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## Chapter 19

### Labor-Management Relations

#### LEARNING OBJECTIVES

After reading this chapter, you should understand the following:

1. How collective bargaining was resisted for many years in the United States, and how political and economic changes resulted in legalization of labor unions
2. The four major federal labor laws in the United States
3. The process by which bargaining units are recognized by the National Labor Relations Board
4. The various kinds of unfair labor practices that employers might engage in, and those that unions and their members might engage in

Over half a century, the federal law of labor relations has developed out of four basic statutes into an immense body of cases and precedent regulating the formation and governance of labor unions and the relationships among employers, unions, and union members. Like antitrust law, labor law is a complex subject that has spawned a large class of specialized practitioners. Though specialized, it is a subject that no employer of any size can ignore, for labor law has a pervasive influence on how business is conducted throughout the United States. In this chapter, we examine the basic statutory framework and the activities that it regulates.

It is important to note at the outset that legal rights for laborers in the United States came about through physical and political struggles. The right of collective bargaining and the right to strike (and corresponding rights for employers, such as the lockout) were hard-won and incremental. The legislation described in this chapter began only after many years of labor-management strife, including judicial opposition to unions and violent and deadly confrontations between prounion workers and management.

In 1806, the union of Philadelphia Journeymen Cordwainers was convicted of and bankrupted by charges of criminal conspiracy after a strike for higher wages, setting a precedent by which the US government would combat unions for years to

come. Andrew Jackson became a strikebreaker in 1834 when he sent troops to the construction sites of the Chesapeake and Ohio Canal. In 1877, a general strike halted the movement of US railroads. In the following days, strike riots spread across the United States. The next week, federal troops were called out to force an end to the nationwide strike. At the Battle of the Viaduct in Chicago, federal troops (recently returned from an Indian massacre) killed thirty workers and wounded over one hundred. Numerous other violent confrontations marked the post-Civil War period in America, including the violent rail strikes of 1877, when President Rutherford B. Hayes sent troops to prevent obstruction of the mails. President Grover Cleveland used soldiers to break the Pullman strike of 1894. Not until the anthracite coal strikes in Pennsylvania in 1902 did the US government become a mediator between labor and management rather than an enforcer for industry.

Many US labor historians see the first phase of the labor movement in terms of the struggles in the private sector that led to the labor legislation of the New Deal, described in [Section 19.1 "A Brief History of Labor Legislation"](#). The second phase of the movement, post-World War II, saw less violent confrontation and more peaceful resolution of labor issues in collective bargaining. Yet right-to-work states in the southern part of the United States and globalization weakened the attractiveness of unions in the private sector. Right-to-work states provided a haven for certain kinds of manufacturing operations that wanted no part of bargaining with unions. Globalization meant that companies could (realistically) threaten to relocate outside the United States entirely. Unions in the public sector of the United States began to grow stronger relative to unions in the private sector: governments could not relocate as companies could, and over the last half century, there has been a gradual decline in private sector unionism and growth in public sector unionism.

## 19.1 A Brief History of Labor Legislation

### LEARNING OBJECTIVES

1. Understand and explain the rise of labor unions in the United States.
2. Explain what common-law principles were used by employers and courts to resist legalized collective bargaining.
3. Be able to put US labor law in its historical context.

### Labor and the Common Law in the Nineteenth Century

Labor unions appeared in modern form in the United States in the 1790s in Boston, New York, and Philadelphia. Early in the nineteenth century, employers began to seek injunctions against union organizing and other activities. Two doctrines were employed: (1) *common-law conspiracy* and (2) *common-law restraint of trade*. The first doctrine held that workers who joined together were acting criminally as conspirators, regardless of the means chosen or the objectives sought.

The second doctrine—common-law restraint of trade—was also a favorite theory used by the courts to enjoin unionizing and other joint employee activities. Workers who banded together to seek better wages or working conditions were, according to this theory, engaged in concerted activity that restrained trade in their labor. This theory made sense in a day in which conventional wisdom held that an employer was entitled to buy labor as cheaply as possible—the price would obviously rise if workers were allowed to bargain jointly rather than if they were required to offer their services individually on the open market.

### Labor under the Antitrust Laws

The Sherman Act did nothing to change this basic judicial attitude. A number of cases decided early in the act's history condemned labor activities as violations of the antitrust law. In particular, in the *Danbury Hatters' case* (*Loewe v. Lawlor*) the Supreme Court held that a "secondary boycott" against a nonunionized company violated the Sherman Act. The hatters instigated a boycott of retail stores that sold hats manufactured by a company whose workers had struck. The union was held liable for treble damages. *Loewe v. Lawlor*, 208 U.S. 274 (1908).

By 1912, labor had organized widely, and it played a pivotal role in electing Woodrow Wilson and giving him a Democratic Congress, which responded in 1914

with the Clayton Act's "labor exemption." Section 6 of the Clayton Act says that labor unions are not "illegal combinations or conspiracies in restraint of trade, under the antitrust laws." Section 20 forbids courts from issuing injunctions in cases involving strikes, boycotts, and other concerted union activities (which were declared to be lawful) as long as they arose out of disputes between employer and employees over the terms of employment.

