

LABOR LAW OUTLINE

§1: THE EVOLUTION OF LABOR RELATIONS LAWS

§1.1: THE LABOR PROBLEM

I. THE LABOR PROBLEM AND THE LAW

A. Historical Roots of Labor Law: it is important to understand the history behind modern labor law because the constant cross-references made in modern statutes and case law to historical statutes, notions, policy and cases.

1. Before the 18th Century there was little attempt by workers to organize.
2. *Historical Changes:* there was generally not attempt to organize because much of the work performed in cities was done by local artisans, journeymen, and skilled traders. However, in the middle of the 1800s several events were unfolding to undermine the independence of the skilled crafts.
 - a. The process of division of labor, abetted by the substitution of power-driven machinery for hand labor, eroded the need for skilled crafts.
 - b. The development of the factor system and the growth in the scale of manufacturing enterprises in the late 1880s—the beginning of the industrial revolution.
 - c. A change in the composition of the working force—employees and workers of unskilled labor were largely immigrants (there was mass immigration going on at the time) and managerial, supervisory, and highly skilled craft work tended to be done by white male protestants.
 - d. The organization of work under the factor system was accompanied by the employer's plenary exercise of its prerogative unilaterally to make and enforce rules—rules governing tardiness (or absence), production, deportment, discipline and the imposition of fines and forfeiture of wages defective work and notice to quit.
3. *Legal Response:* the legal prerogative of employers to demand such obedience drew upon to different sources:
 - a. Contract Law: the first was the claim of contract: that by accepting employment with notice of the rules the employee had given assent and was bound; and
 - b. Agency Law: the second rested upon the antecedent law of master and servant, which viewed the servant as a dependant who owed the master a duty of obedience and of respectful subservience.
4. *Constitutional Right to Freedom of Contract:* during the Supreme Court's formalistic conservative approach before the 1940s, the employer's ability to set terms and conditions of employment, to hire and fire "at will" free of legal interference even from the reach of labor protective legislation, was elevated to the constitutional right of "freedom to contract." [*Lochner v. New York; Adair v. US; Coppage v. Kansas*].

II. RISE OF THE LABOR MOVEMENT

A. Growth of Unions: between the Civil War and WWII, a number of factors influenced the growth of labor unions:

1. The industrial revolution and the rise of large industrial empires;
2. an increase in urbanization due to the industrial revolution and hence, workers began to rely on paid wages to live (rather than profits from agrarian work);

3. an influx of immigrants created a large group of unskilled labor; and
4. urban societies were having an effect on the sociology of groups and the idea of banding together to fight for their rights was a notion that was becoming ever present.

B. Knights of Labor: the first mass organization of the American working class was the formation of the Knights of Labor in 1869.

1. The Knights were originally a secret society formed in Philadelphia consisting of moralists focused on moral and political education, cooperative enterprise and land settlement.
2. The Knights became a convenient vehicle for trade union action and eventually grew to over 700,000 members by 1880 through advocating for equality for all, such as with taxes, and the rights of workers.
3. However, due to decline in leadership ability the Knights fell into existence by the beginning of the 20th century.

C. American Federation of Labor (AFL): was founded in 1886 by Samuel Gompers. The AFL adopted a theory of wage consciousness and in order to signify the rights of labor and with one of the main objectives being to enlarge the bargaining power of the wage earner in the sale of his labor.

1. *Tenants of AFL:* the basic tenants and philosophy of the AFL was:
 1. to use non-partisan lobbying aimed solely at improving economic conditions for all its members; with other political involvement limited;
 2. to improve the conditions of the wage earner “here and now” within the existing economic system, which led the AFL unions to put chief reliance on collective bargaining—increase the individual employees bargaining position by substituting collective strength for individual weakness.
 - a. After union recognition, the typical AFL collective agreement treated wages, hours, and job security as most important.
 3. to maintain exclusive union jurisdiction; that is, each national and international union had its own sphere of jurisdiction into which no other union could trespass (a basic tenant of labor law) which prevented competition between workers and strengthened the unions bargaining position.
2. *Growth:* the AFL was slow to grow at first, but by 1914 had over 2-million workers represented.
3. Employers and courts were strongly opposed to unions and used various tactics to try and limit the effectiveness of unionization and collective bargaining, such as:
 1. discharging employers who joined unions;
 2. yellow dog contracts—which the employer had to sign when beginning work saying that he would not join a union;
 3. blacklists—making it hard for union sympathizers and leaders to find employment; and
 4. in extreme cases, goon squads and vigilantes to try and get rid of the unions.

III. JUDICIAL INTERVENTION

III(A). The Labor Injunction in Private Disputes

A. G/R: Criminal Conspiracy Doctrine: in the early 1800s, the first legislation opposing unionization made it a criminal conspiracy to organize workers and strike for higher wages. Thus, courts applied the law of criminal conspiracy making it an offense to combine to effect an unlawful end or to effect a lawful end by unlawful means [*People v. Melvin; Philadelphia Cordwainers’ Case*].

1. Criminal prosecution for union organization and strikes fell into demise in the middle of the 19th Century as a result of adverse judicial decisions to the criminal conspiracy doctrine and as a result of public policy, which supported unionization at the time [*Commonwealth v. Hunt*].
2. However, as a result of the demise of the criminal conspiracy doctrine, the volume of labor litigation on the civil side greatly increased with employers generally seeking injunctions in order to stop a strike.

B. G/R: Civil Causes of Action for Union Organization and Striking: when a plaintiff proves that several persons have combined and conspired to injure his business, and have done acts producing that effect, he shows temporal damage and a cause of action, *unless* the facts disclose or the defendants prove some ground of excuse or justification—doing damage by combined persuasion, falsehood or force is actionable.

1. Thus, a plaintiff can seek an injunction to prevent the defendant for producing temporal damage.

*[*Vehelahn v. Gunter*].

B(1). G/R: Picketing: no one can lawfully interfere by force or intimidation to prevent employers or persons employed or wishing to be employed from the exercise of their rights.

1. The employer has the *right* to hire all persons who are willing to work for him at a mutually agreed price.
2. Persons seeking employment, or employed, have the right *to enter into or remain in the employment* of any person or corporation willing to employ them.
3. In *Vehelahn v. Gunter*, an employer sought a permanent injunction against picketing workers who were using both peaceful persuasion and threats of violence against employees entering the premises.
4. **G/R:** the maintenance of a picket in front of an employers premises for the purpose of preventing persons in his employ from continuing therein, is unlawful regardless if the picketer's conduct is unlawful.

*[*Vehelahn v. Gunter*].

C. G/R: Interference and Picketing: in some states, it is criminal offense for one, by intimidation or force, to prevent or seek to prevent a person from entering into or continuing in the employment of a corporation or a person.

1. *Intimidation:* is not limited to threats of violence or physical injury to a person or property.
 - a. It has a broader significance, and there may also be **moral intimidation**, which is also illegal.

*[*Vehelahn v. Gunter*].

D. G/R: Organized Labor: a combination (union/organized labor) among persons to regulate their own conduct is within allowable competition, and is lawful although it may indirectly affect others.

1. *Caveat:* a combination to do injurious acts expressly directed at another, by way of intimidation or constraint, either of himself or of persons employed or seeking to be employed by him, is outside the of allowable competition and unlawful.

*[*Vehelahn v. Gunter*].

E. G/R: Unlawful Picketing: an employees, or labor organization's picketing, is not a lawful exercise of interfering with an employer's business when it intimidates the employer indirectly and intimidates other employees, or prospective employees, directly because it interferes with the rights of the employer and the employed, which in effect, constitutes a private nuisance.

1. When a picketing is unlawful and creates a private nuisance, a permanent injunction may be issued to prevent the picketers from engaging in the conduct.

*[*Vehelahn v. Gunter*].

G. **G/R: Holmes' Dissent in *Vehelahn*:** [Holmes' dissent in *Vehelahn* was probably more influential on the development of labor law than the majority opinion and should be used on the Exam because Gelb likes it]: **injunctions should only be issued to prevent breach of contract or use (or threats of use) of violence.** This is because:

1. a person has the right to inflict temporal damage if it is justified in law;

2. free competition in society is worth more than it costs; and

i. **Free competition is the free struggle for life.**

3. the organized refusal by workmen of social intercourse with a man who should enter their antagonist's employ is not unlawful, if it is disassociated from the threat of violence and is made for the sole object of prevailing if possible in a contest with their employer about the rate of wages.

**In other words, Holmes did not believe that the employees were engaged in the use of intimidation and force by simply picketing; whereas, the majority said even peaceful picketing could be a form of intimidation and force.

H. **G/R: Employee's Rights:** there is a legal right to dispose of one's labor with full freedom. This is a legal right, and is entitled to protection.

1. Everyone has a right to enjoy the fruits and advantages of his own enterprise, industry, skill and credit.

2. He has *no right* to be protected against competition, but he has a right to be free from malicious and wanton interference, disturbance, or annoyance.

3. If the annoyance, disturbance or loss comes as the result of competition or the organization or the exercise of like rights by others, it is damage absence injury, unless a superior right by contract or otherwise is interfered with.

4. If the disturbance or loss comes merely from wanton or malicious acts of others, without justification of competition, or the service of any interest or lawful purpose, then it stands on a different footing.

*[*Plant v. Wood*].

I. **G/R: Rival Unions:** acts of an incumbent union (such as trying to persuade employers to only hire labor from the incumbent union and impliedly threatening "trouble" if they did not) are an illegal interference with another individual's rights, who is employed in a rival union, if they are acts intended to force the them to join the incumbent association because the interfere with the other worker's rights to dispose of his labor will full freedom.

1. In *Wood*, the plaintiff's and other employees belonging to a rival union claimed that the actions (trying to convince employers not to hire them) the defendant incumbent union were unlawful because it interfered with their rights to dispose of their labor—the court agreed.

*[*Plant v. Wood*].

J. **G/R: Intentional Interference with Another's Trade:** acts which intentionally damage another's trade are actionable if done without just cause or excuse.

1. Just cause or excuse is to be found in the employer's right to carry on their own trade freely in the mode and manner that best suits them, and which they think best calculated to secure their advantage.

*[*Mogul Steamship Company v. McGregor Gow & Co.*].

K. **G/R: Objectives Test:** after *Plant v. Wood* courts begin to adopt an “objectives test” wherein the court would find concerted union activity illegal if it had an **unlawful objective**. The courts have found the following to be an “unlawful objective”:

1. *Intentional Interference with Contract:* striking and picketing an employer in support of union demands for collective bargaining while the employees are under a one-year contract to work at specified rates [*United Shoe Machinery Corp v. Fitzgerald*].
2. *Interference with Employer’s Means of Business:* a customer boycott to induce an employer not to use new machinery which lowered the demand and quantity of workers needed to do the job; [*Hopkins v. Oxley Stave Co.*]; and
3. *Subcontracting Strikes:* a strike to force an employer to assign work which it had subcontracted out to the currently employed workers [*Central Metal Products v. O’Brien*].

II. THE ANTITRUST LAWS

II(A). The Sherman Act

A. **Generally:** in 1890, Congress enacted the Sherman Antitrust Act which declared unlawful “every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations...”

1. Violations were made punishable as federal crimes, the US Attorney-General was authorized to institute injunction proceedings in the federal courts, and persons injured in their business as a result of such unlawful activities were given the right to sue civilly for **treble damages**.
2. Although the obvious objective of the legislation was the elimination of agreements between manufacturers or suppliers to fix the price or regulate the supply of goods or allocate customers or exclude competitors, the Sherman Act was soon applied more to labor unions than business organizations.
3. The three weapons of the Sherman Act are:
 1. criminal conviction;
 2. injunction; and
 3. civil suit for treble damages.

B. **Sherman Act:** the pertinent sections of the Sherman Act are:

1. **Section 1:** every contract, combination in the form of a trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is hereby declared to be illegal
2. **Section 2:** every person who shall monopolize, or attempt to monopolize, or combine or conspire with any other person or persons, to monopolize any part of the trade or commerce among the several States, or with foreign nations, shall be deemed guilty...
3. **Section 7: [Remedies]:** Any person who shall be injured in his business or property by any other person or corporation by reason of anything forbidden or declared unlawful in this Act, may sue therefor in any [federal] court...and shall **recover three-fold the damages sustained**,....

C. **G/R: Prohibitions Imposed by the Sherman Act:** the Sherman Act, as interpreted by the Supreme Court, prohibits any combination whatever to secure action which essentially obstructs the free flow of commerce between the states, or restricts, in that regard, the liberty of a trader to engage in business [*Loewe v. Lawlor*].

D. **G/R:** Boycotts as a Restraint of Trade: a boycott, although not creating a physical obstruction of commerce, restrains commerce within the meaning of the Sherman Act because it narrows the market for the sale of goods in other states.

1. If the means of the combination (boycott) is to prevent any interstate transportation at all, the fact that the means operated at one end before physical transportation commenced, and at the other end after the physical transportation has ended is immaterial.
2. It is also immaterial whether or not the combination to restrain trade did not engage in interstate commerce because the Sherman Act makes no distinction between classes.
3. The source of the restraint of trade, whether it be capital (the business) or labor (the unions) is also immaterial because the Act prohibits all restraints of trade, without reference to the persons who entered into restraints of trade.
 - a. Congress **did not** explicitly exempt labor unions from the Act, although several efforts were made to exempt unions from the Act; thereby implying that the Act was intended to cover labor unions.
4. **Held:** forming a boycott, is a combination with the meaning of the Act, and hence a boycott of certain products or purchasers is a boycott in restraint of trade or commerce among the several states in the sense those words are used in the Act.
5. There are two main types of boycotts unions engage in, and under *Lawlor*, either would be a restraint of trade:
 1. *Product Boycott*: a boycott of all products manufactured by a corporation; and
 2. *Personal Boycott*: a boycott of a corporation who purchased the labeled “bad” product (a product is labeled “bad” when it is made by non-union employees or open shops).

*[*Loewe v. Lawlor*].

E. **G/R:** Local Strikes: if there is only a *local motive* for a union’s actions (even if it is accompanied by violence and other felonious acts) and if the strike is local in its origin, motive, and waging, it falls outside the coverage of the Sherman Act.

1. *Caveat*: when the intent of the strikers preventing the manufacture or production is shown to be to restrain or control the supply entering the and moving in interstate commerce, or the price of it in interstate markets, there is a direct violation of the Sherman Act.
 - a. This is a HUGE CAVEAT and probably swallows up the general rule because **interstate motives are sufficient to hold a union liable under the Sherman Act.**

*[*Coronado Coal Co. v. United Mine Workers*].

F. **G/R:** Primary and Secondary Boycotts: a boycott which prevents a vendee from reselling articles purchased from a manufacturer and negotiating with the manufacturer for further purchases is a conspiracy in restraint of trade actionable under the Sherman Act §7.

1. In addition, the use of primary and secondary boycotts and the circulation of a list of “unfair dealers” (non-union dealers) intended to influence customers or the manufacturer and subdue the manufacturer to the demands of the union, has the effect of interfering with the manufacturers interstate trade and is actionable.
[*Duplex Printing Press v. Deering*].

II(B). The Clayton Act and the Development of Unions

A. **Generally:** throughout the years (1886-1914) there gradually developed, despite the hostile attitude of the courts and employers, a strong body of opinion which held that workers should be granted the

right to organize labor unions without employer interference, and that employers should be *required* to recognize and deal with their employee's unions.

1. As a result, two provisions [§§ 6 and 20] were added into the Clayton Act when it was adopted in 1912, which was hailed by the AFL as labor's charter to freedom (through judicial interpretation, however, this proved to be false).
2. WWI also had a considerable impact on affecting the growth of unions because of the increase in manual labor during the war.

B. **Clayton Act:** the pertinent provisions of the Clayton Act are:

1. **Section 6:** the labor of a human being is not a commodity or article of commerce. Nothing in the anti-trust laws [Sherman Act] shall be construed to forbid...individual members of [labor] organizations from lawfully carrying out the **legitimate objects** thereof; nor shall such organizations, or the members thereof, be held or construed to be illegal combinations or conspiracies in restraint of trade, under the anti-trust laws.
2. **Section 20:** That no restraining order or **injunction** shall be granted by any court...in any case between *employer and employees*, or between ... employees, or between persons employed and persons seeking employment, involving or growing out of a **dispute concerning terms or conditions of employment** *unless* necessary to prevent irreparable injury...and no such restraining order or injunction shall prohibit any person or persons, whether singly or concert, from terminating any relation of employment....

B(1). **G/R: Conduct Not Subject to an Injunction under Clayton §20:** by its plain language, the Clayton Act exempts from an injunction:

1. terminating any employment or persuading others by peaceful means to do so;
2. being at any place to peacefully persuade any person to work or abstain from working;
3. ceasing to patronize or to employ any part of a labor dispute; or
4. paying or giving to, or withholding from any person engaged in such a dispute, any strike benefits.

C. **G/R: Secondary Boycotts and Sympathetic Strikes:** to instigate a sympathetic strike in aid of a secondary boycott cannot be deemed *peaceful* (within the meaning of §20 of the Clayton Act which constantly refers to peaceful, lawful, and lawfully) and *lawful* persuasion because in essence it is a threat to inflict damage upon the immediate employer, between whom and his immediate employees no dispute exists, in order to bring him against his will into a concerted plan to inflict damage upon another employer who is in dispute with his employees.

1. In other words, secondary boycotts can be enjoined under §20 of the Clayton Act.
**[*Duplex Printing Press v. Deering*].
***This case was **overruled** in *U.S. v. Hutchinson* (see below).

§1.4: LEGISLATIVE AND CONSTITUTIONAL PROTECTIONS

I. THE ENACTMENT OF THE NORRIS-LAGUARDIA ACT ("NLA")

A. **Generally:** after the Supreme Court's restrictive interpretation of the Clayton Act (Congress' first attempt to limit employers' ability to obtain injunctions against striking employees) injunctions were still quickly sought and easily obtained on behalf of employers. Nevertheless, the growing body of persons who believed that the courts should not be involved in labor disputes continued to increase.

1. As a result, Congress enacted the NLA in 1932 and it was clearly an anti-injunction statute.

2. There were several reasons that led to the curtailment of courts power with respect labor disputes which ultimately led to the adoption of the NLA:

a. Substantive Considerations:

i. *Judicial Problems:* the courts did not have the necessary knowledge to handle the substantive issues involved in labor disputes; the court would make abstract references to the “means and objectives” test and then would decline to suggest solutions for fear of taking over the legislatures job.

(A) In other words, the courts could neither adjudicate the underlying labor controversy nor adopt measures to remedy the causes of strikes and industrial unrest.

ii. *Yellow Dog Contracts:* this was a provision of the employment contract in which the employee promised not join a union during the period of his employment. In addition, he could not allow a union to suggest that he break the contract’s provisions.

(A) The political, and general, opposition of yellow dog contracts by the working force and organized labor was one of the main reasons for the enactment of the NLA; notwithstanding, the judicial sanction of such contracts under the rubric of freedom to contract.

iii. *Objectives Test:* the objectives test, as adopted in *Deering* and its progeny was inherently amorphous and permitted judges to make decisions according to their own social or economic preferences; often promoting court bias against union activity.

iv. *Vicarious Liability:* no matter what preventions or knowledge the union had, courts would hold unions vicariously liable (both criminally and civilly) for the actions of their individual members [*U.S. v. Debs*];

b. Procedural Objections: temporary restraining order hearings are conducted ex parte where the employer is heard first; then delays arise before subsequent hearings, where in the interim the strike would end and the Union continued to bear the strain. In addition, the injunction orders were very difficult to interpret by unions and their workers.

B. NLA §2: Interpretation of the Act: in the interpretation of this Act and in determining the jurisdiction and authority of the courts of the U.S., the public policy of the United States is that the individual worker **shall** be free from the interference, restraint, or coercion of employers of labor in the designation of such representatives or in self-organization or in other concerted activities for the purpose of collective bargaining or other mutual aid or protection.

II. THE SHERMAN ACT REEXAMINED

A. **Generally:** In *Loewe v. Lawlor* the Supreme Court held that the Sherman Act applied to combinations of workers in action for damages. With the introduction of the Clayton Act in 1914, which allowed for private injunctive action, the federal courts became available to private parties for equity relief against antitrust violations. In *Duplex Printing Press v. Deering*, the Supreme Court affirmed the grant of such relief, at least against a secondary boycott, in the face of more labor protective provisions, such as §§6 and 20, of the Clayton Act.

1. In the course of time however the usefulness of the Sherman Act as a strike breaking weapon was curtailed by decisions holding that certain strikes at manufacturing establishments did not have the necessary relationship to interstate commerce to come under federal authority.

- a. However, if a union, which had organized some establishments in an industry were to call an organizational strike or institute a boycott in order to organize non-union factories and protect its members against the competition of cheap, non-union goods, then the strike would be unlawful [*See Coronado Coal Co. v. United Mine Workers*].
2. Between the 1930s and 1940s, Congressional support for unionization increased and Congress enacted several worker-friendly Acts standardizing the employer practices regarding minimum wages, maximum hours, overtime pay, disability pay, insurance benefits and the like [*See Fair Labor Standards Act, Railway Labor Act, National Labor Relations Act, and the NLA, among others*].
3. As a result, the Supreme Court did a major re-interpretation of the Sherman Act in *Apex Hosiery*.

