals whose right not to be injured is supposedly protected by the Act. Putting unions to such a risk might chill their institutional willingness to sponsor strikes and maintain picket lines.

590. The Board’s concern for the financial condition of labor unions apparently was stressed in *Drobena v. NLRB*, 612 F.2d 1095 (8th Cir.), *cert. denied*, 449 U.S. 821 (1980). In *Drobena*, the General Counsel was quoted as arguing “that such an award may bring about the financial ruin of a local union resulting from the irresponsible acts of one or a few members surcharged with the emotions that labor strife can produce,” 612 F.2d at 1098.

591. Compare Haggard, *The Right to Work—A Constitutional and Natural Law Perspective*, 1 J. Soc. & Pol. Aff. 215, 220-26 (1976) (suggesting that the right to work free from acts of aggression by others is one of our fundamental natural law rights) with Haggard, *Right to Work*, 11 REASON No. 1, May 1979, at p. 34, 36 (suggesting the difficulty of defining the right to strike in traditional natural law or libertarian terms).

Yet as the Fourth Circuit Court of Appeals put it in another context, "[i]t is indisputable that the thrust of the NLRA is not the protection of the union, not the protection of the employer, but rather the protection of the employee."⁵⁹² If the adequate protection of the employee requires putting either a union or an employer "at risk" when it engages in nominally protected conduct, then so be it.⁵⁹³

One can also take exception to the Board's notion that *protected* strikes and picketing necessarily include conduct that is apt to produce unavoidable violence. As a factual matter, that is not the case.⁵⁹⁴ Many strikes and picketing are carried out without any union-related violence or even serious threats of such violence. This is because responsible union officials have consciously elected not to engage in any violence or dangerously provocative conduct themselves and have taken additional steps to insure that rank-and-file members conduct themselves in an entirely peaceful and non-coercive manner. Conversely, it would seem that the emotionally supercharged situations which do often lead to violence are situations which have been deliberately contrived or consciously tolerated by the labor union officials in charge. If violence-prone strikes can be conceptually distinguished from strikes not having that tendency, then the chilling thesis makes sense only if one assumes that the Board is legitimately concerned with avoiding even the slightest interfer-

592. *Mosher Steel Co. v. NLRB*, 568 F.2d 436, 442 (5th Cir. 1978).

593. Labor Management Relations Act § 10(c), 29 U.S.C. § 158(c)(1976), for example, protects the employer's right to express his views on unionization "if such expression contains no threat of reprisal or force or promise of benefit." In *NLRB v. Gissel Packing Co.*, 395 U.S. 575 (1969), however, the Supreme Court adopted a fairly broad if not obscure test for distinguishing illegal threats of economic reprisal from mere predictions of economic consequences. *Id.* at 618-19. The Court's test clearly puts an employer at risk and may similarly chill what is the exercise of not only a statutory but also a first amendment right. The Court emphasized the right of employees to be free of the coercive impact of dangerously ambiguous statements, and suggested that the employer "can easily make his views known without engaging in 'brinksmanship' when it becomes all too easy to 'overstep and tumble [over] the brink,' . . ." *Id.* at 620 (quoting *Wausau Steel Corp. v. NLRB*, 377 F.2d 369, 372 (7th Cir. 1967)). (The same can be said of strike related violence and of a union's liability for the loss of pay caused by the violence of their employees.

594. The notion that violence is an inevitable and unavoidable incident of strikes is, however, a recurring fallacy in industrial relations law and has even been used by labor arbitrators to exonerate employees who were discharged because of such misconduct. See Haggard, *Picket Line*, *supra* note 4 at 423-31.

ence with strikes falling in the violence-prone category. Such a concern, however, would not be consistent with the intent of Congress.

In the Taft-Hartley Act, Congress recognized a clear distinction between *purely* non-coercive strikes and picketing and conduct which does restrain and coerce the exercise of employee rights. The former is all Congress intended to protect in sections 7 and 13, and it conclusively intended to prohibit the latter in section 8(b)(1)(A).⁵⁹⁵ Such a reading also obviates the inconsistency in the statute falsely perceived by the Board. The entire thrust of the Taft-Hartley Act amendments was, in fact, to repudiate the notion that violence is a necessary incident of strikes that must be tolerated to some degree lest the statutory right to strike be impeded or diminished.⁵⁹⁶ The Board is on shaky ground indeed in resurrecting such a philosophy as justification for its refusal to grant full and adequate relief to what is clearly a violation of rights protected by the statute.