But even the Clayton Act proved of little lasting value to the unions. In 1921, the Supreme Court again struck out against a secondary boycott that crippled the significance of the Clayton Act provisions. In the case, a machinists' union staged a boycott against an employer (by whom the members were not employed) in order to pressure the employer into permitting one of its factories to be unionized. The Court ruled that the Clayton Act exemptions applied only in cases involving an employer and its own employees. *Duplex Printing Press Co. v. Deering*, 254 U.S. 443 (1921). Without the ability to boycott under those circumstances, and with the threat of antitrust prosecutions or treble-damage actions, labor would be hard-pressed to unionize many companies. More antiunion decisions followed.

### **Moves toward Modern Labor Legislation**

Collective bargaining appeared on the national scene for the first time in 1918 with the creation of the War Labor Conference Board. The National War Labor Board was empowered to mediate or reconcile labor disputes that affected industries essential to the war, but after the war, the board was abolished.

In 1926, Congress enacted the Railway Labor Act. This statute imposed a duty on railroads to bargain in good faith with their employees' elected representatives. The act also established the National Mediation Board to mediate disputes that were not resolved in contract negotiations. The stage was set for more comprehensive national labor laws. These would come with the Great Depression.

### **The Norris-La Guardia Act**

The first labor law of the Great Depression was the Norris-La Guardia Act of 1932. It dealt with the propensity of federal courts to issue preliminary injunctions, often ex parte (i.e., after hearing only the plaintiff's argument), against union activities. Even though the permanent injunction might later have been denied, the effect of the vaguely worded preliminary injunction would have been sufficient to destroy the attempt to unionize. The Norris-La Guardia Act forbids federal courts from temporarily or permanently enjoining certain union activities, such as peaceful picketing and strikes. The act is applicable to any "labor dispute," defined as embracing "any controversy concerning 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.” This language thus permitted the secondary boycott that had been held a violation of the antitrust laws in *Duplex Printing Press v. Deering*. The act also bars the courts from enforcing so-called yellow-dog contracts—agreements that employees made with their employer not to join unions.

### The National Labor Relations Act (the Wagner Act)

In 1935, Congress finally enacted a comprehensive labor statute. The National Labor Relations Act (NLRA), often called the Wagner Act after its sponsor, Senator Robert F. Wagner, declared in Section 7 that workers in interstate commerce “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 concerted activities for the purpose of collective bargaining or other mutual aid or protection.” Section 8 sets out five key **unfair labor practices**<sup>1</sup>:

1. Interference with the rights guaranteed by Section 7
2. Interference with the organization of unions, or dominance by the employer of union administration (this section thus outlaws “company unions”)
3. Discrimination against employees who belong to unions
4. Discharging or otherwise discriminating against employees who seek relief under the act
5. Refusing to bargain collectively with union representatives

The procedures for forming a union to represent employees in an appropriate “bargaining unit” are set out in Section 9. Finally, the Wagner Act established the National Labor Relations Board (NLRB) as an independent federal administrative agency, with power to investigate and remedy unfair labor practices.

The Supreme Court upheld the constitutionality of the act in 1937 in a series of five cases. In the first, *NLRB v. Jones & Laughlin Steel Corp.*, the Court ruled that congressional power under the Commerce Clause extends to activities that might affect the flow of interstate commerce, as labor relations certainly did. *NLRB v. Jones & Laughlin Steel Corp.*, 301 U.S. 1 (1937). Through its elaborate mechanisms for establishing collective bargaining as a basic national policy, the Wagner Act has had a profound effect on interstate commerce during the last half-century.

1. Acts that violate the National Labor Relations Act, such as failing to bargain in good faith. Unfair labor practices can be committed by employers and by unions.

### The Taft-Hartley Act (Labor-Management Relations Act)

The Wagner Act did not attempt to restrict union activities in any way. For a dozen years, opponents of unions sought some means of curtailing the breadth of opportunity opened up to unions by the Wagner Act. After failing to obtain relief in the Supreme Court, they took their case to Congress and finally succeeded after World War II when, in 1947, Congress, for the first time since 1930, had Republican majorities in both houses. Congress responded to critics of “big labor” with the Taft-Hartley Act, passed over President Truman’s veto. Taft-Hartley—known formally as the Labor-Management Relations Act—did not repeal the protections given employees and unions under the NLRA. Instead, it balanced union power with a declaration of rights of employers. In particular, Taft-Hartley lists six unfair labor practices of unions, including secondary boycotts, strikes aimed at coercing an employer to fire an employee who refuses to join a union, and so-called jurisdictional strikes over which union should be entitled to do specified jobs at the work site.

In addition to these provisions, Taft-Hartley contains several others that balance the rights of unions and employers. For example, the act guarantees both employers and unions the right to present their views on unionization and collective bargaining. Like employers, unions became obligated to bargain in good faith. The act outlaws the **closed shop**<sup>2</sup> (a firm in which a worker must belong to a union), gives federal courts the power to enforce collective bargaining agreements, and permits private parties to sue for damages arising out of a secondary boycott. The act also created the Federal Mediation and Conciliation Service to cope with strikes that create national emergencies, and it declared strikes by federal employees to be unlawful. It was this provision that President Reagan invoked in 1981 to fire air traffic controllers who walked off the job for higher pay.

### The Landrum-Griffin Act

Congressional hearings in the 1950s brought to light union corruption and abuses and led in 1959 to the last of the major federal labor statutes, the Landrum-Griffin Act (Labor-Management Reporting and Disclosure Act). It established a series of controls on internal union procedures, including the method of electing union officers and the financial controls necessary to avoid the problems of corruption that had been encountered. Landrum-Griffin also restricted union picketing under various circumstances, narrowed the loopholes in Taft-Hartley’s prohibitions against secondary boycotts, and banned “hot cargo” agreements (see [Section 19.3.6 "Hot Cargo Agreement"](#)).