B. **G/R: Sherman Act Violations:** a local factory strike, stopping production and shipment of its product in interstate commerce, **does not** violate the Sherman Act because every strike in modern industry would be brought within the jurisdiction of the federal courts under the Sherman Act to remedy *local violations*.

1. The Sherman Act is concerned with the character of the prohibited restraints and with their effect on interstate commerce.
2. **TEST:** a restraint can only be held to violate the Sherman Act if the restraint operates to *suppress competition in the market*; that is, the activities affecting interstate commerce are directed at control of the markets and are so widespread as to ***substantially affect interstate commerce***.
3. In *Apex Hosiery*, the Supreme Court made an important concession for labor unions, it stated that an elimination of price of price competition based on differences in labor standards is the *objective of the national labor organization*; this effect on competition has not been considered the kind of curtailment of price competition prohibited by the Sherman Act.
4. **Held:** the Court held that a local strike does not violation the Sherman Act because the Act makes not distinction between violent strikes and peaceful strikes, and strikes of a factory are local in nature and therefore not a violation of the Sherman Act.
*[*Apex Hosiery v. Leader*].

III. APPLICATION OF THE NORRIS-LAGUARDIA ACT

A. **Generally:** the Supreme Court placed even further restrictions on the Sherman Act after *Apex Hosiery* by expansively interpreting the NLA.

1. In the 1930s Attorney General's office began to utilize the criminal sanctions of the Sherman Act not to prosecute strikes, picketing, boycotts, and other coercion having a reasonable connection to hours, wages, health, or safety; but rather, the primary targets of Union Activity were:
 - a. union attempts to prevent the use of cheaper material, improved equipment or efficient methods;
 - b. union attempts to compel the hiring of useless and unnecessary labor;
 - c. union extortion of business; and
 - d. union cooperation with business in enforcing price-fixing schemes.

B. **NLA §13(c): Labor Dispute Definition:** provides that a labor dispute includes "any controversy concerning the terms or conditions of employment, or concerning the association or representation of persons in negotiating, fixing, maintaining, changing, or seeking to arrange terms or conditions of

employment, **regardless of whether or not the disputants stand in the proximate relation of employer and employee.**

C. **NLA §13(b): Persons Participating in Labor Disputes:** a person is participating or interested in a labor dispute if he is engaged in the same industry, trade, craft, or occupation in which such dispute occurs, or has a direct or indirect interest therein, or is a member, officer, or agent of any association composed in whole or in part of employer or employees engaged in such industry, trade, craft, or occupation.

D. **G/R: Purpose of the NLA as Evidenced by Legislative History:** the purpose of the NLA was to restore the board purpose which Congress thought it had formulated in the Clayton act but which was frustrated by unduly restrictive judicial interpretation and construction.

1. Thus, the purpose of the NLA was to protect the *rights of labor* in the same manner Congress intended when it enacted the Clayton Act, which by reason of its construction and application by the federal courts, is ineffectual to accomplish the congressional intent.

a. The underlying aim of the NLA was to restore the broad purpose which Congress that it had formulated in the Clayton Act but which was frustrated by unduly restrictive judicial construction.

2. The legislative history of the NLA disclosed that it was needed to *divest the federal courts of equitable jurisdiction* over the granting of injunctions because the federal courts had refused to abide by the clear command of §20 of the Clayton Act.

*[*U.S. v. Hutchenson; Burlington Northern RR v. Brotherhood of Maint. Way Employees*].

E. **G/R: Interrelation Between NLA, the Clayton Act, and the Sherman Act:** the three acts are interrelated in that:

1. **Clayton Act §20:** withdrew from general interdict of the Sherman Law specifically enumerated practices of labor unions by prohibiting injunctions against them—since the injunction was the source of dissatisfaction—and also relieved such practice of *all illegal taint by the catchall provision: nor shall any of the acts specified in this paragraph be considered or held to be a violation of any law of the United States* (i.e. the Sherman Act).

a. However, federal courts read *into* the Clayton Act the very beliefs which it was designed to remove

2. **NLA §4:** removed the fetters upon trade union activities, which according to judicial construction of §20 of the Clayton Act had left untouched, by still further narrowing the circumstances under which the federal courts could grant an injunctions in labor disputes.

a. The Act explicitly formulated the *public policy of the US* in regard to the industrial conflict and by its light established that the allowable area of union activity was not to be restricted, as it had been in the *Duplex Printing Press* case—to immediate employer-employee relations.

3. **Therefore:** Clayton Act §20, and NLA §4, should be read together harmonizing congressional intent that all acts done within the specified guidelines *are protected from attack* as violations of the Sherman Act.

*[*U.S. v. Hutchenson*].

F. **G/R: Jurisdictional Disputes with Other Unions:** there is nothing remotely within the terms of §20 of the Clayton Act that differentiates between trade union conduct directed against an employer because of a controversy arising in the relation between employer and employee, as such, and conduct similarly directed but ultimately due to a struggle between two unions seeking favor of the same employer.

1. In other words, the Clayton Act, as modified by the NLA, does not differentiate between employee/employer disputes and two unions disputing with the same employer as the distinction was judicially constructed in the *Duplex Printing Press* case.
2. **Held:** no criminal liability can be imposed pursuant to the Sherman Act on a union, which because of a jurisdictional dispute with another union, calls for picketing and a boycott against the employer.
*[*U.S. v. Hutchenson*].

G. **G/R:** Primary and Secondary Union Activity: the language of the Clayton Act was/is broad enough to encompass all peaceful strike activity, whether directed at the primary employer or neutral secondary employers [*Duplex Printing Press* however held that §20 did not prevent courts from enjoining secondary activity].

1. The NLA thus reflects congress's decision to *abolish*, for purposes of labor immunity, the distinction between primary activity and secondary activity.
 - a. *Primary Activity:* are activities directed at the specific employer directly involved in the labor dispute;
 - b. *Secondary Activity:* are activities directed against companies doing business with the employer.
2. Congress intended to **preclude courts from enjoining secondary as well as primary** activity (and railroads were to be treated no different than other industry, although this was changed when Congress enacted the Railway Labor Act).
*[*Burlington Northern RR v. Brotherhood of Maint. Way Employees*].

H. **G/R:** Secondary Boycotts: the NLA does not prevent secondary boycotts and picketing by unions because congress's primary motivation in passing the NLA was to immunize secondary picketing and boycotts from federal court injunctions.

1. **Held:** the Supreme Court held that NLA §4 was applicable to the case because a secondary boycott is a "labor dispute" as defined by the NLA and hence, although secondary, federal courts do not have the power to grant an injunction.
*[*Burlington Northern RR v. Brotherhood of Maint. Way Employees*].

I. **G/R:** Motive Inquiry Prohibited: the Supreme Court has interpreted §13(c) of the NLA to embrace disputes having the genesis in political protests as opposed to economic self interest; and the Court believes that it is irrelevant whether the dispute arose out of political reasons or economic reasons because the Court is not going to inquire into the motivations of the union, i.e. it will not take a subject look into intent [*Jacksonville Bulk Terminals v. Longshoreman*].

1. In *Jacksonville* the union refused to handle any cargo coming into or out of the Soviet Union as a result of its invasion of Afghanistan.

IV. LABOR ACTIVITY AND THE CONSTITUTION

A. **G/R:** Freedom of Speech: the First Amendment, as applied to the States through the 14th Amendment, protects freedom of speech and press. The safeguarding of these rights to the ends that men may speak as they want on matters vital to them and that falsehoods be exposed through the process of education and discussion is essential to free government [*Thornhill v. Alabama*].

B. **G/R:** Picketing as Protected Speech: the dissemination of information concerning facts of a labor dispute must be regarded as within the area of free discussion that is guaranteed by the Constitution.

1. Free discussion concerning the conditions in industry and the causes of labor disputes is indispensable to the effective and intelligent use of the process of popular government to shape the density of modern industrial society.
 2. The group in power at any moment **may not impose penal sanctions on peaceful and truthful discussion of matters of public interest** merely on a showing that others may thereby be persuaded to take action inconsistent with its interests.
 3. Abridgement of the liberty of such discussion can be justified only where the *clear danger* of substantive evils arises under circumstances affording no opportunity to test the merits of ideas by competition for acceptance in the market of public opinion.
 4. **Held:** the Supreme Court declared unconstitutional a state statute prohibiting picketing, without exception, as violating the First Amendment because the danger of injury to an industrial concern is neither so serious, nor imminent, as to justify the sweeping proscription of freedom of discussion embodied in the statute.
 - a. In other words, the court hinted that it would treat picketing as political speech—thus giving it the highest protection of speech under the constitution.
- *[*Thornhill v. Alabama*].

§1.5: THE WAGNER ACT

I. ORIGINS AND CONSTITUTIONALITY

A. **Railway Labor Act (1926):** the RLA was enacted as an agreement between interstate carriers and railroad unions, which provides the means to settle disputes arising over railroad worker's rights and interests.

1. Adjustment Boards were established to settle differences in interpretations of unions and employers contracts and to settle minor disputes arising over working conditions.
2. Mediation Boards were also established to help with negotiations in the vent of a mediation breakdown.
3. The RLA also covers air carriers.

B. **Wagner Act Generally:** beginning in the 1930s, a number of factors, including the depression gave rise to increased unionization. However, the probably two most significant factors in the growth of unions were: (a) the federal government's policy of giving encouragement to unionization and collective bargaining and (b) the formation of the Congress of Industrial Organizations.

1. The National Industry Recovery Act of 1934 set standards for fair labor practices, including raising wages, shortening work days, and eliminating industrial homework and child labor
 - a. NIRA §7 gave employees the right to bargain collectively at work.
 - b. In 1935, however, the Act collapsed.
2. In 1935, Congress enacted the Wagner Act, which established on a permanent foundation the legally protected right of employees to organize and bargain collectively through representatives of their own choosing.
3. The basic provisions of the Wagner Act are:
 - a. **§§3-4:** created the NLRB with jurisdiction over unfair labor practices and questions of union representation and gave the Board the power to issue and prosecute complaints under §10.
 - b. **§7:** [the Heart of the Wagner Act]: gave employees the right organize, form a union, bargain collectively through representatives of their own choosing, and to engage in concerted activities for the purpose of collective bargaining or other protection.

- c. **§8(a)(1)**: outlaws employer coercion over employees in the exercise of their rights guaranteed by §7.1
- d. **§8(a)(2)**: employers are prohibited from unlawfully sponsoring or assisting a labor organization;
- e. **§8(a)(3)**: employers are prohibited against discriminating against employees because of union activity;
- f. **§8(a)(5)**: employers are required to bargain collectively with representatives designated by employees.
- g. **§9(a)**: designates representatives selected for the purposes of collective bargaining by a majority of employees in a unit appropriate for such purposes as the exclusive representative of all employees.
- h. **§9(b)-(c)**: NLRB shall settle disputes with respect to what the appropriate unit for bargaining should be and other questions relating to election procedures.

B. **G/R: Constitutionality of the Wagner Act**: the Supreme Court upheld the constitutionality of the Wagner Act as an appropriate exercise of Congress's power under the Commerce Clause to regulate the channels and instrumentalities of interstate commerce.

- 1. The Court was in a period of time when it was expanding Congress power under the commerce and any legislation which regulated an activity which exerted a *substantial effect upon interstate commerce*.

§1.6: The Taft-Hartley Act

A. **Generally**: after WWII, and evidence of illegal and violent activities by unions, Congress passed the Taft-Hartley Act which amended the Wagner Act demonstrating a change in governmental policies toward unions; the government was now neutral and not on the side of organized labor and brought the courts back into the labor dispute picture.

B. **G/R: Effect of Taft-Hartley Act on Labor Laws**: the Act brought about four major changes in labor law after its enactment:

- 1. **Injunctions**: were brought back and could once again be used as a remedy by employers (thus superceding the NLA). **§8(b)**: made the following acts illegal and enjoined:
 - i. violence and intimidation;
 - ii. secondary boycotts;
 - iii. strikes to compel an employer to commit an unfair labor practice;
 - iv. jurisdictional strikes over working conditions.
- 2. **Instituted Policy of Neutrality**: the Act upheld the fundamental right to bargain collectively; however, §7 was amended to provide that the right to refrain from the activities in §7 (i.e. concerted activity, union organization, collective bargaining) on equal footing with the rights granted—evidencing neutrality and an employer friendly provision.
- 3. **Collective Bargaining**: the Act ratified previous NLRB regulation of collective bargaining and even extended governmental regulation of the negotiation and collective bargaining agreements.
 - a. The Act imposed restrictions on how collective bargaining was to be carried on.
 - b. **§8(d)**: regulates the renewal or reopening of collective bargaining agreements.
 - c. The Taft-Hartley Act even regulates some of the substantive terms of a collective bargaining agreement.
 - d. **§8(a)(3)**: outlaws the closed shop and permits only a limited form of union shop.
 - e. **§302**: prescribes and limits the terms of pension and health and welfare trust funds.

4. **Jurisdiction: §301:** provides that suits for violation of collective bargaining agreements in industries affecting interstate commerce may be brought by or against a labor organization as an entity in any appropriate *federal court*.

§1.7: LANDRUM-GRIFFIN ACT

A. **Generally:** the Landrum-Griffin Act was another amendment to the NLRA, twelve years after the passage of the Taft-Hartley Act.

1. In general, the amendments to the NLRA were in keeping with the basic purposes that underlain the Taft-Hartley Amendments.
 - a. Various loopholes in the secondary boycott provisions were closed;
 - b. Restricted the right of unions to picket for the purpose of organizing workers or obtaining recognition from an employer; and
 - c. Various other provisions were enacted which restricted unions ability to coerce employees in deciding whether or not to join a labor union.
2. *Union's Internal Affairs:* for the first time, the Act regulated the internal affairs of the union with certain provisions requiring that elections be held periodically for local and national union officers and that union members be assured the right to vote, to run for union office, and to comment upon and nominate candidates.
 - a. Other provisions prohibited the embezzlement of union funds or property and the making of loans by a union to its officials in excess of a stipulated amount.

§1.8: THE CURRENT AND FUTURE SIGNIFICANCE OF LABOR UNIONS

A. **Generally:** Economic and Societal Effects of Unionization: several conclusions can be drawn about the effects unions have on society:

1. wage effects have not caused monopolies;
2. compensation packages have been increased;
3. wage inequality has not resulted, rather unions promote more equality between workers;
4. increased stability in jobs;
5. swings in the economy affect unionization;
6. encourages positive labor relations;
7. job satisfaction is increased;
8. productivity is increased;
9. the profitability and rate of return for the dollar is earned more in unionized work forces;
10. in the political arena, unions received mixed support.

§1.9: JURISDICTION, ORGANIZATION, AND PROCEDURE OF THE NLRB

I. NLRB JURISDICTION

A. **NLRA §1:** has the jurisdiction to cover enterprises *affecting commerce* and disputes between employers and employees.

1. **§2(2): Employer:** the term employer includes any person acting as an agent of an employer, directly or indirectly. *Exemptions:* employers exempt from coverage the Act include:
 - a. the United States;
 - b. government corporation;
 - c. any state, or political subdivision thereof;
 - d. any person subject to the Railway Labor Act;

- e. or any labor organization.
 - f. The Supreme Court added to this list secondary schools operated by the roman catholic church because NLRB oversight would cause excessive entanglement in violation of the First Amendment [*NLRB v. Catholic Bishop of Chicago*].
2. **§2(3): Employee:** includes any employee and shall not be limited to employees of a particular employer and shall include any individual whose work has ceased as a consequence of (or in connection with) any current labor dispute or because of an unfair labor practice.
Exemptions: the definition of employee shall *not* include:
- a. agricultural labor;
 - b. domestic housework;
 - c. individual employed by parent or spouse;
 - d. independent contractors;
 - e. supervisors;
 - f. anyone employed by an employer subject to the Railway Act;
 - g. or anyone else who is *not* an employer as defined in the act.
 - h. The Supreme Court has held that full time faculty members at a large private university are “managerial employees” and hence outside the protection of the NLRA [*NLRB v. Yeshiva Univ.*].
3. As a practical matter it has not been necessary to delineate the express contours of the commerce power because the NLRB has not been given sufficient funds to enforce the law even with respect to all the employers that are subject to the commerce clause.

B. G/R: Determining Employer/Employee Relationship: in determining the existence of an employer/employee relationship the task of the Board is to apply the common law principles of **agency law, i.e. master/servant**. The question then becomes whether the employer had the right to control that person in the performance of his work; if so, then an employer/employee relationship exists.

C. G/R: Self-Imposed Jurisdictional Standards: [**NLRA §14(c)(1)**] the Board has declared that employers must engage directly or indirectly in interstate commerce to an extent exceeding certain prescribed dollar minima in order to be subject to its jurisdiction.

II. NLRB ORGANIZATION AND PROCEDURE

A. G/R: Organization of the Board: [**NLRA §3**]:

- 1. *Composition:* there are 5-members on the NLRB, appointed by the president of the Board and each serve for a term of five years.
- 2. *Removal:* of a member, can only be done by the president upon a finding of malfeasance in office or neglect of duty proceeded by a formal hearing;
- 3. *Panel:* can sit as a full panel of 5 or may delegate panel down to 2-3 bring majority.
- 4. *Delegation of Powers:* Board can delegate powers to regional directors for cases involving union representation and reauthorization elections by the board.
- 5. *General Counsel:* unfair labor practice charges can be filed at a regional office by any person against an employer, union, or third party, then regional director can issue a complaint.

B. G/R: Primary Functions of the Board: the two primary functions of the Board are:

- 1. determine if employee representatives are within industries under the jurisdiction of the NLRA;
 - a. The Board has complete and final authority;
 - b. decisions of regional director on any point are subject to limited review by the Board.

2. Decide whether a particular challenged activity constitutes an unfair labor practice.
 - a. After complaint has been filed, primary investigation will be made to determine whether to proceed to a hearing after regional directors has issued a compliant.

C. **G/R: Procedure for Unfair Labor Practices**: there is seven step procedure for unfair labor practices:

1. charge filed in regional office;
2. office sends someone to investigate charge;
3. if charge has merit, a complaint is then filed by the government under the NLRA (charge must be filed within 6-months statute of limitations);
4. ALJ has a hearing;
5. ALJ submits finding to Board;
6. Objections or acquiescence in the ALJ's findings;
7. Board makes decision.

D. **G/R: Statutory Construction**: the Court will always give deference to the agency because the agency has expertise.

E. **G/R: Substantial Evidence Rule**: [NLRA §10(f)]: the Board's **finding of fact** will be upheld if supported by substantial evidence on the record considered as a whole.

1. Substantial evidence requires more than a scintilla; taking account of the facts and inferences on both sides of the issue; there must be enough evidence to support the agency's conclusion in a reasonable mind.
2. Thus, courts will defer because the administrative agency is the expert in the "field."

F. **G/R: Judicial Review of Administrative Matters**: judicial review of administrative agencies on matters of statutory interpretation is also deferential, and the court will not impose its own interpretation for that of the agency *unless* the agencies interpretation is clearly erroneous.

1. The court will look to the plain language of the statute, if it is clear, it will stop and enforce the Congressional intent.
2. If the statute is not clear, however, the court will defer to the administrative agencies interpretation of the statute.

*[*Chevron v. NRDC*]

§2: THE ESTABLISHMENT OF THE COLLECTIVE BARGAINING RELATIONSHIP

§2.1: PROTECTION OF THE RIGHT OF SELF-ORGANIZATION

I. INTERFERENCE, RESTRAINT, AND COERCION

A. **Pertinent Provisions of the NLRA**: there are several provisions of the NLRA which deal with restraint, interference and coercion:

1. **§7**: Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted protection, and shall have the right to refrain from any or all of such activities.
2. **§8(a)(1)**: makes it an unfair labor practice for interfere with, retrain, or coerce employees in the exercise of their rights guaranteed in §7.
 - a. Thus, if an employer violates §8(a)(1) he also violates §§8(a)(2)-(5) which respectively make it an unfair labor practice for employers to:

- i. §8(a)(2): forbids the formation of company unions;
- ii. §8(a)(3): forbids discrimination in hiring and firing based on union membership;
- iii. §8(a)(4): forbids discrimination in the hiring or firing of an employee who has asserted his rights before the NLRB; and
- iv. §8(a)(5): makings it an unfair labor practice for an employer to refuse to bargain collectively with the representatives of his employees.

**However, you must KEEP these sections distinct.

- b. In giving effect to §8(a)(1) to protect the right to join a union, the NLRB has emphasized the need to preserve the employee's **free choice**.

3. **§§10(a)-(c)**: prescribe the procedure followed by the Board in an unfair labor practice case. This statutory plan for an adversary proceeding requires that the Board's orders on complaints of unfair labor practices be based on evidence, which is placed before the Board by witness's who are subject to cross-examination by opposing parties. Such a procedure strengthens the assurance of fairness by requiring findings of known evidence.

I(A). Restrictions on Solicitation and Distribution

A. **Generally**: a huge conflict arises when employees want to organize on an employer's property. The employer must tolerate some inconvenience to comply with the employee's §7 rights; however, the employer may limit pro-union solicitation to an employee's free time and this may done even after the start of a union campaign.