Notwithstanding its tenuous basis, the Board's position on back pay liability has not been reversed by the courts of appeals.⁵⁹⁷ This is probably due to the courts' limited power to compel the Board to grant a remedy that the Board has refused to grant as a matter of policy⁵⁹⁸ rather than an affirmative judicial approval of the policy in question.⁵⁹⁹ It would thus appear

595. See generally, text accompanying notes 27-47 *supra*; Haggard, *Picket Line*, *supra* note 4 at 439-48. For a specific example of the kind of violence-prone but not itself violent strike misconduct with which Congress was concerned, see the remarks of Senator Ball, LEGIS. HIST. LMRA at 1019-20.

596. One of Congress' specific concerns in passing the Taft-Hartley Act was the extent to which the Board and the courts had protected employees involved in strike violence from discharge. In *Republic Steel Corp. v. NLRB*, 107 F.2d 472 (3d Cir. 1939), *modified*, 311 U.S. 7 (1940), the court justified its tolerance of strike misconduct on the following basis:

Rising passions call forth hot words. Hot words lead to blows on the picket line. . . . Violence of this nature, however, much as it is to be regretted, must have been in the contemplation of the Congress when it provided in Sec. 13 . . . that nothing therein should be construed so as to interfere with or impede or diminish in any way the right to strike.

107 F.2d at 479. Congress, however, repudiated that approach to the statutory reinstatement rights of employees who have been discharged for strike violence. See Haggard, *Picket Line*, *supra* note 4 at 439-48. Apparently the Board's similarly based approach to the issue of back pay liability was also implicitly repudiated.

597. See cases cited in note 538 *supra*.

598. See text accompanying notes 449-51, *supra*.

599. Indeed, two courts of appeals have registered express doubts about the wisdom

that relief must come either through a change in Board membership or philosophy, or by an amendment to the statute.

F. Additional Judicial Remedies

All of the foregoing remedies, though not legally effective until enforced by a court, nevertheless *originate* in a Board order. There are, however, two additional remedies for section 8(b)(1)(A) violations that are purely judicial in their character and origin.

1. Section 10(j) Injunctions

Section 10(j) gives the Board upon the issuance of an unfair labor practice charge, the discretionary power to immediately petition a United States District Court "for appropriate temporary relief or restraining order." It also authorizes the court to grant such relief "as it deems just and proper."⁶⁰⁰

Under 10(j), the Board's petition must allege that the following conditions exist:

(1) an unfair labor practice charge has been filed; (2) a complaint has been issued; (3) the facts presented support the charge; (4) there is a likelihood that the unfair labor practice will continue unless restrained; (5) the district court has jurisdiction; and (6) the persons sought to be restrained are subject to the Act. Of course, the primary prerequisites are whether the unlawful conduct, as a matter of law, constitutes an unfair labor practice and whether the record shows a reasonable probability that the acts alleged were in fact committed.⁶⁰¹

In *Muniz v. Hoffman*,⁶⁰² the Supreme Court held that the procedural and substantive limitations of the Norris-LaGuardia Act do not apply to injunctions sought by the Board under section 10 of the Labor Management Relations Act. Therefore, union liability and responsibility for the acts of violence being enjoyed is established under common-law agency standards rather than under the stringent standards of the Norris-LaGuardia

and validity of the policy. See cases cited in note 538 *supra*.

600. Labor Management Relations Act, § 10(j), 29 U.S.C. § 160(j) (1976).

601. McDowell & Huhn, *supra* note 434 at 253-54.

602. 422 U.S. 454 (1975).

dia Act.⁶⁰³ Judicial power under section 10(j) includes the power to issue temporary restraining orders.⁶⁰⁴ In appropriate cases, a preliminary injunction can be issued even though an evidentiary hearing has not been held.⁶⁰⁵

The legislative history clearly indicates that section 10(j) injunctions were intended to be one of the preliminary remedies available in the section 8(b)(1)(A) context.⁶⁰⁶ Similarly, in *Squillacote v. Local 248, Food Workers*,⁶⁰⁷ the court said with respect to violence and threats of violence that:

[f]ew, if any, types of violations would present a more compelling case for immediate injunctive relief, Prevention of labor violence is one of the basic purposes of the federal labor acts. Violence has a severe coercive effect on employees' section 157 rights. It is completely contrary to the public interest, and it can quickly give the party willing to engage in such wrongful conduct an advantage.⁶⁰⁸

Accordingly, the Board has made use of this power to a limited extent.⁶⁰⁹

In 1979, the General Counsel issued a report on section 10(j) injunction proceedings during the prior four year period; he also outlined the criteria his office used in deciding whether to seek a preliminary injunction in unfair labor practice cases.⁶¹⁰ With respect to section 8(b)(1)(A) cases in particular, the report indicates that an injunction should be sought only if three requirements were met. First, it must be shown that "there is a substantial amount of physical coercion or violence and/or the threat of such coercion."⁶¹¹ An earlier General Counsel report on the same subject had similarly stated that the remedy is only available where "[t]he misconduct involved is generally serious,

603. *Squillacote v. Local 248, Food Workers*, 534 F.2d 735, 743-44 (7th Cir. 1976).
604. *Id.* at 743.

605. *See, id.* at 749-50 (declined to decide if hearing was necessary in that case).

606. *See* text accompanying note 68, *supra*.

607. 534 F.2d 735 (7th Cir. 1976).

608. *Id.* at 744.

609. *E.g.*, *Price v. Laborers Local 383*, 108 L.R.R.M. 3270 (D. Ariz. 1981); *Wilson v. UAW*, 97 L.R.R.M. 2013 (S.D. Iowa 1977); *Hendrix v. Meat Cutters*, 95 L.R.R.M. 2706 (D. Neb. 1977); *Vincent v. Local 301, Elec. Workers*, 73 L.R.R.M. 2136 (N.D.N.Y. 1969); *Potter v. Cement Workers Union*, 48 L.R.R.M. 2965 (E.D. Tex. 1961).

610. NLRB Case Handling Manual (CCH) ¶ 30,162 at 10,348 (1979).

611. *Id.* at 10,348.

repeated and widespread and connected with a labor dispute of a nature that raises the expectation that, absent injunctive relief, it will continue.”⁶¹² Second, union responsibility must be clearly established. And third, it must be shown that “the charging party has sought the assistance of state or local authorities and that these authorities are unable or unwilling to control the situation.”⁶¹³ The General Counsel further reported that using injunctive relief against mass picketing and violence had been sought in only thirteen cases during the four year period.⁶¹⁴

One member of the Chairman’s Task Force on the NLRB had previously criticized the General Counsel’s adherence to a conservative policy with respect to section 10(j) injunctions against violence. The Task Force’s 1976 interim report⁶¹⁵ noted his suggestions that the Board act more frequently and more promptly in seeking section 10(j) injunctions for union violence; that Regional Directors be delegated the power to petition for such injunctions; and that they be required to do so in all section 8(b)(1)(A) cases “involving labor organizations ‘which have a known proclivity for coercion and violence . . . regardless of the alleged degree of the effectiveness of the police or other law enforcement agencies.’”⁶¹⁶ This member also suggested that such an injunction “include restoration of the status quo by an award to employees of all wages lost as a result of the respondent union’s activities.”⁶¹⁷ The Task Force, however, merely recommended a minor procedural change designed to expedite the processing of Regional Director requests for authority to seek section 10(j) injunctions.⁶¹⁸

Although section 10(j) injunctions *could be* an effective tool for providing immediate relief to the victims of union violence, it appears that the Board has not taken full advantage of this potential remedy.

612. NLRB Case Handling Manual (CCH) ¶30,019 at 10,154 (1976).

613. NLRB Case Handling Manual (CCH) ¶30,162 at 10,348 (1979).

614. *Id.* at 10,349.

615. CHAIRMAN’S TASK FORCE ON THE NLRB, INTERIM REPORT AND RECOMMENDATIONS, LABOR RELATIONS YEARBOOK 1976 (BNA) at 327-88 (1977).

616. *Id.* at 363.