2. A firm where potential employees must belong to a union before being hired and must remain a member during employment.

### KEY TAKEAWAY

Common-law doctrines were used in the early history of the labor movement to enjoin unionizing and other joint employee activities. These were deemed to be restraints of trade that violated antitrust laws. In addition, common-law conspiracy charges provided criminal enforcement against joint employee actions and agreements. Politically, the labor movement gained some traction in 1912 and got an antitrust-law exemption in the Clayton Act. But it was not until the Great Depression and the New Deal that the right of collective bargaining was recognized by federal statute in the National Labor Relations Act. Subsequent legislation (Taft-Hartley and Landrum-Griffin) added limits to union activities and controls over unions in their internal functions.

### EXERCISES

1. Use the Internet to find stories of government-sponsored violence against union activities in the late 1900s and early part of the twentieth century. What were some of the most violent confrontations, and what caused them? Discuss why business and government were so opposed to collective bargaining.
2. Use the Internet to find out which countries in the world have legal systems that support collective bargaining. What do these countries have in common with the United States? Does the People's Republic of China support collective bargaining?



## 19.2 The National Labor Relations Board: Organization and Functions

### LEARNING OBJECTIVE

1. Explain the process that leads to recognition of bargaining units by the National Labor Relations Board.

The National Labor Relations Board (NLRB) consists of five board members, appointed by the president and confirmed by the Senate, who serve for five-year, staggered terms. The president designates one of the members as chairman. The president also appoints the general counsel, who is in charge of the board's investigatory and prosecutorial functions and who represents the NLRB when it goes (or is taken) to court. The general counsel also oversees the thirty-three regional offices scattered throughout the country, each of which is headed by a regional director.

The NLRB serves two primary functions: (1) it investigates allegations of unfair labor practices and provides remedies in appropriate cases, and (2) it decides in contested cases which union should serve as the exclusive bargaining agent for a particular group of employees.

### Unfair Labor Practice Cases

Unfair labor practice cases are fairly common; some twenty-two thousand unfair labor practice claims were filed in 2008. Volume was considerably higher thirty years ago; about forty thousand a year was typical in the early 1980s. A charge of an unfair labor practice must be presented to the board, which has no authority to initiate cases on its own. Charges are investigated at the regional level and may result in a complaint by the regional office. A regional director's failure to issue a complaint may be appealed to the general counsel, whose word is final (there is no possible appeal).

A substantial number of charges are dismissed or withdrawn each year—sometimes as many as 70 percent. Once issued, the complaint is handled by an attorney from the regional office. Most cases, usually around 80 percent, are settled at this level. If not settled, the case will be tried before an administrative law judge, who will take evidence and recommend a decision and an order. If no one objects, the decision and order become final as the board's opinion and order. Any party may appeal the decision to the board in Washington. The board acts on written briefs, rarely on

oral argument. The board's order may be appealed to the US court of appeals, although its findings of fact are not reviewable "if supported by substantial evidence on the record considered as a whole." The board may also go to the court of appeals to seek enforcement of its orders.

## Representation Cases

The NLRB is empowered to oversee representative elections—that is, elections by employees to determine whether or not to be represented by a union. The board becomes involved if at least 30 percent of the members of a potential bargaining unit petition it to do so or if an employer petitions on being faced with a claim by a union that it exclusively represents the employees. The board determines which bargaining unit is appropriate and which employees are eligible to vote. A representative of the regional office will conduct the election itself, which is by secret ballot. The regional director may hear challenges to the election procedure to determine whether the election was valid.

### KEY TAKEAWAY

The NLRB has two primary functions: (1) it investigates allegations of unfair labor practices and provides remedies in appropriate cases, and (2) it decides in contested cases which union should serve as the exclusive bargaining agent for a particular group of employees.

### EXERCISES

1. Go to the website for the NLRB. Find out how many unfair labor practice charges are filed each year. Also find out how many "have merit" according to the NLRB.
2. How many of these unfair labor practice charges that "have merit" are settled through the auspices of the NLRB?

## 19.3 Labor and Management Rights under the Federal Labor Laws

### LEARNING OBJECTIVES

1. Describe and explain the process for the National Labor Relations Board to choose a particular union as the exclusive bargaining representative.
2. Describe and explain the various duties that employers have in bargaining.
3. Indicate the ways in which employers may commit unfair labor practice by interfering with union activity.
4. Explain the union's right to strike and the difference between an economic strike and a strike over an unfair labor practice.
5. Explain secondary boycotts and hot cargo agreements and why they are controversial.

### **Choosing the Union as the Exclusive Bargaining Representative Determining the Appropriate Union**

As long as a union has a valid contract with the employer, no rival union may seek an election to oust it except within sixty to ninety days before the contract expires. Nor may an election be held if an election has already been held in the bargaining unit during the preceding twelve months.

Whom does the union represent? In companies of even moderate size, employees work at different tasks and have different interests. Must the secretaries, punch press operators, drivers, and clerical help all belong to the same union in a small factory? The National Labor Relations Board (NLRB) has the authority to determine which group of employees will constitute the appropriate bargaining unit. To make its determination, the board must look at the history of collective bargaining among similar workers in the industry; the employees' duties, wages, skills, and working conditions; the relationship between the proposed unit and the structure of the employer's organization; and the desires of the employees themselves.