1. **Analysis**:

- a. the first thing that needs to be determined is whether the conduct is occurring on the employers property;
 - i. in no, then is allowable;
 - ii. if yes;
- b. determine whether the solicitation is being conducted by *employees or non-employees*;
 - i. if non-employees, the solicitation will probably be prohibited unless exceptional circumstances exist (such as being secluded from society);
 - ii. if employees, then,
- c. determine whether the conduct occurred during working hours, or the employees free time;
 - i. employers can prohibit solicitation during working time;
 - ii. employers are generally prohibited from disallowing solicitation during an employees free time;
- d. the last thing that needs to be determined is whether the employer has discriminated; if so, then the Board will find against the employer; if not,
 - i. then the Board will balance an employers rights with an employee's rights.
 - ii. REMEMBER: ALWAYS look for a way to argue discrimination—it that can be proved, the employer probably committed an unfair labor practice.

B. **G/R: Solicitation**: solicitation is verbal communications promoting and attempting to organize a union campaign, it also includes the handing out of union authorization cards.

- 1. The Board will impose more *restrictive rules* on employee solicitation during his free time depending on the type of business; i.e., when there is considerable contact with the public or patients, the Board will take a more restrictive approach.

2. *Off Duty Employees*: a court is going to uphold a rule barring off duty employees from union solicitation on company premises as long as the Rule is non-discriminatory.

C. **G/R: Employee Solicitation**: the NLRA does *not* prevent an employer from making and enforcing reasonable rules covering the conduct of employees on company working time, because working time is working time. It is therefore within the province of an employer to promulgate and enforce a rule prohibiting union solicitation during working hours.

1. During time outside the working hours, whether before or after work, or during lunch or break periods, is the employee's time to use as he wishes without unreasonable restraint, although the employee is on *company property*.

a. It is therefore not within the province of an employer promulgate and enforce a rule prohibiting union solicitation by an employee outside working hours, although the employee is on company property.

2. **Presumption**: if an employer prohibits union solicitation, even if on company property, during an employee's free time, the rule will be *presumed* an unreasonable impediment to self-organization and therefore discriminatory in the absence of evidence that special circumstances make the rule necessary in order to maintain production and discipline.

a. This is a rebuttable presumption, however, the burden of proof is on the employer to demonstrate that special circumstances existed.

3. **Held**: a rule against union solicitation is invalid as to union solicitation on the employer's premises during the employee's own time, and a discharge of an employee because of a violation of that rule is an unfair labor practice because it discriminates within the meaning of §8(a)(3).

*[*Republic Aviation Corp v. NLRB*].

D. **G/R: Special Circumstances; Hospitals**: although the Board generally requires employers to permit employee solicitation on union matters during non-working time, it has tolerated hospital bands on such solicitation in working areas devoted strictly to patient care.

1. *Caveat*: but such solicitation must be permitted in other areas such as lounges and cafeterias open to visitors and even to patients *absent a showing that disruption to patient care would necessarily result* if solicitation and distribution were permitted in those areas.

*[*Beth Israel Hosp. v. NLRB*].

E. **G/R: Waiver of Solicitation Rights**: a union may not, unless proof of exceptional circumstances exist, waive its members rights to distribute literature during non-working hours [*NLRB v. Magnavox*].

F. **G/R: Non-Employee Union Solicitation**: an employer may prohibit solicitation and distribution on its premises by non-employee union organizers unless the employee's do not have sufficient alternative means of obtaining information concerning the advantages of unionization.

G. **G/R: Employee; Non-Employee Distinction**: by its plain terms, the NLRA confers rights on only on *employees*; not on unions or their non-employee organizers. The Board in applying the NLRA must make the critical distinction between **employees** (to whom §7 guarantees the right of self-organization) **and non-employees** (to whom §7 only applies derivatively) and the failure to make that distinction is grounds for reversible error.

1. *Employees*: no restriction may be placed on the employee's right to discuss self-organization among themselves, unless the employer can demonstrate that a restriction is necessary to maintain production or discipline.

2. *Non-Employees*: no such obligation is owed to non-employees; that is, an employer cannot be compelled to allow the distribution of union literature by non-employee organizers on his property.

3. Balancing Test: accommodation between the employee's §7 rights and the employer's property rights must be obtained with as little destruction of the one as is consistent with the maintenance of the other.

a. In cases involving *employee activity* the Board can balance the conflicting interests of employees to receive information self-organization on the company's property from fellow employees during non-working time, with the employer's right to control and use his property.

b. In cases involving *non-employee activity* the Board is **not permitted** to engage in the same balancing

4. **Inaccessibility Exception**: where the location of a plant and the living quarters of the employees place them beyond the reach of reasonable union efforts to communicate with them, employer's property rights may be required to yield to the extent needed to permit communication of information on the right to organize.

a. This exception is a relatively narrow one, it does not apply wherever non-trespassory access to employees may be cumbersome or less than ideally effective, but only where the *location of a plant and the living quarters of the employees* place the employees beyond the reach of reasonable union efforts to communicate with them. Some examples include:

i. logging camps, mining camps, and mountain resort hotels.

b. The burden of establishing such isolation is on the union and it is heavy one.

*[*Lechmere Inc. v. NLRB*].

H. **G/R: Problems that Arise in Defining an "Employee"**: whenever defining an employee, it is necessary to go to the **NLRA §2(3)**, which defines an employee as "any employee and shall not be limited to the employees of a particular employer." Thus, the definition is very broad, and when making the distinction between employees and non-employees several problems arise:

1. **Salts**: are individuals who apply for specific jobs in order to obtain the status of an "employee" then once they are employed they can solicit under *Republic Aviation* for unionization; typically, if a salt is paid less than he was making at a former job, the union seeking organization will make up the difference. The Supreme Court has held that salts are employees within the definition of §2(3) [*NLRB v. Town & Country Co.*].

I. **G/R: Equal Access and Time**: the union's right to solicitation is generally fairly limited under *Republic Aviation* and they have sought to establish channels of communication roughly comparable to that of the employer, such as the right to address employees on the shop floor during the workday, as employers often do.

1. The Supreme Court has held that the denial of equal time will ordinarily be presumed lawful and the burden will be on the union (or general counsel) to establish that union is seriously incapacitated from communicating with the employees by different means.

*[*NLRB v. United Steelworkers*].

J. **G/R: Captive Audience Doctrine**: the Board has announced a firm rule outlawing captive audience speeches on company time within the 24-hour period prior to an election, whether by the union or employer, because it interferes with the employee's free choice and thoughtful consideration of the matter.

1. A violation of the Rule will result in the setting aside of an election victor by the speaker-violator and the ordering of a new election.
2. *Caveat*: the rule does not prohibit non-coercive employer or union speeches before the 24-hour period, the dissemination of other forms of propaganda even during the 24-hour period; or the delivery during that period of campaign speeches on or off company property if employee attendance is voluntary and on the employee's own time.
3. Paycheck Process: the board has extended the logic of the captive audience rule to an employer change in the paycheck process within 24-hours prior to an election because of its coercive effect on employees (i.e. believe if they don't vote for the union will get higher pay).
**[Peerless Plywood; Kalin Construction]*.

K. **G/R**: Standards for Consent Elections: the NLRB established a disclosure requirement that will be applied in all election cases:

1. Within 7-days after the Regional Director has approved a consent-election agreement entered into by the parties; the employer **must file** with the Regional Director an election eligibility list, containing the names and addresses of all eligible voters.
 - a. The Regional Director will then make this information available to all parties in the case.
2. Failure to comply with this requirement shall be grounds for setting aside the election whenever proper objections are filed.
3. The Board does not limit the disclosure requirement to the situation in which the employer has mailed antiunion literature to employees' homes because it believes that access to employee names and addresses is a fundamental to a fair and free election regardless of whether the employer has sent campaign propaganda to employees' homes.
4. *Policy*: this rule promotes **free and reasoned choice** by employees who are considering an upcoming election because the employee can hear both sides and then make a informed and reasoned choice.
**[Excelsior Underwear, Inc.]*.

I(B). Election Propaganda

A. **Generally**: the dissemination and distribution of election propaganda involves the pursuit of two inconsistent goals: the freedom of expression on behalf of employers and the full freedom for employees in forming, joining, and assisting labor organizations of their own choosing.

B. **NLRA §8(c)**: the expressing of any views, argument or opinion, or the dissemination thereof, whether written, printed, graphic, or visual form, shall **not** constitute evidence of an unfair labor practice under any of the provisions of this Act, if such expression contains **no threat of reprisal or force or promise of benefit**.

C. **G/R**: Laboratory Conditions Test: in election proceedings, it is the Board's function to provide a laboratory in which an experiment may be conducted, under conditions as nearly ideal as possible, to determine the uninhibited desires of employees *[General Shoe Corp.]*.

1. An election can only serve its true purpose if the surrounding circumstances enable employees to register such a choice for or against a bargaining representative.
2. The Board has a realistic recognition that elections do not occur in a laboratory where controlled or artificial conditions may be established and accordingly, the Board's goal is to assess the actual facts in light of the realistic standards of human conduct.

D. **G/R:** Implied Threats of Reprisal and Promises of Benefits: a statement is coercive and not protected by NLRA §8(c) if it contains threats of reprisal and to impose economic loss as the result of an election if won by the union. The Board will look at the economic realities of the relationship and will not condone a statement with an implied threat of job loss and reprisal, even if couched in the guise of statements of legal position [*Dal-Tex Optical*].

1. Thus, coercion may be found when threats of reprisal are express or implied, even if couched as an assertion of the legal rights of an employer.
2. Similarly, an employers statement to his employees predicting the adverse economic consequences from unionization may be held as coercive if such predictions are based on factors over which the employer has control or will result from his own volition and for his own reasons.

E. **G/R:** Noncoercive Speech as Evidence of Unfair Labor Practices: statements that are protected under the free speech provisions of §8(c) cannot be used as evidence of other unfair labor practices by the employer [*Pittsburgh v. NLRB*].

F. **G/R:** Coercive and Noncoercive Statements: an employer is free to communicate to his employees any of his general views about unionism or any specific views about a particular union, so long as the communication does *not contain a threat of reprisal or force, or promise or benefit*.

1. Predictions: the employer may make a prediction as to the precise effects he believes unionization will have on his company; however, the prediction must be carefully phrased on the basis of objective facts to convey an employer's belief as to demonstrably probable consequences beyond his control or to convey a management decision **already arrived at to close the plant in case of unionization**.
 - a. If there is any implication that an employer may or may not take action solely on his own initiative for reasons unrelated to economic necessities and known only by him, the statement is no longer a reasonable prediction based on available facts but a threat of retaliation based on misrepresentation and coercion, and as such without the protection of the First Amend.
2. Plant Closing: conveyance of an employer's belief, even though sincere, that unionization will or may result in the closing of the plant is not a statement of fact, unless which is most improbable, the eventuality of closing the plant is capable of proof.

*In other words, the threat of a plant closing is a retaliatory threat which constitutes an unfair labor practice if not based on a predetermined decision to close the plant. In such a case, an election can be set aside.
3. **Cox Test:** to determine whether a statement is coercive and not covered by §8(c) the court will ask what is the listener hearing, and what did the speaker intend to convey and have the speaker understand.

**[*NLRB v. Gissel Packing*].

G. **G/R:** Factual Misrepresentations in Election Propaganda: there will ordinarily be a number of factual misrepresentations in during an election campaign by both the employer and union. These statements may lack any threat of reprisal or coercion and thus will be protected under §8(c) against unfair labor practice sanctions; nonetheless, they affect improperly the employees' assessment of the need for union unionization and therefore may warrant the invalidation of election results.

H. **G/R:** Campaign Propaganda: the Board will **NOT** probe into the truth or falsity of the parties campaign statements; and instead, will rely on employees as mature individuals who are capable or recognizing campaign propaganda for what it is and discounting it.

1. *Caveat*: the Board will intervene in instances where a party has engaged in deceptive campaign practices which improperly involve the use of **forged documents** which render the voters unable to recognize propaganda for what it is.
2. Thus, the Board will set aside elections, not because of the *substance of the representation*, but because of the deceptive manner in which it was made; a manner which renders employee's unable to evaluate the forgery for what it is.
*[*Midland National Life Ins. v. Local 304A*].

I. **G/R: Inflammatory Appeals**: a deliberate appeal to prejudice (such as racial/religious prejudice) interferes with an employee's reasoned and untrammelled choice and therefore will be cause to overturn an election.

1. *Caveat*: statements with racial overtones—such as the union's position on segregation or union financial contributions to civil rights groups—will be appropriate but only if temperate in *tone, germane, and correct factually* because employees are entitled to know these matters.
2. The burden will be on the party making use of the racial message to establish that it was truthful and germane, and where there is doubt, it will be resolved against him.
*[*Swell Mfg. Co.*].

I(C). Other Forms of Interference, Restraint, or Coercion

A. **G/R: Employer Interrogation**: employer interrogation of employees as to their desire to be represented by a particular union is not coercive or intimidating on its face. To determine whether a particular interrogation interferes with, restrains, and coerces employees must be found in the record as a whole, taking into consideration 4-factors:

1. the background, i.e., is there a history of hostility and discrimination;
2. the nature of the information sought, i.e., did the interrogator appear to be seeking information which to base taking action against individual employees;
3. the identity of the questioner; i.e., how high was he in the company hierarchy; and
4. the place and method of interrogation, i.e., was the employee called from work into the boss's office or was there an atmosphere of unnatural formality.
*[*NLRB v. Lorben Corp.*].

B. **G/R: Polling**: absent unusual circumstances, the polling of employees by an employer will be violative of **NLRA §8(a)(1) UNLESS** the following safeguards are observed:

1. the purpose of the poll is to determine the truth of the union's claim of majority;
2. this purpose is communicated to employees;
3. assurances are given against reprisal;
4. the employees are polled by **secret ballot**; and
5. the employer not engaged in unfair labor practices or otherwise created a coercive atmosphere.

*[*International Union of Operating Engineers v. NLRB (Struksnes Const. Co.)*].

****NOTE**: the NLRB never overruled the *Lorben* standards, which deal with essentially the same polling issue. Nonetheless, this standard is the preferable one because of the "secret ballot" requirement.

B(1). **G/R: Per Se Violative Polls**: a poll taken while a petition for board election pending does not serve any legitimate purpose or interest of the employer that would not be better served by the forthcoming election by the Board. In accord with the Board's policies, these polls will continue to be

found violative of NLRA §8(a)(1) [*International Union of Operating Engineers v. NLRB (Struksnes Const. Co.)*].

C. **G/R: Change in Employee Benefits:** NLRA §8(a)(1) prohibits an employer from conferring economic benefits on his employees shortly (in this case it was 2-weeks) before a representation election where the employer's purpose is to affect the outcome of an election.

1. The action of employees with respect to the choice of their bargaining agents may be induced by favors bestowed by the employer as well as threats or domination.

a. The danger inherent in well timed increases in benefits is clear—employees are not likely to miss the inference that the source of benefits now conferred is also the source from which future benefits must flow and which may dry up in not obliged.

b. **“The danger inherent in well-timed benefits is the suggestion of a fist inside a velvet glove.”**

2. **Improper Purposes:** employers cannot grant benefits which are *reasonably calculated to impede* the employee's free choice in an upcoming election because this is an improper purpose that is prohibited by §8(a)(1).

a. The converse then, is if the employer has a proper purpose for granting an increase it will not be held violative of the Act.

i. EX: if the employer has a *policy* of giving increases relative to the increases in the community by unionized companies and grants such an increase then is a “changing status quo” and is for a permissible purpose—the retainer of qualified employees.

*[*NLRB v. Exchange Parts*].

I(D). Union Misconduct Affecting Self-Organization

A. **Pertinent NLRA Provisions:** the NLRA not only gives employees the right to organize, but also to refrain from organization if they so desire, and it also contains provisions declaring certain union activities as unfair labor practices—these were a result of the Taft-Hartley Amendments.

1. **§7:** gives the employee the right to refrain from all rights listed that section, i.e., the right to organize, have representative agents, bargain collectively, etc...

2. **§8(b)(1):** declares that is an unfair labor practice for a labor organization or its agents to restrain or coerce employees in the exercise of their rights guaranteed by §7.

3. **§8(b)(4):** prohibits various concerted activities to bring about unionization (secondary boycotts and various other activities that use fraud or intimidation).

B. **G/R: Union Granting Benefits:** the union, like an employer, cannot grant benefits to employees in an attempt to affect the outcome of an election; such as, granting a waiver of the initiation fees for employees signing a recognition slip prior to the election, because the interference has a decisive effect on the outcome of the election results which does not truly represent the employee's views [*NLRB v. Savair Mfg. Co.*].

II. COMPANY DOMINATION OR ASSISTANCE

A. **Generally:** in furtherance of the Act's purposes to protect the exercise of employee associational rights and to ensure them freedom of choice concerning whether and by whom to be represented; NLRA §8(a)(2) forbids employees to dominate, assist, or to interfere with the formation or administration of a labor organization.

B. **NLRA §8(a)(2)**: it shall be an unfair labor practice for an employer to **dominate** [is a term of art in labor law] or interfere with the formation or administration of any labor organization or contribute financial or other support to it....

C. **G/R: Prohibition on “Company Unions”**: §8(a)(2) is designed to prevent interference by employers with organizations of their workers that serve or might serve as collective bargaining agencies—i.e. the company union.

1. Such interference exists when employers actively participate in framing the constitution or bylaws of labor organizations; or when, by provisions in the constitution or bylaws, changes in the structure of the organization cannot be made without the consent of the employer.
 - a. It exists when they participate in the internal management or elections of a labor organization or when they supervise the agenda or procedure of meetings.
 - b. Where several of these interferences exist in combination, the employer may be said to **dominate** the labor organization overriding the will of the employees.
2. *Limitations*: the prohibition on company unions does not outlaw free and independent organizations of workers who by their own choice limit their cooperative activities to the limits of one company.
 - a. Nor does anything in the Act prohibit the freedom of employers to establish pension benefits, outing clubs, recreational societies, and the like so long as such organizations do not extend their functions to the field of collective bargaining, and are not used as covert means of discriminating against the union.

D. **Analytical Framework**: there are several questions to ask when determining if an association of workers by the company is a “company union” and hence prohibited under §8(a)(2):

1. Before the finding of an unfair labor practice under §8(a)(2), a finding of a labor organization is required under §2(5); thus, does the association fall under the definition of a labor organization?
 - a. **NLRA §2(5)** defines a labor organization as:
 - i. an organization of any kind in which *employee’s participate*;
 - ii. which exists, in whole or part, for the purpose of **dealing with** employers;
 - iii. concerning the *conditions of work* (grievances, labor disputes, wages, rates of pay, hours worked, or conditions of work).
Once this definition is met **§8(a)(2) is triggered.
2. If such an organization exists, is the company:
 - a. dominating the organization?
 - i. Such as framing the constitution or bylaws of the organization;
 - ii. providing “other support to it”
 - iii. restricting changes in the formation of the organization; or
 - iv. participating in the internal management or elections of the organization;
 - b. providing financial assistance to the organization?
 - i. such as funding the organization; or
 - ii. providing office supplies, space, etc...conditioned upon the existence of the association.
3. If yes, then an impermissible company union exists under §8(a)(2).

E. **G/R: Employee Representation Committees**: [**NLRA §2(5)** (“the term labor organization means any organization of any kind, or any agency or employee representation committee or plan...”) if the association of workers has a purpose of *representing the employees* it means the statutory definition of “employee representation committee or plan” under §2(5) and will constitute a labor organization if it

also meets the criteria of employee participation and dealing with conditions of work or other statutory subjects.

1. Any group, including an employee representation committee, may meet the definition of a labor organization even if it lacks formal structure, has no elected officers, constitution or bylaws, does not meet regularly, and does not require the payment of initiation fees or dues.

2. Thus, a group may be an employee representation committee within the meaning of §2(5) even if there is no formal framework for conducting meetings among the represented employees or for otherwise eliciting the employee's views.

*[*Electromation*].

F. **G/R:** §2(5) "Dealing With" Requirement: the Supreme Court has held that the *dealing with* language is **broader** than the term "collective bargaining" and applies to situation that do not contemplate the negotiation of a collective bargaining agreement.

1. The Board considers *dealing with* as a bilateral mechanism involving proposals from the employee committee concerning the subjects listed in §2(5), coupled with the real or apparent consideration of those proposals by management.

2. *Caveat:* a unilateral mechanism such as a suggestion box, or brainstorming groups, or analogous information exchanges does not constitute *dealing with*.

*[*Electromation*].

G. **G/R:** §8(a)(2) Domination Requirement: although §8(a)(2) does not define the specific acts that may constitute domination, a labor organization that is a creation of management, whose structure and function are essentially determined by management and whose continued existence depends on the fiat of management, is one whose formation or administration has been dominated under §8(a)(2).

1. In such an instance actual domination has been established by virtue of the employer's specific acts of creating the organization itself and determining its structure and function.

2. *Caveat:* when the formulation and structure of the organization is determined by employees, domination is not established, even if the employer has the potential ability to influence the structure or effectiveness of the organization.