617. *Id.*

618. *Id.*

2. Contempt Proceedings

Once an NLRB order has been enforced by a court of appeals, it becomes a judicial decree that can be further enforced through contempt proceedings. If a party is found in contempt, then a court is empowered to "impose what ever sanctions are necessary under the circumstances to grant full remedial relief, to coerce the contemnor into compliance with [the] court's order, and to fully compensate the complainant for losses sustained."⁶¹⁹ In the words of one study, "[t]his makes available powerful sanction beyond the purely remedial power of the Board."⁶²⁰

In *Squillacote v. Local 248, Food Workers*,⁶²¹ for example, the union was found in contempt for continuing acts of violence through the conduct of its picket captains. The court, accordingly, ordered these captains removed from the picket line for the duration of the restraining order.⁶²²

In *NLRB v. Union Nacional de Trabajadores*,⁶²³ the union was found in contempt of an order which, *inter alia*, required that the union cease and desist from threatening employees and that it publish a notice of intended compliance in a newspaper of general circulation. The union published the required official notice, but the union also ran a "side notice" adjacent to the official notice which, in essence, "destroyed the substance and purpose of the required notice"⁶²⁴ because it "expressed the Union's intention to threaten and use violence in the future."⁶²⁵ The court found this to be contumacious and ordered the union to republish the official notice—this time without the illegal side notice. The union was also found in contempt for two subsequent threats against persons who refused to cooperate with the union's demand that they not work during the strike.

In addition to the republication requirement, the court ordered the union to reimburse "the Board for all its expenses, including attorneys' salaries, and all costs and expenditures in-

619. *NLRB v. Vander Wal*, 316 F.2d 631, 634 (9th Cir. 1963).

620. *McDOWELL & HUNN*, *supra* note 434 at 246.

621. 534 F.2d 735 (7th Cir. 1976).

622. *Id.* at 739.

623. 611 F.2d 926 (1st Cir. 1979).

624. *Id.* at 930.

625. *Id.*

curred in the investigation, preparation, presentation, and final disposition of this proceeding to adjudge the Union and Arturo Grant in civil contempt."⁶²⁶ Finally, to deter future violations, the court ordered that the union be fined "\$10,000 for each and every future violation of the decree and \$1,000 per day for each day such violation continues."⁶²⁷

Although the imposition of fines for future violations only is not unusual,⁶²⁸ it is not clear why the court in a blatant case of contempt should not impose fines in the first instance as well. Similarly, it would seem that the Union Nacional should have been a prime candidate for criminal as well as civil contempt.⁶²⁹ The employees coerced by the union in violation of the original decree had apparently suffered no loss of wages. If they had, it would have been an ideal situation for the court, in the exercise of its own inherent judicial powers, to require the union to make these employees whole for their losses.

In sum, although the remedies that are available under the exercise of the contempt power will only be resorted to infrequently, they should be applied as rigorously as possible in a proper case.

IV. CONCLUSION

By making it an unfair labor practice under the Taft-Hartley Act for labor unions to restrain or coerce employees in the exercise of their section 7 rights, Congress clearly intended to banish from the American labor scene the use of union strong arm tactics in garnering support among otherwise recalcitrant employees. The Board and the courts have generally mirrored that congressional lack of tolerance for union violence in defining the elements of the section 8(b)(1)(A) offense and the scope of union responsibility.

On the other hand, Congress presumably recognized that

626. *Id.* at 934.

627. *Id.* The union president was also ordered to pay \$1,000 for each future violation and \$500 for each day that the violation continued. *Id.*

628. See McDOWELL & HUHNS, *supra* note 434 at 246-47.

629. "[I]f it can be shown that the respondent 'knowingly, willfully and intentionally' violated the court's decree, the Board may petition the court to find the respondent criminally liable for his conduct. Sentences for criminal contempt include monetary fines and imprisonment." *Id.* at 248.

the usual unfair labor practice remedies could not effectuate a complete cure for this unfortunate phenomenon. The Board, and to a lesser extent, the courts, have nevertheless not gone as far as either the statute allows or sound policy requires in devising effective remedies for section 8(b)(1)(A) violations. In particular, unions should be subject to “make whole” orders and loss of federally protected bargaining status. Denial of access to Board processes for certification should be imposed more frequently on unions that are obviously predisposed to the use of violence. Section 10(j) injunctions should be more freely sought and enforced, and penalties for contempt should be maximized. These suggestions will help effectuate the words of the prophet Isaiah, that “Violence shall no more be heard in thy land. . . .”⁶³⁰

630. *Isaiah* 60:18 (King James).