Two groups must be excluded from any bargaining unit—supervisory employees and independent contractors. Determining whether or not a particular employee is a supervisor is left to the discretion of the board.

### Interfering with Employee Communication

To conduct an organizing drive, a union must be able to communicate with the employees. But the employer has valid interests in seeing that employees and organizers do not interfere with company operations. Several different problems arise from the need to balance these interests.

One problem is the protection of the employer's property rights. May nonemployee union organizers come onto the employer's property to distribute union literature—for example, by standing in the company's parking lots to hand out leaflets when employees go to and from work? May organizers, whether employees or not, picket or hand out literature in private shopping centers in order to reach the public—for example, to protest a company's policies toward its nonunion employees? The interests of both employees and employers under the NLRB are twofold: (1) the right of the employees (a) to communicate with each other or the public and (b) to hear what union organizers have to say, and (2) the employers' (a) property rights and (b) their interest in managing the business efficiently and profitably.

The rules that govern in these situations are complex, but in general they appear to provide these answers: (1) If the persons doing the soliciting are not employees, the employer may bar them from entering its private property, even if they are attempting to reach employees—assuming that the employer does not discriminate and applies a rule against use of its property equally to everyone. *NLRB v. Babcock Wilcox Co.*, 351 U.S. 105 (1956). (2) If the solicitors are not employees and they are trying to reach the public, they have no right to enter the employer's private property. (3) If the solicitors are employees who are seeking to reach the public, they have the right to distribute on the employer's property—in a common case, in a shopping center—unless they have a convenient way to reach their audience on public property off the employer's premises. *Hudgens v. NLRB*, 424 U.S. 507 (1976). (4) If the solicitors are employees seeking to reach employees, the employer is permitted to limit the distribution of literature or other solicitations to avoid litter or the interruption of work, but it cannot prohibit solicitation on company property altogether.

In the leading case of *Republic Aviation Corp. v. NLRB*, the employer, a nonunion plant, had a standing rule against any kind of solicitation on the premises. *Republic Aviation Corp. v. NLRB*, 324 U.S. 793 (1945). Thereafter, certain employees attempted to organize the plant. The employer fired one employee for soliciting on behalf of the union and three others for wearing union buttons. The Supreme Court upheld the board's determination that the discharges constituted an unfair labor practice under Section 8(a) of the NLRA. It does not matter, the Court said, whether the employees had other means of communicating with each other or that the

employer's rule against solicitation may have no effect on the union's attempt to organize the workers. In other words, the employer's intent or motive is irrelevant. The only question is whether the employer's actions might tend to interfere with the employees' exercise of their rights under the NLRB.

### **Regulating Campaign Statements**

A union election drive is not like a polite conversation over coffee; it is, like political campaigns, full of charges and countercharges. Employers who do not want their employees unionized may warn darkly of the effect of the union on profitability; organizers may exaggerate the company's financial position. In a 1982 NLRB case, *NLRB v. Midland National Life Ins. Co.*, the board said it would not set aside an election if the parties misrepresented the issues or facts but that it would do so if the statements were made in a deceptive manner—for example, through forged documents. *Midland National Life Ins. Co.*, 263 N.L.R.B. 130 (1982). The board also watches for threats and promises of rewards; for example, the employer might threaten to close the plant if the union succeeds. In *NLRB v. Gissel Packing Co.*, the employer stated his worries throughout the campaign that a union would prompt a strike and force the plant to close. *NLRB v. Gissel Packing Co.*, 395 U.S. 575 (1969). The board ruled that the employer's statements were an impermissible threat. To the employer's claim that he was simply exercising his First Amendment rights, the Supreme Court held that although employers do enjoy freedom of speech, it is an unfair labor practice to threaten consequences that are not rooted in economic realities.

A union campaign has become an intricate legal duel, heavily dependent on strategic considerations of law and public relations. Neither management nor labor can afford to wage a union campaign without specialized advisers who can guide the thrust and parry of the antagonists. Labor usually has such advisers because very few organizational drives are begun without outside organizers who have access to union lawyers. A business person who attempts to fight a union, like a labor organizer or an employee who attempts to organize one, takes a sizeable risk when acting alone, without competent advice. For example, an employer's simple statement like "We will get the heating fixed" in response to a seemingly innocent question about the "drafty old building" at a meeting with employees can lead to an NLRB decision to set aside an election if the union loses, because the answer can easily be construed as a promise, and under Section 8(c) of the National Labor Relations Act (NLRA), a promise of reward or benefit during an organization campaign is an unfair labor practice by management. Few union election campaigns occur without questions, meetings, and pamphleteering carefully worked out in advance.

The results of all the electioneering are worth noting. In the 1980s, some 20 percent of the total US workforce was unionized. As of 2009, the union membership rate was 12.3 percent, and more union members were public employees than private sector employees. Fairly or unfairly, public employee unions were under attack as of 2010, as their wages generally exceeded the average wages of other categories of workers.

### Exclusivity

Once selected as the bargaining representative for an appropriate group of employees, the union has the **exclusive right to bargain**<sup>3</sup>. Thereafter, individual employees may not enter into separate contracts with the employer, even if they voted against the particular union or against having a union at all. The principle of exclusivity is fundamental to the collective bargaining process. Just how basic it is can be seen in *Emporium Capwell Co. v. Western Addition Community Organization* (Section 19.4.1 "Exclusivity"), in which one group of employees protested what they thought were racially discriminatory work assignments, barred under the **collective bargaining agreement**<sup>4</sup> (the contract between the union and the employer). Certain of the employees filed grievances with the union, which looked into the problem more slowly than the employees thought necessary. They urged that the union permit them to picket, but the union refused. They picketed anyway, calling for a consumer boycott. The employer warned them to desist, but they continued and were fired. The question was whether they were discharged for engaging in concerted activity protected under Section 7 of the NLRA.