*[*Electromation*].

H. **G/R:** Animus and Other Factors: §8(a)(2) does not require a finding of antiunion animus or a specific motive to interfere with §7 rights. Thus, the Supreme Court has found that the presence of antiunion motive is not critical to the finding of a violation.

1. There is no basis in the statute to require a finding that the employees believe their organization be a labor organization.

*[*Electromation*].

I. **G/R:** Purpose of the Employee Entity: §2(5) requires the Board to inquire into the *purpose* of the employee entity at issue because it must determine whether it exists for the purpose of dealing with conditions of employment.

1. Purpose is different from motive, and the purpose to which the statute directs inquiry does not necessarily entail subjective hostility towards unions—purpose is what the organization is set up to do and may be shown by what it does.

2. If the purpose is to deal with an employer concerning conditions of employment the §2(5) definition has been met *regardless* of whether the employer has created it, or fostered its creation.

3. **“Perhaps the most telling aspect of dependency is that the committee cannot even make a decision about when it will meet without prior approval from the employer”** Chairman Gould.

*[*Electromation*].

J. **G/R: Supervisors: [NLRA §14(a)]:** supervisors are not specifically “employers” or members of a labor organizations within the meaning of the NLRA. The Board has taken the position that they will deal with the “supervisor issue” on a case by case basis under §14(a).

1. **§14(a):** provides that “nothing herein shall prohibit any individual employed as supervisor from becoming or remaining a member of a labor organization, but no employer subject to this act shall be compelled to deem individuals defined...as supervisors as employees for the purpose of any law either national or local related to collective bargaining.

a. This section, in effect, shields the employer from liability when dealing with supervisors—moral of the story, don’t sell yourself out to the company and join the union.

2. A problem arises when a supervisor sits on a committee because it is very difficult to tell where that person’s loyalties lie—to the employees or to the manager.

K. **G/R: Union Negotiation before Recognition: [NLRA §9(a)]: §9(a)** guarantees employees freedom of choice and majority rule in their selection of a bargaining representative. The Act, thus can place a non-consenting minority under the bargaining responsibility of an agency selected by a majority of workers.

1. The grant of exclusive recognition to a minority union constitutes unlawful support in violation of **§8(a)(2)** because the union which is favored is given a marketed advantage over any other union in securing the adherence of employees; notwithstanding that the employer and union had a good faith belief that the union had majority status.

a. This is because nothing in the language prescribes scienter an element of an unfair labor practice under §8(a)(2).

2. *Card Checks:* are the manner whereby the union goes around and secures recruits by having employees join the union by signing or checking the cards. Card checks are critical because an employer can only recognize a union without a minority from by an election, but can never recognize a minority without a majority from all card checks.

3. *Remedy:* redo the card check, or haven an election (which is the prevailing trend).

*[*Intern’l Ladies Garment Workers v. NLRB*].

K(1). **G/R:** it is ordinarily a violation of §8(a)(2) if the company enters into a collective bargaining agreement before it hires a substantial portion of the workforce for the same reasons.

L. **G/R: Modern Midwest Piping Doctrine:** the Board will not find §8(a)(2) violations in rival union (initial organizing) situations when an employer recognizes a labor organization which represents an uncoerced, unassisted majority, before a valid petition for an election has been filed with the board.

1. However, once notified of a valid petition, an employer must refrain from recognizing any rival unions until the regional director conduct a valid election; in other words, strict employer neutrality in initial organizing situations.

2. **30% Rule:** when one of the several rival labor organizations cannot command the support of even 30% of the unit, it will no longer be permitted to forestall an employer’s recognition of another labor organization which represents an uncoerced majority of employees and thereby frustrate the establishment of a collective bargaining relationship.

3. **Violations:** although an employer will no longer be automatically violate §8(a)(2) by recognizing one of the several rival unions before an election petition has been filed; an employer will still be found to have violated §8(a)(2) for recognizing a labor organization which does not actually have majority employee support.

III. DISCRIMINATION

A. **NLRA §8(a)(3):** makes it an unfair labor practice for an employer to discourage or encourage union membership in any labor organization by discrimination in regard to hiring, tenure, or employment or with respect to any term or condition of employment.

B. **Generally:** cases that arise under §8(a)(3) involve the discharge of employees, with the employer claiming the discharge was for a legitimate work related reason, while the Board (or Union) claims that the employer's true motive was *discrimination*, i.e., retaliation for being a union member supporter.

1. It is clear that if discriminatory motive and discouragement of union support can be shown, §8(a)(3) will be violated; such a discharge will violate §8(a)(1) as well.

a. A violation can be found under §8(a)(1) simply by proof that the impact on §7 rights outweighs any legitimate employer interest.

2. **G/R:** the great bulk of discharge cases brought to the NLRB are framed under §8(a)(3), with the §8(a)(1) violation following derivatively.

a. It is, in other words, generally required that there be proof that the discharge, or lesser discipline, was a product of anti-union animus.

b. In some cases, the record will suggest that the business related reason proffered by the employer for the discharge is in fact no more than a pretext, and that the sole reason for the discharge was in fact the employee's union activities.

3. *Examples of Discrimination:* discrimination in hiring or firing; discrimination in tenure, terms of employment or conditions of employment; union security agreements; discriminatory discharge and/or layoffs.

C. **G/R: Pretextual Firing and Discrimination:** an employer may discharge an employee for good reason, poor reason, or no reason at all so long as the provisions of the NLRA are not violated.

1. It is a violation of the NLRA §8(a)(3) to discharge an employee because he has engaged in activity on behalf of the union.

2. Conversely, an employer may retain an employee for good reason, bad reason, or no reason at all and the reason is not a concern of the Board; however, an employer cannot retain an employee and then use his poor work performance as a **pretext for discharging when he becomes union affiliated.**

*[*Edward Budd Mfg. Co. v. NLRB*].

D. **Wright Line Test: Dual Motives:** [this is how the board deals with dual motives] §10(c) of the NLRA, which states that unfair labor practice violations must be based upon the preponderance of testimony taken by the Board; requires that the Board has the burden of proving that the employee's conducted protected by §7 was a **substantial or motivating factor in the discharge.**

1. The employer's business justification is an affirmative defense, to which the employer bears the burden of not simply initiating the introduction of evidence but also of persuading the fact finder. [*Wright Line, NLRB v. Transportation Management Corp.* (Supreme Court upheld test formulated by Board in Wright Line case before the Board)].

E. **G/R: Employee Discharges or Suspensions**: in controversies involving employee discharges or suspensions, the ***motive of the employer is the controlling factor***. Absent a showing of antiunion animus, an employer may discharge an employee without running afoul of the fair labor laws for good reason, bad reason, or no reason at all.

1. The mere fact that an employee not only breaks a company rule, but also evinces a pro-union sentiment is *not* enough to destroy the just cause for his discharge.

2. The essence of discrimination in violation of §8(a)(3) is *treating like cases differently*; that is, if an employer fires a union sympathizer or organizer, finding of discrimination rests on the assumption that in the absence of the union activities he would have treated the employee differently.

a. If the company has **well established and equally applied** company rules, a firing based on a violation of that rule cannot be deemed discriminatory.

3. **Caveat**: if the misdeeds of an employee are so flagrant that he would have been fired anyway, there is no room for discrimination to play a part because neither the employee nor any others will be harmed by the firing if all understand that the employee would have been fired anyhow.

4. **Remedies**: the Board has the power under **NLRA §10(c)** has the power to reinstate a wrongfully discharged employee, however, that power is remedial and punitive. It is not to penalize the employer for antiunion animus by forcing on the payroll an employee unfit to stay on the job.

*[*Mueller Brass v. NLRB*] [Gelb likes this case].

F. **G/R: Company Prerogatives and Discrimination**: a company may suspend its operations or change its business methods so long as the change in operations is *not* motivated by illegal intention to avoid obligations under the Act.

1. An employer *may* discharge or refuse to employ one of its employees for any reason, just or unjust, except because of discrimination of union activities and relationships

a. The only discrimination proscribed in §8(a)(3) is discrimination that discourages or encourages membership in labor organizations.

b. The controlling issue in discrimination cases is the true **motivation** of the discharge.

2. In other words, when the sole motivation of the employer is to remain profitable, or other economic considerations of the time, it is not unlawful for them to terminate union positions.

*[*NLRB v. Adkins Transfer Co.*].

G. **G/R: Runaway Shops**: an analogous problem to discrimination arises when an employer because of a union, decides to close its plant and relocate elsewhere.

1. There is a general agreement that if the employer's move is motivated by hostility toward and a desire to escape the union, the action **violates §8(a)(3)**.

2. It is well settled that an employer may not transfer its business to deprive employees of rights protected by §7.

3. **Caveat**: the courts have been generally more willing than the Board to countenance employer relocation triggered by worsening economics to which the union substantially contributes.

H. **G/R: Discriminatory Lockouts (Temporary Closings)**: the discriminatory lockout is designed to destroy a union and is an economic weapon which has been used to discourage collective bargaining and collective employee activities and as such, they are held to violate the NLRA because they involve *discriminatory employer action for the purposes of obtaining some benefit in the future* from new employees *[*Textile Workers Union v. Deering*].

I. **G/R: Complete Business Liquidation:** a complete liquidation of a business yields no future economic benefit for the employer if such liquidation is bona fide. It may be motivated more by spite against the union, then business reasons, but it is *not* the type of discrimination which is prohibited by the NLRA.

1. When an employer closes his entire business, even if liquidation is motivated by vindictiveness towards the union, such an action is not an unfair labor practice.

*[*Textile Workers Union v. Deering*].

J. **G/R: Partial Business Liquidation:** a discriminatory partial closing of a business may have repercussion on what remains of the business, affording the employer leverage for discouraging the free exercise of §7 rights among remaining employees of much the same kind as found to exist in the runaway shop and temporary closing cases.

1. An organizational integration (such as was the case in *Deering* wherein he owned and operated over 17 shops and textile mills) is not a prerequisite to finding a violation §8(a)(3); however, it does help the union's case.

2. **TEST:** the test for when a partial business liquidation constitutes an unfair labor practice is:

a. If the person exercising control over a plant that is being closed for antiunion reasons:

i. have an **interest** in another business, whether or not affiliated with or engaged in the same line of commercial activity as the closed plant, of sufficient substantiality to give promise of their reaping the benefit from the discouragement of unionization in that business;

ii. act to close their plant the **purpose** of producing such a result; and

iii. occupy a relationship to the other business which makes it **reasonably foreseeable** that its employees will fear that such business will also be closed if they persist in organizational activities;

iv. such an activity is an unfair labor practice.

3. **Remedies:** the Board can order reinstatement of the discharged employees in the other parts of the business.

4. **Remember:** in partial closing the courts will disregard corporate entity lines that have been formulated (such as parent, brother and sister, and subsidiary corporations) by the organizers in an attempt to evade a federal statute—there are many cases in corporate law which disregard entity lines when applying a federal statute.

5. **Counterargument:** if the company can demonstrate that it moved for economic reasons, and not antiunion animus, by keeping corporate records and so forth, the it will probably not be held to be a violation of the Labor Laws.

*[*Textile Workers Union v. Deering*].

K. **G/R: Supervisors:** are exempt from the definition of “employee” under NLRA §2(3); hence, they can be disciplined for almost any reason, and that is the Board's position.

1. **Exception:** supervisors, however, cannot be disciplined for:

a. testifying before the Board or for processing an employee's grievance;

b. refusing to commit an unfair labor practice; or

c. as a pretext for discharging a pro-union crew.

*[*Parker Robb Chevrolet v. Automobile Salesmen Union*].

IV. REMEDIES FOR UNFAIR LABOR PRACTICES

A. **NLRA §10(c):** gives the Board the option of three main remedies for violations of unfair labor practices:

1. it can issue a *cease and desist order* to remedy specific or general conduct if the company has a long history of anti-union sentiment (in such circumstances the Board can order an employer to “cease and desist in any manner from interfering with an employees organizational rights).
2. it can issue orders for affirmative action; that is, it can order the employer to fix a problem; or
3. it can order the reinstatement of employees who were discriminated against, with or without backpay.
4. In addition to these three traditional remedies the board may also order, and in some cases formulates novel remedies, such as:
 - a. posting notice in the plant that it has been found to have committed an unfair labor practice;
 - b. mail notice stating that it has committed an unfair labor practice;
 - c. have a company official read the notice of unfair labor practice to employees;
 - d. give union access to employer bulletin boards or parking lots;
 - e. reimburse the board for costs of prosecution the action, and
 - d. various other techniques.

B. G/R: Remedies for Discriminatory Discharge or in Hiring: the refusal to hire employees solely because of their union affiliations is an unfair labor practice under §8(a)(3); and hence, the remedial authority of the Board under §10(c) becomes operative.

1. The Board has three remedies under §10(c) for discrimination:
 - a. issuance of a cease and desist order;
 - b. reinstatement or instatement of the aggrieved person; and
 - c. with or without backpay.
2. **Reinstatement:** is the conventional correction for discriminatory discharge and the right to reinstatement cannot be doubted.
 - a. The mere fact that the victim of discrimination has found equivalent employment does not itself preclude the Board from undoing the discrimination and requiring employment; but neither does the remedy automatically flow from the Act itself when discrimination has been found.

*[*Phelps Dodge v. NLRB*].

C. NLRA §10(j): Board’s Remedial Power: §10(j) authorizes the Board in emergency situations to seek temporary injunctions in federal district court restraining the employer or union from continuing an unfair labor practice even before a hearing occurs.

1. There are four prerequisites for obtaining a temporary restraining order under §10(j):
 - a. the filing of an unfair labor practice charge;
 - b. issuance of a complaint on the charge;
 - c. facts supporting the charge; and
 - d. a likelihood that the unfair labor practice will continue unless restrained.
2. Temporary injunctions are not used much and typically on sought in extreme cases of unfair labor practices, such as:
 - a. The threat or use of violence;
 - b. extreme acts when an election is nearing; or
 - c. to stop a company from dismantling a plant (such as in *Darlington Mfg. Co.*); or
 - d. in any other case when irreparable injury imminent.

§2.3: SELECTION OF THE REPRESENTATIVE FOR PURPOSES OF COLLECTIVE BARGAINING

OVERVIEW

A. **G/R: Union Recognition**: there are three ways for a union to be recognized under modern labor law:

1. through a Board certified election;
2. voluntary recognition by an employer; and
3. involuntary/forced recognition through a bargaining order based on past misconduct by the employer.

B. **G/R: Majority Support**: there are three ways that a union may demonstrate that it has majority support:

1. *Authorization Cards*: the union can use, and get signed authorization cards;
2. **30% Rule**: if the union gets 30% or more authorization cards signed, it can petition for an election; and
3. *Election*: by winning an election certified by the Board (if the union gets an election the ballot simply consists of a “yes” or “no” box for that union).

C. **NLRA §8(a)(5): Employer Refusal to Bargain**: it is an unfair labor practice for the employer to refuse to bargain collectively with the representatives of his employees, subject to the provisions of §9(a), which provides that the representatives selected by a majority of the employees of the appropriate unit will be the exclusive representatives for collective bargaining.

1. The grounds for finding an unfair labor practice are:
 - a. the unit claims must be the correct one;
 - b. a majority of employees were in favor of the union at the time of the employer’s refusal to bargain; and
 - c. the employer improperly refused to bargain.

D. **G/R: Election Proceedings**: [NLRA §9]: §9 proceedings are commenced by a union petition for an election; the employer may also file a petition for election when two or more unions present conflicting representational claims and whenever a union puts in a claim for recognition with it.

E. **G/R: Immediate Duty to Bargain**: once a representative has been designated by a majority of the employees, the employer is under an immediate duty to bargain collectively.

F. **G/R: Decertification**: [NLRA §9(c)(1)(A)(ii)] states that any employee can file a petition alleging that the majority of the employees in the bargaining unit *do not wish* to be represented by current union; if the board finds such a question exists, it can then order a decree election.

I. GROUNDS FOR NOT PROCEEDING TO AN INVESTIGATION AND CERTIFICATION

A. **Generally**: the most important grounds upon which the Board may decline to proceed to an investigation or certification have been:

1. the want of substantial interest on the part of the petitioning union;
2. the commission of unremedied unfair labor practices;
3. prior certification or the lapse of less than a year since the last previous election; and
4. the subsistence of a valid collective bargaining agreement.

B. **G/R: Substantial Interest Requirement:** the Board will proceed to investigation and certification only when there is a showing of substantial interest by the union (ordinarily authorization cards signed by at least 30% of the proposed bargaining unit).

C. **G/R: Grounds for Denying an Election:**

1. if unremedied unfair labor charges are pending the Board will not proceed to certification until the issues are resolved—a union can file a blocking charge;
2. **Election Bar:** after any election, there cannot be an election for another year; thus, regardless of who wins (the union or the employer—union loses), there cannot be another election for another year. This is a statutory (hence mandatory requirement) requirement based on the policy of effectuating the employees choice of representation or lack thereof.
3. **Contract Bar:** the collective bargaining agreement itself can be a bar to an new election for a *period of 3-years*.
 - a. The collective bargaining agreement must in writing and executed by all the contracting parties covering:
 - i. all employees in the rival union’s petition and all employees in the appropriate bargaining unit;
 - ii. it must grant exclusive recognition to the union as the exclusive representative of all members in that unit; and
 - iii. it must embody the substantial terms and conditions of employment.
 - b. Once a contract meets all these requirements it will as act a bar to any other election for the terms of the contract, but not to exceed 3-years.
 - c. **30/60-90 Rule:** ordinarily contracts that constitute a bar to an election will cease do so upon their termination; nevertheless, a rival union or a decertification petitioner must bear certain other requirements in mind in order for the petition to be considered by the Board:
 - i. The rival union must file its petition not more than 90-days nor less than 60 days before the termination of the contract.
 - ii. If a new contract is executed in this period it will act as a bar provided that it satisfies the above requirements and proved that no petition was timely filed in the preceding “open” period of 30-days.
 - iii. If a new contract was not executed when the 60-days expire, a petition can be filed at any time prior to the execution of a new agreement.
4. **Certification Bars:** after a union wins an election, and is certified, there cannot be another election for 1-year. If the new union is certified there cannot be another election for a year. The only differences between this and the election bar is that:
 - a. If the union loses it cannot be certified; and
 - b. if the union wins, the date of certification will be later than the date of election; hence, barring a new election for a slightly longer period than under the election bar.

D. **G/R: Unreasonable Contract Bars:** a contract of an unreasonable duration is not a bar to a new determination of representatives, such a contract may not bar full statutory collective bargaining, including the reduction to writing of any agreement reached, as to any group of employees in an appropriate unit covered by such a contract, upon the certification of new collective bargaining representative for them [*American Seating Co.*].

II. APPROPRIATE BARGAINING UNITS

II(A). Significance

A. **NLRA §9(a):** provides that a representative chosen by a majority of the employees in a unit appropriate such purposes is to be the **exclusive representative** of all employees in that unit.

B. **NLRA §9(b):** provides that the Board shall decide in each case whether, in order to assure to employees the fullest freedom in exercising the rights guaranteed by this Act, the *unit appropriate* for the purposes of collective bargaining shall be the employer unit, craft unit, plant unity or subdivision thereof.

1. Hence, the Board has a lot of discretion in determining the appropriate bargaining unit—it does not have to be the most optimal or efficient unit, only “an” appropriate unit.
2. Unions generally prefer smaller bargaining units because they are easier to organize and it makes negotiation easier; whereas, companies prefer larger bargaining units because it is harder for unions to organize.
3. §9(b) specifically forbids non-guards to placed in the same bargaining unit as guards.

II(B). Criteria for Unit Determinations

A. **Generally:** the Board’s unit determination generally takes the form of an endorsement of the unit requested by the petitioning party, and in some instances a rare veto. The only substantive criteria the Board uses in making unit determinations is §9(b) which only broadly requires the Board to assure to employees the fullest freedom in exercising the rights guaranteed by the NLRA; namely, the §7 rights to join a union, to bargain collectively and to engage in concerted activities and the right to refrain from doing so.

B. **G/R: Community of Interests Standard:** the Board seeks to make its unit determinations by seeking an employee group with a *community of interests*, and which neither embraces employees having a substantial conflict of economic interest nor omits employees sharing a unity of economic interest with other employees in the election or bargaining constituency. To determine a community of interest the Board considers:

1. Similarity in the scale and manner of determining earnings;
2. similarity in benefits, hours and working conditions;
3. similarity of jobs, skills, and training;
4. contact and interchange among employees;
5. geographic proximity;
6. integration of production process;
7. common supervision and labor relations policy making;
8. desires of the affected parties; and
9. the extent of union organization.

**This is vague standard and some factors will only apply at certain times, while others will not, and the Board will decide the appropriate unit on a case-by-case basis for each particular company.

****Note:** hospitals and health care institutions have different rules and considerations for the appropriate bargaining unit, see below.