### The Duty to Bargain

#### The Duty to Bargain in Good Faith

The NLRA holds both employer and union to a duty to "bargain in good faith." What these words mean has long been the subject of controversy. Suppose Mr. Mardian, a company's chief negotiator, announces to Mr. Ulasewicz, the company's chief union negotiator, "I will sit down and talk with you, but be damned if I will agree to a penny more an hour than the people are getting now." That is not a refusal to bargain: it is a statement of the company's position, and only Mardian's actual conduct during the negotiations will determine whether he was bargaining in good faith. Of course, if he refused to talk to Ulasewicz, he would have been guilty of a failure to bargain in good faith.

3. After a union election, the union will be, by law, the exclusive bargaining agent for a group of employees.

4. The contract between the union and the employer.

Suppose Mardian has steadily insisted during the bargaining sessions that the company must have complete control over every aspect of the labor relationship, including the right to hire and fire exactly as it saw fit, the right to raise or lower wages whenever it wanted, and the right to determine which employee was to do which job. The Supreme Court has said that an employer is not obligated to accept any particular term in a proposed collective bargaining agreement and that the

NLRB may not second-guess any agreement eventually reached. *NLRB v. American National Insurance Co.*, 343 U.S. 395 (1962). However, the employer must actually engage in bargaining, and a stubborn insistence on leaving everything entirely to the discretion of management has been construed as a failure to bargain. *NLRB v. Reed St Prince Manufacturing Co.*, 205 F.2d 131 (1st Cir. 1953).

Suppose Mardian had responded to Ulasewicz's request for a ten-cent-an-hour raise: "If we do that, we'll go broke." Suppose further that Ulasewicz then demanded, on behalf of the union, that Mardian prove his contention but that Mardian refused. Under these circumstances, the Supreme Court has ruled, the NLRB is entitled to hold that management has failed to bargain in good faith, for once having raised the issue, the employer must in good faith demonstrate veracity. *NLRB v. Truitt Manufacturer Co.*, 351 U.S. 149 (1956).

### **Mandatory Subjects of Bargaining**

The NLRB requires employers and unions to bargain over "terms and condition of employment." Wages, hours, and working conditions—whether workers must wear uniforms, when the lunch hour begins, the type of safety equipment on hand—are well-understood terms and conditions of employment. But the statutory phrase is vague, and the cases abound with debates over whether a term insisted on by union or management is within the statutory phrase. No simple rule can be stated for determining whether a desire of union or management is mandatory or nonmandatory. The cases do suggest that management retains the right to determine the scope and direction of the enterprise, so that, for example, the decision to invest in labor-saving machinery is a nonmandatory subject—meaning that a union could not insist that an employer bargain over it, although the employer may negotiate if it desires. Once a subject is incorporated in a collective bargaining agreement, neither side may demand that it be renegotiated during the term of the agreement.

### **The Board's Power to Compel an Agreement**

A mere refusal to agree, without more, is not evidence of bad-faith bargaining. That may seem a difficult conclusion to reach in view of what has just been said. Nevertheless, the law is clear that a company may refuse to accede to a union's demand for any reason other than an unwillingness to consider the matter in the first place. If a union negotiator cannot talk management into accepting his demand, then the union may take other actions—including strikes to try to force management to bow. It follows from this conclusion that the NLRB has no power to *compel* agreement—even if management is guilty of negotiating in bad faith. The federal labor laws are premised on the fundamental principle that the parties are free to bargain.

## **Interference and Discrimination by the Employer Union Activity on Company Property**

The employer may not issue a rule flatly prohibiting solicitation or distribution of literature during “working time” or “working hours”—a valid rule against solicitation or distribution must permit these activities during employees’ free time, such as on breaks and at meals. A rule that barred solicitation on the plant floor during actual work would be presumptively valid. However, the NLRB has the power to enjoin its enforcement if the employer used the rule to stop union soliciting but permitted employees during the forbidden times to solicit for charitable and other causes.

### **“Runaway Shop”**

A business may lawfully decide to move a factory for economic reasons, but it may not do so to discourage a union or break it apart. The removal of a plant from one location to another is known as a runaway shop. An employer’s representative who conceals from union representatives that a move is contemplated commits an unfair labor practice because the union is deprived of the opportunity to negotiate over an important part of its members’ working conditions. If a company moves a plant and it is later determined that the move was to interfere with union activity, the board may order the employer to offer affected workers employment at the new site and the cost of transportation.

### **Other Types of Interference**

Since “interference” is not a precise term but descriptive of a purpose embodied in the law, many activities lie within its scope. These include hiring professional strikebreakers to disrupt a strike, showing favoritism toward a particular union to discourage another one, awarding or withholding benefits to encourage or discourage unionization, engaging in misrepresentations and other acts during election campaigns, spying on workers, making employment contracts with individual members of a union, blacklisting workers, attacking union activists physically or verbally, and disseminating various forms of antiunion propaganda.