C. **G/R: Hospital Units:** the Board for the first time in 35-years (since the implementation of the NLRA) passes a substantive rule delineating the appropriate bargaining units for hospitals; however, in so doing, it acted contrary to §9(b)’s requirement that the Board decide the appropriate bargaining unit **in each case**. Nonetheless the Supreme Court held that the Board did not act arbitrary and capricious

by going to rulemaking instead of adjudication. Thus, the court upheld the Board's Rule which established the following bargaining units for the health care industry:

1. all registered nurses;
2. all physicians;
3. all other professionals;
4. all technical employees;
5. all skilled maintenance workers;
6. all business office clerical workers;
7. all guards; and
8. all other employees.

*Thus, eight and only eight, units shall be appropriate for any hospital (subject to three exceptions in special circumstances).

**[*American Hospital Ass'n v. NLRB*].

II(C). Single Location versus Multi-Location Units

A. **G/R:** the most optimal bargaining unit need not be established, only an appropriate bargaining unit.

B. **Generally:** many employers carry on their businesses in a variety of geographical areas, with different stores and retail chains throughout the country. Where a union seeks to organize a company of this kind, it is possible to conceive a unit comprising all the employees in the region, state, municipality, or all the employees within a signal plant, office or store or a class of employees within a single store, office, or plant.

1. As noted, the union will seek a smaller bargaining unit, and the company will strive for a larger unit.
2. The Board generally prefers small bargaining units also; however, §9(c)(5) does not require this nor indicate a preference for it.

C. **G/R:** Presumption of Single Store Bargaining Unit: a single plant unit, being one of the types listed in the statute as appropriate for bargaining purposes, is **presumptively appropriate** and this presumption has been widely followed in multi-location industries.

D. **G/R:** Bargaining Unit Determination: the primary responsibility for determining the appropriateness of a unit for collective bargaining rests with the Board. It is given broad discretion in determining bargaining units to assure to employees the fullest freedom in exercising the rights guaranteed by the Act.

1. Because the board is given such wide discretion, it follows that bargaining unit determinations are rarely disturbed on judicial review.

*[*NLRB v. Chicago Health and Tennis Clubs*].

E. **G/R:** Determination of Appropriate Bargaining Units: in making unit determinations, the Board must effect the policy of the NLRA to assure employees the fullest freedom in exercising their rights, yet at the same time respect the interest of an integrated multi-unit employer in maintaining enterprise wide labor relations.

1. In reaching its decision, the Board considers several criteria, with no single factor being determinative:
 - a. geographic proximity of the stores in relation to each other;
 - b. history of collective bargaining or unionization;

- i. This factor is particularly important because if large integrated companies have a history of bargaining in single store units it can be argued that it should work for a more centralized company with single stores in the same city.
 - c. extent of employee interchange between various stores;
 - d. functional integration of operations; and
 - e. centralization of management, particularly with regard to central control personnel and labor relations.
 2. **G/R:** the Board has adopted the administrative police that a single store is *presumptively appropriate* unit for bargaining.
 - a. That presumption however is not conclusive and may be overcome where factors are present in a particular case which would counter the appropriateness of a single unit store.
- *[*NLRB v. Chicago Health and Tennis Clubs*].

II(D). Multi-employer and Coordinated Bargaining

A. **Generally:** a number of employers within a single are or industry may band together to bargain as a group with a single union which represents employees at all of the companies. This is common, if not dominant bargaining pattern in such industries as clothing, construction, longshore and maritime, trucking and warehousing, coal mining and wholesale and retail trades.

B. **G/R:** Withdrawal from Multi-Employer Bargaining Units: the Board's rules for withdrawal from a multi-employer bargaining unit permit withdrawal prior to the date set for negotiation of a new contract or the date on which negotiations actually begin, provided that adequate notice is given.

1. Once negotiations for a new contract have commenced, however, **withdrawal is not permitted** unless there are unusual circumstances.
 - a. *Unusual Circumstances:* will be found where an employer is subject to external financial pressures or where a bargaining unit has become substantially fragmented.
2. The Board has specifically held that an impasse is not such an unusual circumstance because an impasse is not sufficiently destructive of group bargaining to justify withdrawal.
3. *Interim Agreements:* the parties in a multi-employer bargaining unit can implement interim agreements which allow business to continue until a final agreement between the parties is reached, but these must be distinguished from an entirely new contract.

*[*Bananno Linen Service v. NLRB*].

C. **G/R:** Union Negotiating Committees: mixed union negotiating committees (i.e. the union in negotiations brings other union negotiators from different unions to the bargaining table, not to help in the formation of the collective bargaining agreement by as "experts in negotiation") are **not per se** improper absent showing of ulterior motive or bad faith, and an employer commits an unfair labor practice unless it bargains with the such a group.

1. **NLRA §8(b)(1)(B):** the right to choose bargaining representatives is a right of the employees and a corresponding right of employers to choose whomever they want to represent them in formal negotiations is fundamental to the statutory scheme.
 - a. In general, either side, can choose as it deems fit a representative and neither side can control the other's selection.
 - b. Exception: the freedom to choose a bargaining representative is not absolute, and exceptions arise in situations infected with ill-will which make bargaining impracticable. The employer has the burden to demonstrate, when objecting to the

employee's selection of a bargaining representative, to show a **clear and present danger** to the collective bargaining process, which is a considerable burden.

c. **Clear and Present Danger Test:** there are only a few things which constitute a "clear and present danger" to collective bargaining:

- i. conflicts of interest;
- ii. someone as a bargaining representative who has expressed great animosity towards the employer;
- iii. a union established company in direct competition with the employer;
- iv. an ex-union official added to employer committee's to put one over on the union; or
- v. someone who has made racial or ethical slurs on or against the employer.

2. As a general proposition, the union may include members of other unions on a negotiating committee because the union has an interest in using experts to bargain, whether the expertise be on technical, substantive matters, or on the general art of negotiation.

a. In filling that need, no good reason appears why the union may not look to outsiders, just as the employer is free to do.

*[*General Electric v. NLRB*].

III. REVIEW OF REPRESENTATION PROCEEDINGS

A. **Generally:** the NLRA has no provision for direct judicial review of Board determinations, such as the appropriate bargaining unit, made in the course of representation proceedings:

1. **NLRA §10(f):** provides that a party may have judicial review if "aggrieved by a final order" or the Board, however, decisions in representation proceedings are not "final orders."
2. Since such orders issue only in unfair labor practice cases, an aggrieved party must commit an unfair labor practice in order to obtain judicial review.
3. **NLRA §9(d):** provides that the record in the presentation case is to become a part of the record which is certified to the federal court of appeals in the unfair labor practice case.
 - a. EX: the most common example is when the employers refusal to bargain with a union certified by the Board as bargaining representative, when the certification is based upon a determination of a bargaining unit or the validity of the union's election victory which the employer wishes to challenge on review. In other words, the employer has to commit an unfair labor practice, usually refusal to bargain, to get into federal court.
4. *But note:* 28 U.S.C. §1337 provides that federal courts have jurisdiction to hear any case arising under the laws of the United States.

B. **G/R: Direct Statutory Violation by NLRB:** if an administrative agency, such as the NLRB, acts in excess of its delegated powers, then the inference is strong that Congress intended the statutory provisions of general jurisdiction to apply; in other words, a federal district court does not lack jurisdiction if the NLRB acts in *direct contravention of a statutory mandate*; although the NLRA does not give the court jurisdiction to review the Board's bargaining unit certification determination.

1. In *Kyne* the Board certified a bargaining containing professionals and non-professionals in direct contravention of §9(b)(1). Because the employer had no remedy, he sued the NLRB directly, and took them to federal court, and the Supreme Court held this was permissible when there is **direct statutory violation**.

*[*Leedom v. Kyne*].

2. **But Note:** the *Kyne* exception is a **very narrow one**, not to be extended to permit plenary district court review of Board orders in certification proceedings whenever it can be said that an

erroneous assessment of the facts before it has led to a conclusion which does not comport with the law [*Boire v. Greyhound Corp.*].

§2.3: SECURING BARGAINING RIGHTS THROUGH UNFAIR LABOR PRACTICE PROCEEDINGS

A. **Generally:** although it is much easier for the union to secure recognition through a Board conducted election, this is not the only method by which a union can secure bargaining status. The union can also secure bargaining status through unfair labor practice proceedings brought against the employer, typically upon claims that the employer improperly refused to bargain under §8(a)(5).

1. Under this approach, the union must demonstrate majority status through authorization cards.

There are two types of authorization cards:

a. *Single Authorization Cards:* which are signed by the employee stating that he authorizes a election **only**; and

b. *Dual Authorization Cards:* which are signed by the employee and authorize the union to seek and an election and thereafter upon a victory in the election to represent the employee.

*Under the law as written, an employee does not have to become a member of the union even if he union represents the bargaining unit; hence, an employee signing a single authorization card is not per se represented upon victory by the union.

B. **G/R: Gissel Bargaining Orders:** the most commonly traveled route for a union to obtain recognition as the exclusive bargaining representative is through the Board's election and certification procedures under NLRA §9(c); however, a union is not limited to an election because §8(a)(5) provides that it shall be an unfair labor practice for an employer to refuse to bargain collectively with the representatives of his employees, subject to the provisions of §9(a). Under §9(a) an employer **has a duty to bargain whenever the union representative presents convincing evidence of majority support.**

1. Thus, the Union can establish majority status by means other than an election by showing:

- a. convincing support, for instance by a union called strike or a strike vote; or
- b. through possession of authorization cards signed by a majority of the employees authorizing the union to represent them for collective bargaining purposes.

2. The Board is not limited to cease and desist orders in cases where an employer commits an unfair labor practice; but also has the authority issue a bargaining order without first requiring the union to show that is been able to maintain a majority status. The Board orders three types of bargaining orders:

a. *Gissel I Orders:* can be entered (even when a union has not demonstrated a majority) when the employer's acts are so egregious that a bargaining order may be issued; such as, when an employer rejects the union's showing of majority status and then engages in coercive unfair labor practices designed to undermine that support.

b. *Gissel II Orders:* can be issued when the union has demonstrated a majority, through cards or otherwise, and the employee acts to undermine or impede the election process;

- i. Such cases the Board will take into account the extensiveness of an employer's unfair labor practices in terms of their pas effect on the election conditions and their likelihood of reoccurrence in the future.

c. *Gissel III Orders:* the employer's unfair labor practices are minimal and do not affect the election process too much, in these cases, the issuance of a bargaining is largely discretionary on behalf of the Board, and is the category most likely where the issuance of an order may not be granted.

*[*NLRB v. Gissel Packing Co.*].

C. **G/R:** Cumberland Shoe Doctrine: the customary approach of the Board in dealing with allegations of misrepresentations by the union and misunderstanding by the employees for the purpose for which authorization cards were being solicited is:

1. that if the card itself is unambiguous (i.e. states on its fact that the signer authorizes the union represent an employee for collective bargaining purposes and not to seek an election) it will be counted *unless* it is proven that he employee was told that the card was to be used *solely* for the purpose of obtaining an election.

a. The “solely requirement” is enforced strictly; therefore, the test is liberal and it gives a lot of weight to the authorization card. In other words, the cards are counted unless the employee can show that the union representative said the card was **solely for the purposes of an election, and nothing else.**

2. Alternative Approach to Authorization Cards: under the Board’s current approach, an employer’s good faith doubt as to the union’s majority status is largely irrelevant and the key to an issuance of a bargaining order is the commission of a serious unfair labor practice that interferes with the election process and tends to preclude holding a fair election.

a. Thus, an employer can insist that a union go t an election, regardless of his subjective motivation, so long as he is not guilty of misconduct; he need no affirmative reasons for rejecting a recognition request, and he can demand an election with a simple “no comment” to the union.

b. *Caveat*: an employer **cannot refuse** to bargain if he *knows*, through a personal poll for instance, that a majority of his employees supported the union; and union cannot refuse recognition initially because of questions as to the appropriateness of the unit and then later claim, as afterthought, that he doubted the union’s strength.

3. **NOTE**: the Supreme Court in *Gissel* did not rule on which of these was the more viable method; instead, it merely stated that in this case, the authorization cards were unambiguous single authorization cards, and hence, it did not have to decide which approach is more viable. However, the Board follows the alternative approach. And your dumbass should argue that one of the exam.

*[*NLRB v. Gissel*].

D. **G/R:** Timing of Finding Election Fairness: under *Gissel* the issuance of a bargaining order when the Board concludes that the employers unlawful conduct has made a fair election unlikely and that the earlier-gather cards better reflect uncoerced employer preferences. At what precise time should the possible fairness of an election be determined? The answer is unclear, but generally the Board will take into considerations of intervening factors between the commission of the Act, and the ultimate resolution of the case (which is probably years later).

E. **G/R:** Criteria for Issuance of a Bargaining Orders: the board has failed to establish clear guidelines for establishing when a bargaining order may be entered; however, in a dissenting opinion which was supported by the Court of Appeals, stated a bargaining order should only be issued when:

1. in a case where significant benefits were granted during an organizing campaign; and
2. when the employer engaged in repeated discriminatory acts in violation of §8(a)(3).

*[*NLRB v. General Stencils*].

3. One standard is clear however—the board **must have a majority of employee support before the board will issue a bargaining order.** [*Gourmet Foods, Inc. v. Warehouse Employees of St. Paul*].

F. **G/R: Refusal to Bargain Absent Unfair Labor Practices:** a union with authorization cards purporting to represent a majority of employees which is refused recognition by an employer (who has not committed any unfair labor practices) has the burden of taking the next step and invoking the Board's election procedure or it can file unfair labor charges (based on a refusal to bargain) and hope for a *Gissel III* bargaining order [*Linden Lumber v. NLRB*].

H. **G/R: Factors relevant in the Issuance of a *Gissel II* Bargaining Order:** there are three factors that are crucial in the issuance of a *Gissel II* bargaining order:

1. the passage of time since the practices;
 - a. This is important because of changes in circumstances, the dispute may have dissipated, and so forth.
2. turnover of unit members; and
 - a. Turnover unit members is important because the card majority may have changed, either up or down.
3. change in management.
 - a. This is the most difficult element to evaluate, but management may either support, or more usually, not support a union and change in one direct or the other is relevant.

*[*Flaming Hilton v. NLRB*].

I. **G/R: Certification Bar:** a certification, if based on a board conducted election, must be honored for a reasonable period of time, usually a year, in the absence of *unusual circumstances*.

1. *Unusual Circumstances:* have been found in at least three circumstances:
 - a. the certified union dissolved or became defunct;
 - b. as a result of schism, substantially members of and officers of the certified union transferred their affiliation to a new local or international; or
 - c. the size of the bargaining unit fluctuated rapidly within a short time.

*[*Brooks v. NLRB*].

J. **G/R: Duty to Bargain:** the Board has uniformly found an unfair labor practice where, during the certification year, an employer refused to bargain on the ground that the certified union no longer possessed a majority; that is, during the one year certification an employer's refusal to bargain with the union is a *per se* unfair labor practice under §§8(a)(1) and 8(a)(5).

1. **Policy:** the policy behind this Rule is that the NLRA provides:
 - a. employees can petition the Board for a de-certification after a year, at which time they have an opportunity to choose to no-longer be represented by the union;
 - b. an employer, if in doubt as to the majority claimed by a union without formal election or beset by conflicting claims of rival unions, can likewise petition the Board for an election;
 - c. after a valid certification or de-certification election has been conducted, the Board cannot hold a second election in the same bargaining unit until a year has elapsed; and
 - d. *Board certification can only be granted as the result of an election*, though an employer would presumably still be under a duty to bargain with an uncertified union that had a clear majority.

2. **G/R:** thus, the general rule is that the employer has a *duty* to bargain with a certified bargaining agent for 1-year even if, shortly after the election which resulted in certification, the union lost without fault of the employer a majority of employees for from the union because this rule furthers industrial peace and stability, with due regard to administrative prudence.

*[*Brooks v. NLRB*].

K. **G/R: Presumption after the Certification Period:** after the one year certification period, the presumption of majority status continues, but it becomes rebuttable. This presumption is designed to promote stability in collective bargaining relationships without impairing the free choice of employees.

1. Accordingly, once the presumption is shown to be operative, a *prima facie* case is established that an employer is obligated to bargain, and that its refusal to do so is unlawful.
2. The prima facie case may be rebutted if the employer affirmatively shows either:
 - a. that at time of the refusal to bargain the union no longer enjoyed majority representative status; or
 - b. that the employers refusal was predicated on a *good faith* and *reasonably* grounded doubt of the union's continued majority status, for example, if only ¼ of the employees were paying union dues.
 - i. this is an objective standard which can be proven by facts such as the employees not paying dues or demonstrating a general interest not to be in the union.

**[*Brooks v. NLRB*].

L. **G/R: Non-Strike Situations:** the Board has long presumed that new employees hired in a non-strike situation support the incumbent union is the same proportion as the employee's they replace [*NLRB v. Curtis Matheson*].

M. **G/R: Strike Situations:** in strike situations, the Board will not apply any presumption regarding striker replacements' union sentiments, and will determine their view on a case by case basis [*NLRB v. Curtis Matheson*].

N. **G/R: Board's Presumption Analysis:** the starting point for the Board's analysis is the basic presumption that the union is supported by a majority of bargaining unit employees.

1. The employer bears the burden of rebutting the presumption, after the one-year certification period, either by showing that the union *in fact* lack majority support, or by demonstrating a sufficient *objective* good faith basis for doubting the union's majority status.
2. When dealing within non-striking replacements, the board presumes the replacements support the incumbent union;
3. Under its no-presumption analysis for dealing with strike-breakers, the Board takes into account the particular circumstances surrounding each strike and the hiring of replacements, while retaining the long standing requirement that the employer must come forth with some objective evidence substantiate his doubt of continuing majority support.
 - a. Hence, in particular situations, the Board may find that the strike-breakers actually support the union but were forced to cross the picket line because of economic reasons requiring him to work
4. **Held:** the Board's refusal to adopt a presumption that striker replacements oppose the union is rational and consistent with the NLRA and therefore it may formulate a no presumption rule and evaluate each case on a case-by-case basis.

*[*NLRB v. Curtis Matheson*].

O. **G/R: Judicial Review of Board Decision Making:** the Supreme Court has emphasized often that the NLRB has the primary responsibility for developing and applying the national labor policy and will uphold a Board decision if it is **rational and consistent** with the NLRA.

1. Although the Board generally may not act as arbitrator of the economic weapons the parties can use, it may adopt rules restricting conduct that threatens to impair the employee's right to engage in concerted activity.

*[*NLRB v. Curtis Matheson*].

O(1). **G/R:** Test for Upholding Factual Findings of an Administrative Agency: whether the conclusion is supported by substantial evidence as a whole; that is, the court must decide whether on the record it would have been possible for a reasonable jury to reach the Board's conclusion [*Allentown Mack v. NLRB*].

P. **G/R:** Employer Options when Believes Union No Longer Enjoys Majority Support: under longstanding precedent of the NLRB, an employer who believes that an incumbent union no longer enjoys the support of a majority of its employees it has three options:

1. request a formal, Board supervised election;
2. withdraw recognition for the union and refuse to bargain; and
3. to conduct an internal poll of employee support for the union.

*The NLRB has consistently held that the latter two are unfair labor practices *unless* the employer can show it had a "good faith reasonable doubt" about the union's majority support.

*[*Allentown v. Mack v. NLRB*].

Q. **G/R:** Job Interviews: in job interviews, the Board is skeptical of persons who disavow union support because anyone who says that may only be trying to appease the employer and obtain a job.

R. **G/R:** Polling: generally, an employer would want to conduct a poll to determine if the majority still retains majority status. If a poll is conducted under the proper procedures, then the employer has conclusive proof of a good faith reasonable doubt that the majority has lost support.

§3: NEGOTIATION OF THE COLLECTIVE BARGAINING AGREEMENT

I. OVERVIEW

A. **Generally:** Congress has to a considerable degree replaced a bargaining structure based on voluntarism and economic force with one based on legal compulsion. This policy is reinforced by a host of federal and state statutes that limit the managerial control and promulgate substantive rules regarding the workplace.

B. **NLRA §8(a)(5) and 9(a):** unequivocally impose an obligation on the to recognize the bargaining representative designated or selected by a majority of its employees in the appropriate bargaining unit.

C. **NLRA §8(d):** Collective Bargaining: to bargain collectively is the performance of a mutual obligation of the employer and the representative of the employees to meet at reasonable times and **confer in good faith** with respect to wages, hours, and other terms and conditions of employment, or the negotiation of an agreement, or any question arising thereunder....

D. **G/R:** Discriminatory Discharges and Secondary Boycotts: the law (NLRA) forbids resort to economic weapons such as discriminatory discharges by the employer and secondary boycotts by the union as a means of extracting bargaining concessions, but other weapons not expressly outlawed elsewhere in the statute may be proscribed under **NLRA §§ 8(a)(5) and 8(a)(3)**.

E. **G/R:** Substantive Content of Collective Bargaining Agreement: nonetheless, despite all the rules, the substantive content of the collective bargaining agreement remains to a great degree “free” or unregulated.

1. The American labor policy reflects the belief that the process by which workplace rules are set is to be essentially a free one, without government dictating what proposals and counterproposals can be made, how they are to be timed, and when and how economic pressure is to be applied, and the like.
2. However, bargaining still must be done in **good faith**.

§3.1: EXCLUSIVE REPRESENTATION AND MAJORITY RULE

A. **G/R:** Contract in Labor Law: a Company, which has granted individual contracts to its employees, had a duty to bargain with the union, if the union is elected by the workers, because individual contracts cannot be excepted from the NLRA and **must** heed to collective contracts if the union is authorized by a majority vote and the union is certified or recognized as the exclusive bargaining representative of the employee [*JI Case Co. v. NLRB*].

1. Hence, §8(a)(5) requires the employer to bargain, and failure to do so is an unfair labor practice.

B. **G/R:** Individual Employment Contracts: individual contracts, no matter what the circumstances that justify their execution or what their terms, may not be availed of to defeat or delay the procedures prescribed by the NLRA looking to collective bargaining; nor to exclude a contracting employee from a duly ascertained bargaining unit; nor may they be used to forestall bargaining or to limit or condition the terms of the collective agreement.

1. Since the collective bargaining agreement is to serve the purpose contemplated by the NLRA, the individual contract cannot be effective as a waiver of any benefit to which the employee otherwise would be entitled under the agreement.
 - a. The very purpose of the Act is to supercede the terms of separate agreements of employees with terms, which reflect strength and bargaining power and serve the welfare of the group.
 - b. Its benefits and advantages are open to every employee of the represented unit, whatever the type or terms of his preexisting contract of employment.

* [*JI Case Co. v. NLRB*].

C. **G/R:** Majority Rule: the workman is free, if he values his own bargaining position more than that of the group, to vote against representation; but the **majority rules**, and if it collectivizes the employment bargain, individual advantages or favors will generally in practice go in as a contribution to the collective result [*JI Case Co. v. NLRB*].

D. **G/R:** Individual Negotiation with Employer: despite the national labor policy against racial discrimination in employment, the NLRA does not protect concerted activity by a group of minority employees (2-persons in this case) to bargain with their employer over issues of employment discrimination in circumvention of their elected representatives.

1. *Policy:* in any one or two individuals was allowed to directly negotiate with the employer, it would undermine the scheme of collective bargaining. In addition, it hurts and fragments the union, and places undue burden on the employer by making him choose which employees get priority and on his time.
2. In securing a regime of majority rule, Congress sought to secure to all members of the unit the benefits of their collective strength and bargaining power, in full awareness that the

superior strength of some individuals or groups might be subordinated to the interest of the majority.

*[*Emporium Capwell Co. v. Western Add. Comm. Org.*].

E. **G/R: Limits on Majority Rule:** *Emporium Capwell* and *JI Case* make clear that the interests and wishes of individuals and minority groups within the bargaining unit must be subordinated to the exclusive-bargaining status of the majority labor organization. However the Board and NLRA have set limits on majority rule in order to obtain more equitable results, such as:

1. in determining the appropriate bargaining unit, the Board will exclude employees w/ a conflict of interest or who lack a community of interest;
2. while the union has broad discretion, it also has a duty bargain fairly on behalf of the employees, including non-members, and failure to do so can constitute an unfair labor practice;
3. the employees can exercise their rights by ousting a union through a decertification election;
4. the Landrum-Griffin Act provides protective standards and procedures to assure proper conduct for union internal affairs;
5. unit members will not automatically become members of the union, i.e., a unit member must become a union member *only* if the employer and union negotiate a proper collective bargaining provision making membership a condition of continued employment;
6. non-mandatory bargaining subjects may be adjusted by individual or minority bargaining;
7. **NLRA §9(a)** permits employees to present and process grievances directly with the employer; and
8. **duty of fair representation:** is one of the most significant limitations upon a union's power to accommodate interests within the bargaining unit. Although adopted under the Railway Labor Act, the duty of fair representation has been extended to unions in industries covered by the NLRA.
 - a. Breach of the duty of fair representation is an unfair labor practice.

F. **G/R: Duty of Fair Dealing:** the aim of Congress [in acting the Railway Labor Act/applicable to NLRA too] was to impose on a bargaining representative of a craft or class of employees, the duty to exercise fairly the power conferred upon it in behalf of those for whom it represents, without hostile discrimination towards any of them.

1. So long as the labor union assumes to act as the statutory representative of a craft, it cannot rightly refuse to perform the **duty of fair dealing** which is inseparable from the power of representation conferred upon it, to represent the entire membership of the craft.
2. While the statute does not deny such a bargaining labor organization the right to determine eligibility of its members, it does require the union, in collective bargaining and in making contracts, to represent the non-union or minority union members of the craft without hostile discrimination, **fairly, impartially, and in good faith.**
3. Whenever, necessary to that end, the union is required to consider requests of non-union members of the craft and expressions of their views with respect to collective bargaining with the employer and to give them **notice of, and opportunity for hearing upon the proposed action.**

**Steele v. Louisville & Nashville R. Co.*

G. **G/R: Implied Fiduciary Duty:** in other words, the union has an implied duty of fair dealing; that is, a fiduciary duty (a punctilio duty of highest honor) on the part of the union to its bargaining representative [just like in *Meinhard v. Salmon*].

1. The implied duty on behalf of the union, gives its members the following rights:
 - a. notice and opportunity for a hearing;

- b. right to petition to redress grievances;
 - c. to be fairly represented; and
 - d. the right to be treated fairly, impartially and in good faith.
2. This duty is implied because there is a relationship of trust and dependence which means the fiduciary owes the represented a duty of fairness.

H. G/R: Remedies for Breach of Duty of Fair Dealing: the union (representative) which discriminates may be enjoined from doing so and its members may be enjoined from taking the benefit of such discriminatory action.

1. The employer, is also not permitted or bound to take a benefit from a contract which the bargaining representative is prohibited by statute from making.
2. In both cases, the right asserted which is derived from the duty imposed by statute on the bargaining representative is a federal right *implied* from the statute and the policy behind its adoption.
3. In the absence of any administrative remedy, the right may be asserted in federal court.
*[*Steele v. Louisville & Nashville R. Co.*]

I. G/R: Limitations on the Duty of Fair Representation: the union has the discretion to make reasonable distinctions among employees, such as, pertaining to competency, skill, and such but *cannot* be for an impermissible purpose, such as discrimination [*Ford Motor Co. v. Huffman*].

§3.2: DUTY TO BARGAIN IN GOOD FAITH

A. NLRA §8(d): requires the employer and union to meet and confer at reasonable times, and also to bargain in **good faith**.

A(1). **NLRA §8(a)(5):** makes it an unfair labor practice for an employer to refuse bargain collectively with the employee's representative.

A(3). **NLRA §8(b)(3):** makes it an unfair labor practice for a union or its agents to refuse to bargain collectively with an employer, provided it is the representative of his employees.

A(4). **Duty to Bargain Collectively:** the duty to bargain collectively under §§8(a)(5) and 8(b)(3) is defined by §8(d) as the duty to meet and confer in good faith with respect to wages, hours, and other terms of employment.

1. Clearly, the duty thus defined may be violated without a general failure of subject good faith; for there is no occasion to consider the issue of good faith if a party has **refused to negotiate in fact**—to meet and confer—about any of the mandatory subjects.
 - a. A refusal to negotiate *in fact* as to any subject which is within §8(d), and which the union seeks to negotiate, violates §8(a)(5) through the employer has every desire to reach agreement with the union upon an over-all collective bargaining and earnestly and in all good faith bargains to that end.

*[*NLRB v. Katz*].

B. G/R: Standards of Conduct under §§8(a)(5) and 8(d): The Supreme Court in establishing the parameters to be applied under the Act, has said the act does not compel any agreement whatsoever between employees and employers and it is equally clear that under §8(d) the Board **may not**, either directly or indirectly, compel concessions or otherwise sit in judgment upon the substantive terms of collective bargaining agreements.

1. However, the enforcement obligation to bargain collectively is critical to the statutory scheme and has long recognized performance of the duty to bargain requires more than a willingness to enter upon a sterile discussion of union-management differences.

*[*NLRB v. A-1 King Size Sandwiches*].

B. **G/R: Good Faith Standard**: the duty to bargain in good faith is an obligation to participate actively in the deliberations so as to indicate a present intention to find a basis for agreement. Not only must the employer have an open mind and a sincere desire to reach an agreement, but a sincere effort must be made to reach *common ground*.

1. This standard necessarily implies subjective intent depending on external manifestations.

a. **Test**: look at the conduct of the parties, rather than their isolated actions.

2. *Caveat*: §8(d) does **not** impose upon either party the duty to accept a proposal or make a concession.

*[*NLRB v. Montgomery Ward*].

C. **G/R: Proving Bad Faith**: although bad faith may occasionally be demonstrated by the declarations of the party in question, proof must ordinarily be derived by drawing inferences from external conduct; however, more often effort is made to prove determine bad faith from the tactics or procedures employed by the respondent in bargaining with the other party.

1. In certain circumstances, the Board has sought to single out particular tactics used by the respondent as *per se violations* of the duty bargain in good faith (see below).

D. **G/R: Surface Bargaining**: in evaluating the parties' good faith, the Board is not precluded from examining the substantive proposals put forth because in some instances, the proposals put forth are the only indicia bad faith.

1. *Surface Bargaining*: an employer engages in surface bargaining where its proposals are so unusually harsh, vindictive, or unreasonable that they are predictably unacceptable.

a. Thus, surface bargaining occurs where the fundamental areas of bargaining are closed off due to entrenched positions on one side.

b. Entrenchment forecloses areas of negotiation and the bargaining energies are wasted.

c. Only where such basic areas of employment are subject to discussion, can true collective bargaining occur.

2. In some instances, the mere *content* of various proposals and counterproposals between the management and the union may be sufficient evidence of a want of good faith to justify a holding to that effect.

*[*NLRB v. A-1 King Size Sandwiches*].

E. **G/R: Duty to Disclose Information**: when an employer refuses a wage increase demand by claiming economic inability during bargaining, *good faith requires* the employer to allow the union to examine the employer's confidential books and records if the union requests.

1. Good faith bargaining necessarily requires the claims made be either party to be honest claims.

2. *Caveat*: the Supreme Court noted, however, that in every case in which economic inability is raised as an argument against increased wages it does *not* automatically follow employees are entitled to substantiating evidence, it will be determined on case by case basis.

*[*NLRB v. Truitt Mfg. Co.*].

F. **G/R: Duty to Supply Information:** the duty to bargain collectively under §8(a)(5), includes a duty to provide relevant information needed by the labor union for the proper performance of its duties as the employees bargaining representative.

1. The duty to supply information under §8(a)(5) turns on circumstances of each case and the same can be said for the type of disclosure which will satisfy that duty.
 - a. A union's bare assertion that it needs information to process a grievance does not automatically oblige the employer to supply all the information in a manner requested.
2. An employer does *not* violate his duty to bargain in good faith by refusing to divulge to the union representing its employees tests and test results achieved by individual employees in a psychological aptitude test, unless the union obtains the employee's consent.
 - a. The policy the court espoused for the rule is that it protected the workers individual rights of confidentiality.

G. **G/R: Union's Obligation to Supply Information:** a union, like the employer, has an obligation to supply information if it is asserting facts during negotiations which the employer believes in improbable or highly unlikely; in other words, the union has the same duties as employers [*Detroit Printing Union v. NLRB*].

H. **G/R: Trade Secrets:** if a company is required, or divulges trade secrets to a union, which is highly confidential information, most companies will make a union sign an indemnification contract stating that it will be liable if it discloses the Company's trade secrets.

I. **G/R: On-the-Job Protests:** a union does not fail to bargain in good faith in violation of §8(b)(3) by sponsoring on the job conduct designed to interfere with the employer's business and place economic pressure upon him at the same time he is negotiating a contract.

1. In *Insurance Agent's Inter'nl Union*, the employees stopped soliciting policies, failed to follow company procedures, and engaged in morning sit-ins.
2. **NOTE:** none of these tactics were protected by NLRA §7. Unprotected activities which are *grounds for discharge* are also deemed to be unfair labor practices.
 - a. Employees, by engaging in such unprotected activity, risk suffering the consequences of participating in such activities—being fired.
 - b. But as long as the *negotiations are conducted in good faith*, unprotected activities outside of the negotiations will not taint the bargaining process.

*[*NLRB v. Insurance Agents' Intern'l Union*].

J. **G/R: Negotiations:** an employer is **not required** to lead with his best offer; he is free to bargain. But even after impasse is reached he has no license to grant wage increases greater than nay he has ever offered the union at the bargaining table, for such action is necessarily inconsistent with a sincere desire to conclude an agreement with the union.

1. *Wage Increases:* the employer need not lead with his best offer, or even need secure the union's consent to implement a benefit; however, he must first offer the benefit to the union at the bargaining table and "bargain to impasse" on that very issue before the employer can implement the change. If the company fails to do so, it is **conclusive bad faith**.
 - a. An impasse is reached when there is a deadlock.

*[*NLRB v. Katz*].

K. **G/R: Unilateral Action by the Employer:** unilateral action by the employer without prior discussion with the union does amount to a refusal to negotiate about the affected conditions of employment

under negotiation, and must of necessity obstruct bargaining because it will often disclose an unwillingness to agree with the union and rarely justified by any reason of substance.

1. The Board may hold such unilateral action to be an unfair labor practice in violation of §8(a)(5) without also finding an employer guilty of overall subjective bad faith.

2. Once the company and the union have reached an impasse at the bargaining table, they may confer benefits; however, the employer **may not make unilateral changes which confer greater wage increases** than any he has ever offered the union at the bargaining table because such action is necessarily inconsistent with a sincere desire to conclude an agreement with the union.

3. **Held:** an employer's unilateral change in conditions of employment under negotiation is a violation of §8(a)(5) because it circumvents the duty of negotiation, which frustrates the objectives of §8(a)(5) much as does a flat refusal to bargain.

*[*NLRB v. Katz*].

L. **G/R: Merit Increases and the Status Quo:** a company is permitted to make changes to the status quo without violating the duty of to bargain in good faith; however, the status quo must be defined and standardized and not left to the whim and caprice of the company. It must use objective criteria in defining the status quo. Moreover, if the status quo is change (such as granting a merit increase after X number of working days without an injury) and the company fails to implement that change, then that also could be *substantially departing from past practices* and hence, a violation of a duty to bargain in good faith.

1. EX: if a company regularly grants merit increases, "merit" must be defined as some objective criteria, such as accomplishing a task or low absenteeism. Then the company can make a unilateral change without bargaining to impasse on the subject because it is not really making a unilateral change, it is merely implementing company policy.

a. This can be viewed as an exception to the general rule that a company must first bargain to impasse before implementing a unilateral change.

*[*McClatchy Newspapers v. NLRB*].

M. **G/R: Boulwarism:** it may be an unfair labor practice for an employer to carefully present a researched benefit package and then assume a "take it or leave it" bargaining position, while at the same time undertaking an extensive publicity campaign aimed at the public and its employees about the merits of the package and stating it will not horse trade or give into a strike.

1. The Board, if fact, held such tactics did constitute unfair labor practices because the company was unable to bargain fairly; that is, they were set on implementing their proposal unilaterally adopted.

*[*NLRB v. General Electric*].

N **NLRA §10(c): Remedies for Breach of Duty to Bargain:** under §10(c) the Board may impose several remedies for breach of duty to bargain in good faith:

1. the Board may order a bargaining order;

2. compensatory relief;

3. or any other remedy just under the circumstances (taking into consideration the flagrancy of the violation);

4. **BUT NEVER** can the Board force an agreement upon the parties; the Board may never order a party to accept a particular agreement.

§3.3: SUBJECTS OF COLLECTIVE BARGAINING

A. **Generally:** the subjects of collective bargaining fall into one of three categories:

1. *Mandatory Bargaining Subjects;*
2. *Permissive Bargaining Subjects;* and
3. *Illegal Bargaining Subjects.*

B. **NLRA §§8(a)(5); 8(b)(3); 9(a); and 8(d):** Mandatory Bargaining Subjects: §§8(a)(5); 9(a); and 8(d) delineate the scope of the mandatory bargaining subjects under the NLRA:

1. **§9(a):** states that representatives designated or selected for the purposes of collective bargaining by the majority of the employees shall be the exclusive representative of the employees for bargaining with respect to *rates of pay, wages, hours of employment, or other conditions of employment.*
2. **§8(d):** imposes a duty on both parties to bargain collectively over those subjects; and
3. **§§8(a)(5) and 8(b)(3):** makes it an unfair labor practice for either the union or the employer to refuse to bargain collectively over those subjects.

B(1). **G/R: Mandatory Bargaining Subjects:** the duty to bargain extends to each and every subject embraced within the statutory phrase, so that it is an unfair labor practice for either the employer or union to refuse to bargain about such subject upon the request of the other.

1. Courts have interpreted “rates of pay, wages, hours of employment, or *other conditions of employment* [the catchall]” to include several things, such as:
 - a. *Retirement Benefit Plans:* as falling within the meaning of rates of pay;
 - b. *Work Assignments:* as a condition of employment;
 - c. *Grievances:* as falling within the scope of conditions of employment;
 - d. *Safety Rules and Practices:* as falling within the scope of conditions of employment;
 - e. *Job Security:* as falling within the scope of conditions of employment (brings in subcontracting issues)
 - f. Among others.

C. **G/R: Permissive Bargaining Subjects:** are thing which fall outside the terms “rates of pay, wages, hours or employment, or other conditions of employment.” They are not statutory; therefore, there is no duty to bargain over about these topics.

1. Under some circumstances, insisting upon bargaining to agreement on a permissive subject *may* be a per se violation of §§8(a)(5) or 8(b)(3).

D. **G/R: Illegal Bargaining Subjects:** an illegal contract provision (one which violates the law, yeah no shit dumbass) is not mandatory, nor permissive, and is not even permissible for inclusion in a labor agreement.

1. It is an unfair labor practice to insist on the inclusion in the contract of an illegal provision or use economic force in support of such a demand.
2. Even a voluntarily negotiated illegal provision is unenforceable and void.

***G/R:** the distinction between mandatory and permissive is needed in order to determine:

1. whether a party must bargain in good faith if requested (required to do if mandatory);
2. whether pertinent information must be disclosed (required if mandatory);
3. whether unilateral action may be taken without bargaining to impasse (may done if permissive); and
4. whether instance backed by economic force is lawful (permissible if mandatory; gray area if permissive).
5. whether an action constitutes an unfair labor practice.

a. EX: in *Fibreboard* (below) the court held that subcontracting was a mandatory subject of bargaining; hence, if it would have fired the employees for picketing because it of their picketing it would have been an unfair labor practice; on the other hand if the subject was not mandatory, the picketing would have been grounds for being fired and they would have committed the unfair labor practice.

**THUS CLASSIFY THE SUBJECT BEFORE APPLYING OTHER RULES!

E. **G/R:** Compulsory Agreements and Substantive Terms of a Labor Agreement: the NLRA was designed to promote industrial peace by encouraging the making of voluntary agreements governing relations between unions employers.

1. The Act **does not compel** any agreement whatsoever between the employers and employees.
 - a. §8(d) contains a good faith test of bargaining and an express provision that the obligation to bargain collective does *not compel* either party to agree to the proposal or require the making of a concession.
2. The Act **does not** regulate the substantive terms governing wages, hours, working conditions, which are incorporated into the agreement.
 - a. The Act does not undertake the governmental regulation of wages, hours, working conditions; instead, it seeks to provide a means by which agreement may be reached with respect to them.
 - b. It is equally clear that the Board may not, directly or indirectly, compel concessions or otherwise sit in judgment upon the substantive terms of the collective bargaining agreement.

*[*NLRB v. American Nat'l Ins. Co.*].

F. **G/R:** Management Functions Clause: a management functions clause is a clause dealing with promotions, discipline, work scheduling and the like whereby the company attempts to exclude such subjects from arbitration and grievance procedures.

1. The bargaining for a management functions clause covering any condition of employment guaranteed by §7 **is not** a *per se* violation §8(a)(5) and the duty to bargain in good faith and under the statute the Board cannot tell what the management they can bargain for, unless it is illegal.
 - a. Refusal to negotiate, or a take it or leave it approach may be evidence of bad faith in negotiating but it is still a permissive bargaining subject under the act.

*[*NLRB v. American Nat'l Ins. Co.*].

G. **G/R:** Insistence of Permissive Subjects in the Collective Bargaining Agreement: the insistence on inclusion in a collective bargaining agreement of proposals that are not mandatory subjects of collective bargaining is, in effect, a refusal to bargain about subjects which are within the scope of mandatory bargaining and hence a violation of §8(a)(5) [*NLRB v. Borg-Warner Corp.*].

F. **G/R:** Industry Promotion Funds: an industry promotion fund (such as to support and advance the interests of the floor covering industry) is not a subject of mandatory bargaining (and hence permissive) because an industry promotion fund is outside the employment relationship [*NLRB v. Detroit Resilient Floor Decorators*].

G. **G/R:** Past Practices: when a company has consistently provided an amenity to its workers and has established a history of such practices, and for practicable reasons the workers are unable to obtain the goods from any other location, the providing of those goods is a mandatory bargaining subject because it becomes a "condition of the workplace." [*Ford v. NLRB*].

1. In *Ford*, the Supreme Court upheld the Board's order requiring the parties to bargain over the vending machine prices because when the consistent view of the company in *past practices* was that in-plant food prices and services were provided to workers, and they were unable to obtain them from other sources, they became a condition of employment.