### **Discrimination against Union Members**

Under Section 8(a)(3) of the NLRA, an employer may not discriminate against employees in hiring or tenure to encourage or discourage membership in a labor organization. Thus an employer may not refuse to hire a union activist and may not fire an employee who is actively supporting the union or an organizational effort if the employee is otherwise performing adequately on the job. Nor may an employer discriminate among employees seeking reinstatement after a strike or



discriminatory layoff or **lockout**<sup>5</sup> (a closing of the job site to prevent employees from coming to work), hiring only those who were less vocal in their support of the union.

The provision against employer discrimination in hiring prohibits certain types of compulsory unionism. Four basic types of **compulsory unionism**<sup>6</sup> are possible: the closed shop, the union shop, maintenance-of-membership agreements, and preferential hiring agreements. In addition, a fifth arrangement—the agency shop—while not strictly compulsory unionism, has characteristics similar to it. Section 8(a)(3) prohibits the closed shop and preferential hiring. But Section 14 permits states to enact more stringent standards and thus to outlaw the union shop, the agency shop, and maintenance of membership as well.

1. **Closed shop.** This type of agreement requires a potential employee to belong to the union before being hired and to remain a member during employment. It is unlawful, because it would require an employer to discriminate on the basis of membership in deciding whether to hire.
2. **Union shop**<sup>7</sup>. An employer who enters into a union shop agreement with the union may hire a nonunion employee, but all employees who are hired must then become members of the union and remain members so long as they work at the job. Because the employer may hire anyone, a union or nonunion member, the union shop is lawful unless barred by state law.
3. **Maintenance-of-membership agreements.** These agreements require employees who are members of the union before being hired to remain as members once they are hired unless they take advantage of an “escape clause” to resign within a time fixed in the collective bargaining agreement. Workers who were not members of the union before being hired are not required to join once they are on the job. This type of agreement is lawful unless barred by state law.
4. **Preferential hiring.** An employer who accepts a preferential hiring clause agrees to hire only union members as long as the union can supply him with a sufficient number of qualified workers. These clauses are unlawful.
5. **Agency shop.** The agency shop is not true compulsory unionism, for it specifically permits an employee not to belong to the union. However, it does require the employee to pay into the union the same amount required as dues of union members. The legality of an agency shop is determined by state law. If permissible under state law, it is permissible under federal law.

5. A management tactic designed to gain bargaining advantage for the company by refusing to allow union members to work (and thus depriving them of their pay).

6. Employers must not discriminate where there is a closed shop, a union shop, maintenance-of-membership agreements, or preferential hiring agreements.

7. This exists where the bargaining unit and the employer have agreed that the employer can hire either labor union members or nonmembers but that all nonunion employees must become union members within a specified period of time.

## The Right to Strike

Section 13 of the NLRA says that “nothing in this Act, except as specifically provided for herein, shall be construed so as either to interfere with or impede or diminish in any way the right to strike, or to affect the limitations or qualifications on that right.” The labor statutes distinguish between two types of strikes: the **economic strike**<sup>8</sup> and the strike over an unfair labor practice. In the former, employees go on strike to try to force the employer to give in to the workers’ demands. In the latter, the strikers are protesting the employer’s committing an unfair labor practice. The importance of the distinction lies in whether the employees are entitled to regain their jobs after the strike is over. In either type of strike, an employer may hire substitute employees during the strike. When it concludes, however, a difference arises. In *NLRB v. International Van Lines*, the Supreme Court said that an employer may hire permanent employees to take over during an economic strike and need not discharge the substitute employees when it is done. *NLRB v. International Van Lines*, 409 U.S. 48 (1972). That is not true for a strike over an unfair labor practice: an employee who makes an unconditional offer to return to his job is entitled to it, even though in the meantime the employer may have replaced him.

These rules do not apply to unlawful strikes. Not every walkout by workers is permissible. Their collective bargaining agreement may contain a no-strike clause barring strikes during the life of the contract. Most public employees—that is, those who work for the government—are prohibited from striking. Sit-down strikes, in which the employees stay on the work site, precluding the employer from using the facility, are unlawful. So are wildcat strikes, when a faction within the union walks out without authorization. Also unlawful are violent strikes, jurisdictional strikes, secondary strikes and boycotts, and strikes intended to force the employer to sign “hot cargo” agreements (see [Section 19.3.6 "Hot Cargo Agreement"](#)).

To combat strikes, especially when many employers are involved with a single union trying to bargain for better conditions throughout an industry, an employer may resort to a lockout. Typically, the union will call a whipsaw strike, striking some of the employers but not all. The whipsaw strike puts pressure on the struck employers because their competitors are still in business. The employers who are not struck may lawfully respond by locking out all employees who belong to the multiemployer union. This is known as a defensive lockout. In several cases, the Supreme Court has ruled that an offensive lockout, which occurs when the employer, anticipating a strike, locks the employees out, is also permissible.

8. Employees go on strike to force an employer to give in to workers’ demands.

9. Union picketing directed at one business, designed to induce that business to stop doing business with the union’s employer.

## Secondary Boycotts

Section 8(b)(4), added to the NLRA by the Taft-Hartley Act, prohibits workers from engaging in **secondary boycotts**<sup>9</sup>—strikes, refusals to handle goods, threats,

coercion, restraints, and other actions aimed at forcing any person to refrain from performing services for or handling products of any producer other than the employer, or to stop doing business with any other person. Like the Robinson-Patman Act ([Chapter 16 "Antitrust Law"](#)), this section of the NLRA is extremely difficult to parse and has led to many convoluted interpretations. However, its essence is to prevent workers from picketing employers not involved in the primary labor dispute.