H. **G/R: Effect on Employees:** if a policy implemented by the company has a substantial effect on employees, such as the potential to effect the continued employment of employees who become subject to it, it is a mandatory bargaining subject as a condition of employment [*Johnson-Bateman v. Intern'l Ass'n of Machinists*].

1. In *Johnson-Bateman*, the Court held that the implementation of a drug testing policy was a mandatory subject of bargaining because it had the potential to affect the continued employment of the workers who were subject to it and the testing requirement was **germane to the working environment**.

2. **TEST:** if something is germane to the working the environment it may have the potential to become a "condition of employment" and hence, a mandatory bargaining subject.

I. **G/R: Changing the Status Quo:** in labor law, the status quo governs until negotiations prove otherwise; thus, if the employer unilaterally changes the status quo it could have the effect of being an unfair labor practice, or a mandatory subject of bargaining, because the general rule in labor is negotiation before change.

J. **G/R: Subcontracting:** a stipulation with respect to contracting out of work performed by members of the bargaining unit is appropriately called a condition of employment.

1. The Act does encourage a party to engage in a fruitless marathon discussions at the expense of frank statements in support of his position; it does however, at least demand that the issue be submitted to the mediatory inclusion of the collective bargaining agreement.

3. **Held:** "the contracting out" for replacement employees to replace the existing bargaining unit with those of independent contractors to do the same work under similar conditions of employment, *is a statutory subject of collective bargaining*.

a. **Note:** Thus, subcontracting is a mandatory subject of collective bargaining *but* the court limited its holding to contracting out that involves the replacement of employees in a bargaining unit with those of an independent contractor to do the same work under similar employment conditions and specifically *held* that it did not encompass other forms of subcontracting.

b. Justice Stewart concurring opinion, however, proved to be more influential than the majority opinion, the key statement being: **Nothing the Court holds today should be understood as imposing a duty to bargain collectively regarding such managerial decisions, which lie at the core of entrepreneurial control.**

*[*Fibreboard v. NLRB*].

J(1). **G/R: Subcontracting as the Status Quo:** in *Fibreboard* there was no contract between the union and employer at the time of the subcontracting and the employer had never subcontracted that work before; hence, it was changing the status quo.

1. If the company has a managements functions clause in the collective bargaining which gives it the right to subcontract, it may do so permissibly.

2. Moreover, when a employer's decision to subcontract is consistent with *past practice*, it is that practice which will be treated as the status quo, and the employer is free to continue unilaterally to subcontract consistent with that status quo and need bargain only regarding a departure therefrom.

3. The Board will also not likely find a duty to bargain when the subcontracting has little or no impact on job security of workers in the bargaining unit.

*[*Westinghouse Elect. Corp.*].

K. **G/R: Subjects of Bargaining:** NLRA §8(d) does not immutably fix a list of subjects for mandatory bargaining; however, it does establish a limitation against which proposed topic must be measured. In general terms the limitation includes only issues that settle an aspect of the relationship between employers and employees.

1. **Subjects that Cannot be Bargained Over:** items which have an indirect impact on workers, such as management decisions having only an indirect and attenuated impact on the employment relationship are outside the scope of bargaining; such as:

- a. choice of advertising and promotion;
- b. product type and design; and
- c. financing arrangements.

2. **Subjects that Can be Bargained Over:** other management decisions, which have a *direct* impact on workers and are almost exclusively an aspect of the relationship between employer and employee *must* be bargained over; such as:

- a. the order of succession of layoffs, recalls;
- b. work rules;
- c. labor costs (a matter particularly suitable for resolution within the collective bargaining unit);
- d. *termination* of employment (which **results from the closing of a plant**); and
- e. job security.

3. **Other Management Decisions:** [partial closings]: a third type of management decision, one that has a direct impact on employment, since jobs will be eliminated by the termination, but has its focus on the *economic profitability* of a contract, a concern wholly apart from the employment relationship.

- a. A decision, involving a change in the scope and direction of an enterprise, is akin to a decision whether to be a business at all, not in itself primarily about conditions of employment, though the effect of the cession may necessarily terminate employment.

*[*First Maintenance Corp. v. NLRB*].

L. **G/R: TEST for Determining Whether a Management Decision can be Bargained Over:** in view of an employer's need for unencumbered decision making, bargaining over management decisions that have a substantial impact on the continued availability of employment should be required only if the benefit, for labor-management relations and the collective bargaining process, outweighs the burden placed on the conduct of business [*First Maintenance Corp. v. NLRB*].

M. **G/R: Decision to Close Business:** an employer's decision to shut part of its business for purely economic reasons is not a term and condition of employment subject to mandatory bargaining under the Act [*First Maintenance Corp. v. NLRB*].

N. **G/R: Effects Bargaining:** there is no doubt that the an employer is under a duty to bargain about the results or effects of its decision to *stop work* at particular plant [*First Maintenance Corp. v. NLRB*].

1. The union is also entitled to bargain contract provisions relating to notice of termination and the like.

O. **G/R: Plant Relocations**: the following standard is used for determining whether a decision to relocate bargaining work is a mandatory subject of bargaining:

1. First, the burden is on the NLRB to establish that the employer's decision involved a relocation of unit work unaccompanied by a basic change in the nature of the employer's operation.
 - a. If the NLRB successfully carries his burden in this regard, he will have established *prima facie* that the employer's decision is a mandatory subject of bargaining.
2. Then the employer may produce evidence rebutting the *prima facie* case by establishing that:
 - a. the work performed at the new location *varies significantly* from the work performed at the former plant;
 - b. the work performed at the former plant is to be discontinued entirely and not moved to the new location, or
 - c. establishing that the employer's decision involves a change in the scope and direction of the enterprise.
3. Alternatively, the employer may proffer a defense to show by a preponderance of the evidence:
 - a. that labor costs (direct and/or indirect) were not a factor in the decision; *or*
 - b. the even if labor costs were a factor in the decision, the union could not have offered labor cost concessions that could have changed the employer's decision to relocate.
4. The Test involve three distinct layers of analysis:
 - a. First the test recognizes decisions laying at the **core of entrepreneurial control**, in which the employer may unilaterally take action; specifically, the test **exempts** from the duty to bargain relocations involving:
 - i. a basic change in the nature of the employer's operation;
 - ii. a change in the nature of the scope and direction of the employer's enterprise;
 - iii. situations in which the work performed at the new location varies significantly from the work performed at the former plant; or
 - iv. situations in which the work performed at the former plant is to be discontinued entirely and not moved to the new location.
 - b. The second layer is a subjective one wherein the relevant question is whether **labor costs were a factor** in the employer's relocation; under this analysis the Board will distinguish relocations motivated by labor costs from those motivated by other perceived advantages of the new location.
 - c. The third layer involves a futility provision; the Board permits an employer to relocate without negotiating where its union would not or could not offer sufficient concessions to change its decision.
5. **Expenditure of Capital**: the expenditure of capital is a factor but it is not a dispositive factor in the courts analysis because many terms and conditions of employment over which employers are plainly bound to bargain involve the expenditure of capital.
 - a. Unless management rights are impermissibly invaded every time a union bargains for a break-room water cooler or shop floor safety equipment, the realm of mandatory bargaining must include at least some decisions involving capital expenditures.

*[*United Food & Commercial Workers v. Dubuque Packing*].

P. **G/R: Plant Closings Bill—the Worker Adjustment and Retraining Notification Act**: this bill affect employers with **100 or more** employees and deals with:

1. ***Plant Closings***: a temporary or shutdown of a single site that results in loss of employment for **50 or more employees during any 30-day period**, and

2. *Mass Layoffs*: a **reduction of 33% of the employees or at least 50-employees** during any 30-day period.
3. In either case, 60-days notice must be given to the union, if the employees are represented under the NLRA, or to the employees individually if they are not so represented.
4. The Act may be enforced in federal court brought by the union or by the aggrieved employees.

Q. G/R: Unilateral Action and Pension Plans: an employer's unilateral modification of pension and insurance benefits negotiated by the union for all employees is merely a *permissive* subject of collective bargaining and such a modification not an unfair labor practice which must be resolved through collective bargaining of the retirees [*Allied Chemical v. Pittsburgh Plate Glass*].

R. G/R: Vitally Affects Test: in each case the question is not whether the third party concern is antagonistic to or compatible with the interests of the bargaining unit employees, but whether it **vitally affects the terms and conditions of their employment**.

1. In *Allied Chemical*, the Court held that pension plans of retiree's did not vitally affect the terms and conditions of the workers employment;
2. In *Teamsters v. Oliver*, however, the court held that a rental agreement for trucks vitally affected the truck drivers was a mandatory subject of bargaining because it was integral to the establishment of stable wage structures covered by the employees.

*NOTE: the NLRB has held that job applicants are "employees" with the statutory definition of the Act; therefore the same factors apply to them as does the other parties.

§3.4: ROLE OF THE STRIKE AND THIRD PARTY IMPASSE RESOLUTION

I. THE PREMISES OF COLLECTIVE BARGAINING AND THE ROLE OF THE STRIKE

A. Generally: collective bargaining is part of an economy founded on free enterprise. Collective bargaining works for two main reasons, among others:

1. The long negotiations over the terms of a collective bargaining contract tend to bring about agreement, or at least to narrow the area of disagreement; and
2. the second factor that makes collective bargaining work is the strike (or fear of the strike).
3. So long as our labor policy is predicated on collective bargaining, we cannot eliminate the risk of strikes—we must pay for our freedom.

II. FACILITATION OF VOLUNTARY AGREEMENTS

A. Generally: Congress has sought to preserve the strike as a last resort by encouraging the parties first exhaust all attempts at direct negotiation as well as third party intervention in order to reach a settlement which will reflect the private interests of the parties.

B. G/R: Notification and "Cooling Off" Period: **NLRA §8(d)** provides elaborate procedural requirements designed to help settle labor disputes, and to avert hasty and ill considered strikes.

1. **§8(d)(1)**: requires that any party any party desiring to terminate or modify an existing collective bargaining agreement must serve written notice on the other party at least 60-days prior to the expiration date of the contract, or, if the contract provides no such date, 60-days prior to the time when the termination or modification is to be made.

2. **§8(d)(3):** stipulates that within 30-days of submitting written notice required by §8(d)(1), the moving party must inform the Federal Mediation and Conciliation Service together with any State agency which is designed and empowered to mediate or conciliate the dispute.
3. **§8(d)(4):** requires the party to continue in full force and effect without restoring to strike or lockout, all the terms and conditions of the exiting contract for a period of 60-days after such notice is given or until the expiration date of such contract, whichever occurs later.
4. A failure to comply with these provision constitutes an unfair labor practice as a refusal to bargain under §§8(a)(5) or 8(b)(3).

C. **G/R: Health Care Professions:** Congress (in 1974) *eliminated* form the Labor Act an exclusion for private non-profit hospitals, which had been a part of the Act.

1. **§8(g):** *requires* the Federal Mediation and Conciliation Service to intervene and effect a settlement in the health care negotiations and appoint a Board to investigate disputes and make recommendations for settlement.
2. The notice periods and requirements are also longer for the health care industry also.
3. In other words, strikes in the health care industry are regulated much more heavily because of the peculiar need for uninterrupted rendition of services to the public.

D. **G/R: Conciliation and Mediation:** when a conciliation or mediation agency becomes involved in an unresolved labor negotiation, its purpose is to bring the parties to agreement on the terms of a contract through the use of informed and creative persuasion (this is mediation, not arbitration).

E. **G/R: Fact Finding Boards:** fact findings board sometimes supplement the mediation services; this is more prevalent in the Railroad Industry.

I. EFFECT OF A STRIKE UPON THE DUTY TO BARGAIN

A. **G/R: Peaceful Strikes:** barring any specific provision which outlaws the action, a union's resort during negotiations to a peaceful work stoppages, even if regarded as unconventional, peculiarly disruptive, and indeed obnoxious by common standards, does not in itself violation the duty to bargain in good faith, although it may render the parties subject to discharge [*NRLB v. Ins. Agents Int'l Union*].

1. Such a strike does not relieve the employer of his duty to bargain in good faith; that is, a strike does not in and of itself, suspend the bargaining obligation [*NLRB v. JH Rutter-Rex Mfg.*].

B. **G/R: Replacement Workers:** an employer faced with an economic strike (e.g. over wages) is entitled to hire permanent or temporary replacement workers for the strikers in order to keep the business going.

1. However, if the strike is based on an unfair labor practice committed by the employer, then the employer may hire temporary replacements during the strike, but must give the employees their jobs back after resolution of the matter.

C. **G/R: Subcontracting Striking Workers Jobs:** an employer—at least absent an economic strike—is obliged to bargain with his union before he decides to subcontract.

1. The basis for this requirement is that subcontracting erodes the bargaining unit and is an “appropriate” subject for collective bargaining [*Fibreboard*].
2. *McKay Rule:* an employer faced with an economic strike is entitled to replace strikers permanently with new employees.

3. Thus, the **general rule** [to reconcile these holdings] is that an employer **may not** permanently replace striking workers with subcontractors, absent an *economic necessity*.

a. *Economic Necessity*: an employer may not be obliged to bargain with a union about permanent subcontracting during a strike when that subcontracting is necessary to the business purpose of keeping the plant continuously in operation and time of decision is of the essence [*Hawaii Meats*].

i. However there is a distinction between “temporary” and “permanent” subcontractors. Temporary subcontracting is to end at the end of the strike, and the courts look more favorably on use of temporary subcontracting; whereas, permanent subcontracting is for an indefinite future period not to terminate at the expiration of the strike, which is basically tantamount to firing the employees, or at least eviscerating the bargaining unit which courts look unfavorably upon.

*[*Land Air Delivery v. NLRB*].

B. **G/R: State Law Breach of Contract Actions**: the NLRA does not preempt state court actions by displaced permanent replacements on theories of breach of contract—the promise not be displaced in a strike settlement (a fraud action exists also).

1. Hence if an employer is required by the Board, or agrees, to supplant “permanent replacements” with reinstated strikers it could be very costly for the employer.

*[*Blknap Inc. v. Hale*].

§3.5: BARGAINING REMEDIES

A. **G/R: Compelled Contract Provisions**: the object of the NLRA is not to allow governmental regulation of the terms and conditions of employment, but rather, to ensure that employers and their employees could work together to establish mutually satisfactory conditions.

1. The basic theme of the Act is that through collective bargaining the passions, arguments, and struggles of prior years will be channeled into constructive, open discussions, leading to a mutual agreement.

2. It is **clear that the Board may not, either directly or indirectly, compel concessions or otherwise sit in judgment upon the substantive terms of collective bargaining agreements.**

a. It remains clear that §8(d) prevents the Board from controlling the settling of a the terms of collective bargaining agreements.

b. It is implicit in the Act the that the Board acts to oversee and referee the process of collective bargaining, leaving the results of the contest to the bargaining strengths of the parties.

3. The Board’s remedial powers under §10(c) of the Act are broad, but they are limited to carrying out the policies of the Act itself—one of those fundamental policies is freedom of contract, this is America after all.

*[*HK Porter Co. v. NLRB*].

§4: ADMINISTRATION OF THE COLLECTIVE BARGAINING AGREEMENT

§4.1: THE COLLECTIVE BARGAINING AGREEMENT AND THE GRIEVANCE PROCESS

I. THE COLLECTIVE BARGAINING AGREEMENT

A. **Generally:** even though a collective bargaining agreement may be established, the duty to bargain collectively does not end. The parties must bargain over the *interpretation and application* of the agreement.

1. **ANY** disputes that arise when interpreting and applying the agreement can be handled in 3-ways:

1. *Grievance Discussions:* the parties may settle the disputes informally through grievance development and discussions between management representatives and union representatives.
2. *Arbitration:* the issue may be determined by arbitration if the grievance procedures do not resolve the dispute and the agreement provides for arbitration or the parties make special submissions to arbitration.
3. *Judicial Resolution:* the issue may be taken to court if there is not agreement to arbitrate or if the parties cannot agree whether or not the issue is a matter to arbitration.

B. **Collective Bargaining Agreements:** the Collective bargaining agreement is **not** a contract for employment; rather, it is a contract for people within a bargaining unit and for the wages, terms and conditions of employment for these persons. The persons within the bargaining unit can change without having any effect on the collective bargaining agreement.

1. In a collective bargaining agreement, it is not possible to reduce everything to writing because it is every hard to negotiate on every facet of industrial life.

a. Some things are left out of the agreement purposefully, or are not brought up in bargaining or resolved ambiguously (i.e. things that one side knows the other side will not concede to are not brought up purposely).

i. This is different from contract law and leaving a provision out of the bargaining agreement is not a major problem because the parties expect that disputes will arise and arbitration provisions are put in the agreement to resolve those disputes.

2. *Arbitration* then treats as part of the agreement the customs, traditions, and common practice of the particular plant.

a. Labor law is the grand dad of arbitration, 96% of labor disputes are resolved through arbitration.

b. In labor law, an arbitrator will usually write an opinion (as a method of sort of codifying the company's traditions and practices); whereas, commercial arbitrators usually do not write opinions.

3. The grievance procedure is designed to provide **industrial due process to the worker.**

C. **G/R: Object of the Agreement:** the object of the collective bargaining agreement is a written agreement between the employers and employees which defines the relations between the parties and among the employees themselves.

1. The agreement lays out the manner disputes will be resolved, including interpreting the actual agreement.

2. The agreement is NOT an employment contract, but rather fixes the terms of employment relations as employees are hired or continued to be hired.

D. **G/R: Nature of the Agreement:** the bargaining agreement is not an ordinary voluntary commercial agreement although some similarities may exist between the two.

1. The agreement is compelled by law, deals with complex, ongoing relationships that determine the parties rights subject to periodic negotiations for a considerable time in the future.

2. The agreement may contain intentional gaps and ambiguities about parties items the parties wish to leave open or could not come to an agreement or resolution on at the time of bargaining.
3. The arbitrator will interpret the agreement based on:
 - a. what has been reduced to writing;
 - b. common law; and
 - c. the customs and industrial practices of the particular industry.

E. **G/R: Institutions and Parties Involved in the Collective Agreement:** the collective bargaining is a agreement between the employer and employee; however, it necessarily contemplates other decision makers as will, including the NLRB, the courts (state and federal), arbitrators, and other federal agencies.

1. In labor law, usually a single arbitrator resolves the issue, as opposed to a panel of 3 arbitrators as are commonly used in the commercial industries.

II. THE GRIEVANCE PROCEDURE

A. **G/R: Grievance Procedure:** the grievance procedure is a several step process:

1. The first step is to determine how the collective bargaining agreement defines “grievance.”
 - a. Sometimes it is defined broadly as “any dispute, disagreement, or difference argin between any employee or the union and the company.”
 - b. More often however it is defined more narrowly, as disputes relating in some manner to the proper interpretation or application of the collective bargaining agreement.
2. Then the grievance procedure proceeds along an number of steps from informal to more formal:
 - a. Usually, the aggrieved employee or union orally presents the complaint to the immediate first in line supervisor, if that resolves the issue, it is over.
 - b. Secondly, the grievance will be reduced to writing, and carried through additional steps involving higher authority, both of the employer and union.
 - c. The process then will ultimately conclude with arbitration; however, along the way it may be resolved or the parties may not decide to pursue the issue any further because of the costs or benefit of proceeding.

B. **G/R: Grievance Mechanics:** the grievance clause in the collective bargaining agreement will usually, at a minimum, try and provide for the following things:

1. who may initiate a grievance;
2. who will evaluate the grievance;
3. how rapidly must the grievance be processed;
 - a. What is the statute of limitations for a grievance action (usually fairly short);
4. when must the grievance be reduced to writing; and
5. what special provision will be made to facilitate the work of the union representative in processing grievances.

C. **G/R: Purpose of Grievances:** a well drafted and administered grievance procedure provides an effect system for peacefully settling disputes and improving the climate of labor relations; and system of **industrial due process to create industrial peace.**

1. *Peace:* may industrial disputes can be resolved amicably without the use of the courts.
2. *Contract Interpretation:* one of the key jobs of the arbitrator is to interpret the meaning, phrases, sections, and purposes of the collective bargaining agreement.

3. **Obey then Grieve:** is the cardinal rule of the grievance procedure, there is always exceptions for safety issues the like.

§4.2: GRIEVANCE ARBITRATION

I. THE NATURE AND FUNCTIONS OF LABOR ARBITRATION

A. **G/R: Grievance Arbitration:** is a process by which disputes arising under a collective agreement are adjudicated by person who have been selected by the parties for that purpose.

1. Grievance arbitration has widespread use, and the arbitrator's decision is usually considered binding on the parties, because the parties have agreed to that in advance and it is cheaper than going to court.
2. Arbitration clauses are different in every collective bargaining agreement.
3. Arbitration is usually fairly informal, and non-technical, there are no rules of evidences or procedure.

B. **G/R: Review of the Arbitrator's Decision:** an arbitrator has much more leeway than a judge; nonetheless, the board will still have jurisdiction over arbitration disputes. **However**, the Board has stated that it will decline such jurisdiction where the arbitration proceedings are:

1. *fair and regular*,
 2. all the parties have agreed to be bound, and
 3. the decision is not clearly repugnant to the NLRA
- *In other words, review is strict and narrow.

C. **Labor Management Relations Act §301:** if the request to arbitrate is refused by an employer, the Union may bring an action in federal court under §301 of the LMRA to require the employer to arbitrate. The employer may then object to the order; the court then makes its decision whether to grant the order to arbitrate.

II. DISCHARGE AND DISCIPLINE

A. **G/R: Burden of Proof:** normally, the moving party (party seeking arbitration, usually the union) has the burden because he is the grieving party.

1. **Exception:** in discharge cases, the arbitrator will place the burden on the employer to prove discharge was not inappropriate.

B. **G/R: Standard of Proof:** the standard of proof is a preponderance of the evidence. The arbitrators never require proof beyond a reasonable doubt, even in the capital punishment of labor law—discharge.

C. **G/R: Just Cause:** discharge as a type of violation of work rules must be for “just cause.”

1. It is the arbitrator's duty to determine what constitutes “just cause.”
- *[*Mallinckrodt Inc.*].

D. **G/R: Violation of Work Policies and Uniformity:** an employer may justifiably discharge an employee for violation of a work rule, however, one of the key components in an arbitrator's decision is *uniformity*; that is, the company has to treat similarly situated persons similar.

1. EX: if one person gets fired for drinking on the job, and three others have not, the arbitrator may find that the employer ratified the conduct and hence reinstate the employee even though he broke a clear company rule.

*[Walker Mfg.].

III. SUBCONTRACTING

A. **Generally:** subcontracting is an issue that arises in the arbitration context a lot because it is usually not provided for in the contract (on the things employers are loath to bargain over) and hence arbitrators have developed several methods to deal with the issue.

B. **G/R: Arbitrator's Jurisdiction:** an arbitrator, like a court, may determine its own jurisdiction powers and if it finds that the grievance is subject to the grievance procedures of the collective bargaining agreement, it is permissible for him to decide the case, and the parties are bound [Allis-Chalmers Mfg.].

C. **G/R: Precedent in Arbitration Cases:** arbitrators are *not bound* by precedent. It is permissible for them to use them as persuasive authority, but they are not bound, *unless* it is an arbitration proceeding involving interpreting the same provision of the same contract [Allis-Chalmers Mfg.].

D. **G/R: Good Faith Test:** in determining whether a term or clause is impliedly in a contract, such as a subcontracting clause the arbitrator will look at the good faith of the employer. Good faith is present when the managerial decision to subcontract is made on the basis of a rational consideration of factors related to the conduct of an efficient, economical operation, and with some regard for the interests, and expectations of the employees affected. In so doing the arbitrator will look at:

1. *Past Practices:* of the company in subcontracting for services and for the manufacturing of components, which can be a factor in negating an broad, implied limitation on subcontracting, but not as eliminating the restriction altogether.
2. *Futility of Bargaining:* the arbitrator may also look the futility of bargaining; that is, an unsuccessful attempt by the union to negotiate into the collective bargaining agreement specific restrictions on subcontracting, is likewise a fact which may help support the claim that the parties have recognized that the company has latitude in the matter of subcontracting.
3. The arbitrator will **not** consider that it is *per se* arbitrary, unreasonable, or an act of bad faith to contract out work primarily to reduce production costs.

*[Allis-Chalmers Mfg.].

E. **G/R: Bad Faith Relating to Subcontracting:** there are instances of *bad faith* which can be prima facie established:

1. to negotiate a collective agreement with the Union representative covering classifications of work while withholding from the Union the fact that the employer contemplates, in the immediate future, a major change in operations which will eliminate such work;
2. entering into a "subcontracting" arrangement which is a subterfuge, in the sense that the "employees" of the ostensible subcontractor become in substance the employees of the employer;
3. the commingling of employees of a subcontractor, working under different set of wages or other working conditions, regularly and continuously with employees of the employer performing the same kinds of work; and
4. contracting out work for the specific purpose of undermining or weakening the union or depriving employees of employment opportunities.

*[*Allis-Chalmers Mfg.*].

F. **G/R:** Subcontracting when it has Never been Dealt with by the Parties: when an arbitrator finds that the parties have not dealt with the subject of contracting out in their working agreement, the employer is prohibited from subcontracting out *unless*:

1. he acts in good faith;
2. he acts in conformance with past practice;
3. he acts reasonably;
4. his act does not deprive a substantial number of employees of their employment;
5. his acts were dictated by the requirements of business;

OR

6. If his acts were prohibited by the recognition clause;
7. his acts were barred by the seniority provisions of the working agreement; or
8. if his act violates the *spirit of the agreement*.

*[*American Sugar Refining Co.*].

IV. EFFECT OF PAST PRACTICE AND PUBLIC LAW

A. **G/R:** Past Practices and Public Law: the collective bargaining agreement is *not* confined to the written terms of the document executed by the company and the union.

1. The agreement contains a number of unspoken rights and obligations, which go even beyond the express terms.

a. The most significant of these unwritten rules are the **customs and usages—past practices**—which represent the accepted way that the employees are treated and the production processes are ordered.

2. Another source of arbitral principles lying outside the written terms of the contract are the rules of law laid down by legislatures and courts to regulate the conduct of private persons, some of these rules apply to society generally, such as the broad rules or torts, contracts, and criminal law, while others apply only to employers and employees, such as the rules regulating industrial safety and health, the freedom of employees to organize and bargain collectively, and the abolition of employment discrimination based upon race, sex, or national origin.

B. **G/R:** Past Practices: long standing plant practices, customs and usages are incorporated into the collective bargaining agreement, *unless* expressly negated by its terms.

1. If any of these mutually acceptable methods of effectuating the contract become undesirable to either party, it should obtain the consent of the other party to revise the contract.

a. The terms of the contract **cannot be unilaterally** changed during the time period it covers.

2. In the absence of a change in the contract, established practices under the old contract are given approval by the execution of the new and become (by construction) part of the new contract.

3. This principle has been applied against labor as well as management.

*[*Phillips Petroleum*].

B(1). **TEST:** the past usage, custom or practice, to achieve contractual status, **must concern a major condition of employment.**

1. Thus, existing practices, with respect to the major conditions of employment, are to be regarded in as included within the contract, negotiated after the practice has become established, and not repudiated or limited by it.

2. **FACTORS:** the arbitrator will consider are:
1. the contract's express written terms;
 2. the parties prior negotiations;
 3. the degree of mutual acceptance;
 4. the durations of the time for which the practice has been followed; and
 5. other unique facts in the plant's history or tradition which might be relevant.
- *[*Phillips Petro.*].

§4.3: JUDICIAL ENFORCEMENT OF THE COLLECTIVE AGREEMENTS

A. **Labor Managements Relation Act §301(a):** suits for violation of contracts between an employer and a labor organization representing employees in an industry affecting commerce...may be brought in any district of the United States having jurisdiction over the parties....

- B. **G/R: Judicial Interpretation of §301:** there have been two interpretations of §301 by the courts:
1. *Minority View:* §301 merely gives federal district courts jurisdiction in controversies that involve labor organizations in industries affecting commerce, without regard to diversity of citizenship or the amount in controversy.
 2. *Majority View: Jurisdiction Plus:* §301(a) is more than jurisdictional, it authorizes federal courts to fashion a body of federal law for the enforcement of these collective bargaining agreements and includes within that federal law specific performance of promises to arbitrate grievances under collective bargaining agreements. [The Supreme Court Adopted this view].
 - a. *Policy:* this construction of §301 is proper because:
 - i. it promotes a uniform federal labor law;
 - ii. the statute and legislative history support this construction; and
 - iii. to promote the policy of the national labor laws—industrial peace.
- *[*Textile Workers v. Lincoln Mills*].

- C. **G/R: Substantive Federal Labor Law:** under §301(a), federal courts can enforce collective bargaining agreements by applying a federal substantive law based on the federal courts national labor policy.
1. Thus, state law is not an independent source of private rights.
 2. These are hybrid type situations then: the court will be enforcing a collective bargaining agreement essentially through a federal contract *influenced by the national policy* regarding labor policy (i.e. federal labor statutes).
 - a. Thus, once the parties have made a collective bargaining agreement, the enforcement of that contract should be left to the usual processes of the law, and not the NLRB.
- *[*Textile Workers v. Lincoln Mills*].

D. **G/R: No-Strike Agreements:** a strike to settle a dispute which a collective bargaining agreement provides shall be settled exclusively and finally by compulsory arbitration constitutes a violation of the collective bargaining agreement [*Lucas Flour*].

E. **G/R:** only when negotiations fail, can a union strike [*Groves v. Ring Screw Works*].

F. **G/R: Judicial Review of Arbitration Awards:** the hands-off approach by the NLRB towards arbitration disputes also applies to judicial review of the award/dispute decision by the arbitrator.

G. **G/R:** Steelworkers Trilogy: in 3-cases, the Supreme Court delineated the scope, purpose, and function of a reviewing court's duty when reviewing an arbitrator's decision:

1. **G/R:** the merits of either the grievance or the arbitration award are irrelevant, when a federal court is asked to enforce an arbitration or award:
 - a. judicial review is **limited to whether the parties agreed to arbitrate the dispute** and whether the moving party is right or wrong is a matter for the arbitrator. .
2. **TEST for Determining whether the Parties Agreed to Arbitrate:** the court will determine whether the dispute or grievances falls within the scope of the arbitration clause in the collective bargaining agreement, i.e., whether the subject is substantively subject to arbitration:
 - a. It is sufficient is the claim on its face falls within the scope of the arbitration agreement;
 - b. all inferences will be drawn in favor of permitting arbitration; and
 - c. parties may voluntarily submit the issue of whether the matter can be arbitrated to the arbitrator, in which case the **WAIVE** any right to subsequent judicial review on the matter.
3. **Policy:** arbitration is the linchpin of the federal labor policy for collective bargaining enforcement and this means that the courts cannot substitute their judgment or intervene where the parties have committed themselves to arbitration.

G(1). **G/R:** under a contract providing for compulsory arbitration, all grievances must go to arbitration, no matter how frivolous or meritless they may appear to a court.

1. **Policy:** it is therapeutic and what one man considers frivolous may be not considered frivolous by another.

*[*US Steelworkers v. American Mfg.*].

G(2). **G/R:** in the absence of any express provision excluding a particular grievance from arbitration, only the most forceful evidence of a purpose to exclude the claim from arbitration can prevail; particularly where the contract provides a "no strike clause."

1. **Test for Denial of Arbitration:** after first reading the collective bargaining agreement, and determining its substantive content, the court will not deny arbitration *unless* it can be said with positive assurance that the arbitration clause was not susceptible to an interpretation that covers the asserted dispute. The federal courts can only deny arbitration if there is a positive assurance in the collective bargaining agreement that the matter was not supposed to be subjected to arbitration.

*[*United Steelworkers v. Warrior & Gulf Navigation Co.*].

G(3). **G/R:** a mere ambiguity in the opinion accompanying an arbitration award, which permits inference that the arbitrator may have exceeded his authority is *not* a reason for the court to refuse to enforce the award [*US Steelworkers v. Enterprise Wheel & Car Corp.*].

*That's the trilogy rules, it evidences that modern law favors arbitration, or at least Justice Douglas who wrote all three opinions.

§5: STRIKES, PICKETING, AND BOYCOTTS

§5.1: RIGHTS OF EMPLOYEE PROTESTERS UNDER THE NLRA

I. PROTECTED CONCERTED ACTIVITY

A. **NLRA §7:** employees shall have the right to engage in...**concerted activities** for the purpose of collective bargaining or other mutual aid and protection.

B. **NLRA §8(a)(1):** makes in an unfair labor practice for any employer to interfere with, restrain, or coerce employees in the exercise of their §7 rights.

1. §8(a)(3) also outlaws employer discouragement of union membership—which has been broadly construed to encompass concerted activity protected in §7 in support of a labor organization—which is accomplished by discrimination.

C. **G/R: Concerted Activity Defined:** the term “concerted activity” is not defined by the Act but it clearly embraces the activities of employees who have joined together in order to achieve common goals.

1. A lone employee’s invocation of a right founding in his collective bargaining agreement is a *concerted activity* in a very real sense.
 - a. caveat: of course, at some point an individual employee’s actions may become so remotely related to the activities of fellow employees that it cannot be reasonably said that the employee is engaged in a concerted activity.
 - i. EX: the Board has held that if an employer was to discharge an employee for purely personal “gripping” the employee could not claim protection of §7.
2. The employee’s who may engage in concerted activities for “mutual aid and protection” are defined by NLRA §2(3) to include any employee, and shall not be limited to the employees of a particular employer, unless the Act explicitly state otherwise.
 - a. This definition was intended to employees when they engage in otherwise proper concerted activity in support of employees of employers other than their own. The Board and courts have long held that the mutual aid and protection clause encompasses such activity.

*[*NLRB v. City Disposal Systems*].

D. **G/R: Non-Union Concerted Activity:** the language of §7 makes clear that it is not necessary to have a union sponsoring concerted activity, or anywhere on the scene, in order for such activity to be protected as “concerted activities for mutual aid or protection [*NLRB v. Wash. Alum. Co.*].

1. In *Washington Alum.* the S.Ct. held that a spontaneous walkout by 2-employees because of the coldness of the work place was concerted activity for the mutual aid or protection of the other employees, in that case, there was no union representing the employees.

E. **G/R: Interboro Doctrine:** an individual’s assertion of an individual right grounded in a collective bargaining agreement is recognized as *concerted activity* and therefore afforded the protection of §7.

1. There *must* be collective bargaining agreement for the Interboro Doctrine to apply.
2. There are two justifications for the Interboro Doctrine:
 - a. the assertion of a right contained in a collective-bargaining agreement is an extension of the concerted action that produced the agreement; and
 - b. the assertion of such a rights affects the rights of all employees covered by the collective bargaining agreement.
3. *Employees State of Mind:* the Court found that the employees state of mind is basically irrelevant, and the employee does not have to state that he is invoking a right under the collective bargaining agreement.
 - a. In addition, it is also irrelevant that the employee had his lone interests in mind at the time he took the action.

b. This is because the process—beginning with the organization of the union, continuing into the negotiation of a collective bargaining agreement and extended through the enforcement of the agreement—is a single collective activity.

4. When an employee invokes a right grounded in the collective bargaining agreement, he does not stand alone.

*[*NLRB v. City Disposal Systems*].

5. Under certain circumstances an employees actions will be held to be concerted, even if the individual is ignorant of the fact that the activities are concerted [*Air Surrey Corp. v. NLRB*].

E(1). **G/R: Application in Non-Union Situations:** the Interboro doctrine does *not apply* if there is not a collective bargaining agreement. Where employees are not unionized, an employee's assertion of a right that can only be of presumed interest to the other employees is not a concerted activity.

1. The Board will find a concerted activity *only if* it was engaged in **with other employees or on the authority of other employees.**

2. If it is not a concerted activity, the employer can discharge the employee without violating §8(a)(1).

*[*Meyers Industries*].

F. **G/R: Employees' Request for Union Assistance:** an employee's request for union assistance is within the literal coverage of the statutory phrase "concerted activities for mutual aid or protection."

1. This is true even though the employee alone may have an immediate stake in the outcome; he seeks "aid or protect" against a perceived threat to his employment security. The union representative whose participation he seeks is safeguarding the particular employee's interest, but also the interests of the entire bargaining unit by exercising vigilance to make certain that the employer does not initiate or continue a practice of imposing punishment unjustly.

*[*NLRB v. Weingarten*].

G. **G/R: Investigatory Context:** the NLRA was designed to eliminate the inequality of bargaining power between employees and employers. Requiring a long employee to attend an investigatory interview which he *reasonable believes* may result in the imposition of discipline perpetuates the inequality the Act was designed to eliminate and bard recourse to the safeguards the Act provided to redress the perceived imbalance of economic power between labor and management [*NLRB v. Weingarten*].

H. **G/R: Political and Judicial Appeals as Concerted Activity:** the mutual aid or protection clause protects employees from retaliation by their employers when they seek to improve working conditions through resort to administrative and judicial forums, and the employees appeals to legislators to protect their interests as employees are within the scope of this clause.

1. **Caveat:** some concerted activity bears a less immediate relationship to employees' interests as employees' than other such activity. At some point the relationship becomes so attenuated that an activity cannot fairly be deemed to come within the mutual aid and protection clause.

*[*Eastex, Inc. v. NLRB*].

I. **G/R: Test for Determining whether an Employees Activities are Protected:** the test of whether an employee's activity is protected is not whether it relates to employees' interests generally, but whether it relates to interests of the employees' as employees [*Harrah's Lake Tahoe Resort Casino*].

II. UNPROTECTED CONCERTED ACTIVITY

A. **G/R:** Unprotected Activities: even assuming that the employees are engaged in “concerted” activity for mutual aid and protection it does not necessarily follow that such activity is immune from discipline. The Broad language of §7 has never been read without qualification. Unprotected activities include the following:

1. *Industrial Sabotage*: destroying company equipment or products even in the cause of unionization or improvement in working conditions;
2. *Illegal Activity*: when the employees’ conduct is in violation of the law it is not protected;
3. *Disloyal Conduct*: if the employees’ conduct is so contrary to the dictates of the employment relationship as to warrant characterization as **indefensible, reprehensible, or disloyal** it will not be protected; and
4. *Violence*: actual violence, or the threat of violence are unprotected activities.

B. **G/R:** concerted activity—even for mutual aid or protection—will be held to fall outside the protection of §7 if its objective is contrary to the terms or spirit of the NLRA or allied federal legislation.

C. **G/R:** Test for When Activities are Not Protected: the Act provides no guidelines; however, the test is that otherwise protected activity will fall outside the scope of the Act if the conduct is a violation of the law or contrary to the essential duties of the employment relationship.

D. **G/R:** Use of Economic Weapons: the use of economic pressure, in support of demands outside mandatory bargaining will constitute a refusal to bargain in good faith and hence, employees will be unprotected by the NLRA and subject to summary discharge.

E. **G/R:** No Strike Clauses: if the employer and union have negotiated a no-strike clause, and the employer commits an unfair labor practice (such as discharging a union supporter) and the union goes on strike to protest the action; such activity does not violate the no strike clause because of the employer’s unfair labor practice [*Mastro Plastic Corp. v. NLRB*].

1. This is a **very important decision** and it is a powerful tool for unions.

F. **G/R:** Criminal or Tortious Conduct: if strikers engage in concerted activities which violate the criminal law or tort laws of a state, that will render their conduct unprotected (even violating an injunction).

1. The same is true when the strikers engage in actual or threatened violence on the picket line or at the home of fellow workers.

- a. **But Note**: “The emotional tension of a strike almost inevitably gives rise to a certain amount of disorder and conduct on a picket line cannot be expected to approach the etiquette of the drawing room or a breakfast table.”

- i. In other words, when a strike occurs in ain’t gonna be no cup of tea, and the Board will take that into consideration.

*[*NLRB v. Fansteel Metallurgical*].

G. **G/R:** Employee Disloyalty: an employer may discharge for cause employees who have deliberately attacked in a public way the quality of product or service provided by an employer even though such an attack comes in the midst of a labor controversy.

1. Under **NLRA §10(c)** an employee can not be reinstated if he as been discharged *for cause* and detrimental disloyalty through the distribution of negative handbills depicting the employer as unfair is sufficient case. Other reasons of discharge **for cause** include:

- a. insubordination;

- b. disobedience, or
- c. disloyalty.

III. EMPLOYERS RESPONSE TO CONCERTED ACTIVITY

A. **G/R: Discriminatory Rehiring**: discrimination in rehiring striking employees on accounts of their union activity violates §8(a)(1) in regard to *tenure of employment*. Any discrimination solely for participating in union activity which is protected under the Act, violates the Act [*NLRB v. Mackay Radio and Telegraph Co.*].

B. **G/R: Discharge and Reinstatement of Strikers**: the categories of strikers, and their ability to be reinstated, is a significant factor the union takes into consideration when deciding to call a strike, or other concerted activity. There are two categories of strikes:

1. **Unfair Labor Practice Strikes**: if the union goes on strike because a company has committed an unfair labor practice, such as the discriminatory firing of employees, *then*:
 - a. the strikers are **entitled to be reinstated** during or after the strike and the employee/strikers are not required to make an unconditional application for reinstatement before the employer is obligated to rehire them.
 - b. An employer who has **discharged a economic striker before hiring a permanent replacement** may be found to have committed an unfair labor practice because he is discriminating against an employee for lawful union activity because the discharge converts the economic striker into a unfair labor practice striker so that the discharged employee is unconditionally entitled to reinstatement (a right she would not have if she was an economic striker).
2. **Economic Strikers**: all other strikes, the most common is a strike for the increase of benefits:
 - a. an economic striker receives little protection as to reinstatement.
 - b. The employer is not compelled to discharge replacements hired during a strike or otherwise create new jobs for economic strikers after the fact; such strikers are **only entitled to** nondiscriminatory review and disposition of their job applications for rehiring.
3. **Union Unfair Labor Practices**: if the union goes on strike, and such action is itself an unfair labor practice, then employees do not have a right to reinstatement.