Suppose that the Amalgamated Widget Workers of America puts up a picket line around the Ace Widget Company to force the company to recognize the union as the exclusive bargaining agent for Ace's employees. The employees themselves do not join in the picketing, but when a delivery truck shows up at the plant gates and discovers the pickets, it turns back because the driver's policy is never to cross a picket line. This activity falls within the literal terms of Section (8)(b)(4): it seeks to prevent the employees of Ace's suppliers from doing business with Ace. But in *NLRB v. International Rice Milling Co.*, the Supreme Court declared that this sort of primary activity—aimed directly at the employer involved in the primary dispute—is not unlawful. *NLRB v. International Rice Milling Co.*, 341 U.S. 665 (1951). So it is permissible to throw up a picket line to attempt to stop anyone from doing business with the employer—whether suppliers, customers, or even the employer's other employees (e.g., those belonging to other unions). That is why a single striking union is so often successful in closing down an entire plant: when the striking union goes out, the other unions “honor the picket line” by refusing to cross it and thus stay out of work as well. The employer might have been able to replace the striking workers if they were only a small part of the plant's labor force, but it becomes nearly impossible to replace all the workers within a dozen or more unions.

Suppose the United Sanders Union strikes the Ace Widget Company. Nonunion sanders refuse to cross the picket line. So Ace sends out its unsanded widgets to Acme Sanders, a job shop across town, to do the sanding job. When the strikers learn what Ace has done, they begin to picket Acme, at which point Acme's sanders honor the picket line and refuse to enter the premises. Acme goes to court to enjoin the pickets—an exception to the Norris-La Guardia Act permits the federal courts to enjoin picketing in cases of unlawful secondary boycotts. Should the court grant the injunction? It might seem so, but under the so-called ally doctrine, the court will not. Since Acme is joined with Ace to help it finish the work, the courts deem the second employer an ally (or extension) of the first. The second picket line, therefore, is not secondary.

Suppose that despite the strike, Ace manages to ship its finished product to the Dime Store, which sells a variety of goods, including widgets. The union puts up a picket around the store; the picketers bear signs that urge shoppers to refrain from buying any Ace widgets at the Dime Store. Is this an unlawful secondary boycott?

Again, the answer is no. A proviso to Section 8(b)(4) permits publicity aimed at truthfully advising the public that products of a primary employer with whom the union is on strike are being distributed by a secondary employer.

Now suppose that the picketers carried signs and orally urged shoppers not to enter the Dime Store at all until it stopped carrying Ace's widgets. That would be unlawful: a union may not picket a secondary site to persuade consumers to refrain from purchasing any of the secondary employer's products. Likewise, the union may not picket in order to cause the secondary employees (the salesclerks at the Dime Store) to refuse to go to work at the secondary employer. The latter is a classic example of inducing a secondary work stoppage, and it is barred by Section 8(b)(4). However, in *DeBartolo Corp. v. Florida Gulf Coast Building and Construction Trades Council*, the Supreme Court opened what may prove to be a significant loophole in the prohibition against secondary boycotts. *DeBartolo Corp. v. Florida Gulf Coast Building and Construction Trades Council*, 485 U.S. 568 (1988). Instead of picketing, the union distributed handbills at the entrance to a shopping mall, asking customers not to patronize any stores in the mall until the mall owner, in building new stores, promised to deal only with contractors paying "fair wages." The Court approved the handbilling, calling it "only an attempt to persuade customers not to shop in the mall," distinguishing it from picketing, which the Court said would constitute a secondary boycott.

### **Hot Cargo Agreement**

A union might find it advantageous to include in a collective bargaining agreement a provision under which the employer agrees to refrain from dealing with certain people or from purchasing their products. For example, suppose the Teamsters Union negotiates a contract with its employers that permits truckers to refuse to carry goods to an employer being struck by the Teamsters or any other union. The struck employer is the primary employer; the employer who has agreed to the clause—known as a hot cargo clause—is the secondary employer. The Supreme Court upheld these clauses in *United Brotherhood of Carpenters and Joiners, Local 1976 v. NLRB*, but the following year, Congress outlawed them in Section 8(e), with a partial exemption for the construction industry and a full exemption for garment and apparel workers. *United Brotherhood of Carpenters and Joiners, Local 1976 v. NLRB*, 357 U.S. 93 (1958).

### **Discrimination by Unions**

A union certified as the exclusive bargaining representative in the appropriate bargaining unit is obligated to represent employees within that unit, even those who are not members of the union. Various provisions of the labor statutes prohibit unions from entering into agreements with employers to discriminate against

nonmembers. The laws also prohibit unions from treating employees unfairly on the basis of race, creed, color, or national origin.

### **Jurisdictional Disputes**

Ace Widget, a peaceful employer, has a distinguished labor history. It did not resist the first union, which came calling in 1936, just after the NLRA was enacted; by 1987, it had twenty-three different unions representing 7,200 workers at forty-eight sites throughout the United States. Then, because of increasingly more powerful and efficient machinery, United Widget Workers realized that it was losing jobs throughout the industry. It decided to attempt to bring within its purview jobs currently performed by members of other unions. United Widget Workers asked Ace to assign all sanding work to its members. Since sanding work was already being done by members of the United Sanders, Ace management refused. United Widget Workers decided to go on strike over the issue. Is the strike lawful? Under Section 8(b)(4)(D), regulating jurisdictional disputes, it is not. It is an unfair labor practice for a union to strike or engage in other concerted actions to pressure an employer to assign or reassign work to one union rather than another.

### **Bankruptcy and the Collective Bargaining Agreement**

An employer is bound by a collective bargaining agreement to pay the wages of unionized workers specified in the agreement. But obviously, no paper agreement can guarantee wages when an insolvent company goes out of business. Suppose a company files for reorganization under the bankruptcy laws (see [Chapter 12 "Bankruptcy"](#)). May it then ignore its contractual obligation to pay wages previously bargained for? In the early 1980s, several major companies—for example, Continental Airlines and Oklahoma-based Wilson Foods Corporation—sought the protection of federal bankruptcy law in part to cut union wages. Alarmed, Congress, in 1984, amended the bankruptcy code to require companies to attempt to negotiate a modification of their contracts in good faith. In Bankruptcy Code Section 1113, Congress set forth several requirements for a debtor to extinguish its obligations under a collective bargaining agreement (CBA). Among other requirements, the debtor must make a proposal to the union modifying the CBA based on accurate and complete information, and meet with union leaders and confer in good faith after making the proposal and before the bankruptcy judge would rule.

If negotiations fail, a bankruptcy judge may approve the modification if it is necessary to allow the debtor to reorganize, and if all creditors, the debtor, and affected parties are treated fairly and equitably. If the union rejects the proposal without good cause, and the debtor has met its obligations of fairness and consultation from section 1113, the bankruptcy judge can accept the proposed

modification to the CBA. In 1986, the US court of appeals in Philadelphia ruled that Wheeling-Pittsburgh Steel Corporation could not modify its contract with the United Steelworkers simply because it was financially distressed. The court pointed to the company's failure to provide a "snap-back" clause in its new agreement. Such a clause would restore wages to the higher levels of the original contract if the company made a comeback faster than anticipated. *Wheeling-Pittsburgh Steel Corp. v. United Steelworkers of America*, 791 F.2d 1071 (3d Cir. 1986). But in the 2006 case involving Northwest Airlines Chapter 11 reorganization, *In re Northwest Airlines Corp.*, 2006 Bankr. LEXIS 1159 (So. District N.Y.), the court found that Northwest had to reduce labor costs if it were going to successfully reorganize, that it had made an equitable proposal and consulted in good faith with the union, but that the union had rejected the proposed modification without good cause. Section 1113 was satisfied, and Northwest was allowed to modify its CBA with the union.

#### KEY TAKEAWAY

The NLRB determines the appropriate bargaining unit and also supervises union organizing drives. It must balance protecting the employer's rights, including property rights and the right to manage the business efficiently, with the right of employees to communicate with each other. The NLRB will select a union and give it the exclusive right to bargain, and the result will usually be a collective bargaining unit. The employer should not interfere with the unionizing process or interfere once the union is in place. The union has the right to strike, subject to certain very important restrictions.

## EXERCISES

1. Suppose that employees of the Shop Rite chain elect the Allied Food Workers Union as their exclusive bargaining agent. Negotiations for an initial collective bargaining agreement begin, but after six months, no agreement has been reached. The company finds excess damage to merchandise in its warehouse and believes that this was intentional sabotage by dissident employees. The company notifies the union representative that any employees doing such acts will be terminated, and the union, in turn, notifies the employees. Soon thereafter, a Shop Rite manager notices an employee in the flour section—where he has no right to be—making quick motions with his hands. The manager then finds several bags of flour that have been cut. The employee is fired, whereupon a fellow employee and union member leads more than two dozen employees in an immediate walkout. The company discharges these employees and refuses to rehire them. The employees file a grievance with the NLRB. Are they entitled to get their jobs back? *NLRB v. Shop Rite Foods*, 430 F.2d 786 (5th Cir. 1970).
2. American Shipbuilding Company has a shipyard in Chicago, Illinois. During winter months, it repairs ships operating on the Great Lakes, and the workers at the shipyard are represented by several different unions. In 1961, the unions notified the company of their intention to seek a modification of the current collective bargaining agreement. On five previous occasions, agreements had been preceded by strikes (including illegal strikes) that were called just after ships arrived in the shipyard for repairs. In this way, the unions had greatly increased their leverage in bargaining with the company. Because of this history, the company was anxious about the unions' strike plans. In August 1961, after extended negotiations, the company and the unions reached an impasse. The company then decided to lay off most of the workers and sent the following notice: "Because of the labor dispute which has been unresolved since August of 1961, you are laid off until further notice." The unions filed unfair labor practice charges with the NLRB. Did the company engage in an unfair labor practice? *American Shipbuilding Company v. NLRB*, 380 U.S. 300 (1965).

## 19.4 Case

### Exclusivity

Emporium Capwell Co. v. Western Addition Community Organization

420 U.S. 50 (1975)

The Emporium Capwell Company (Company) operates a department store in San Francisco. At all times relevant to this litigation it was a party to the collective-bargaining agreement negotiated by the San Francisco Retailer's Council, of which it was a member, and the Department Store Employees Union (Union), which represented all stock and marketing area employees of the Company. The agreement, in which the Union was recognized as the sole collective-bargaining agency for all covered employees, prohibited employment discrimination by reason of race, color, creed, national origin, age, or sex, as well as union activity. It had a no-strike or lockout clause, and it established grievance and arbitration machinery for processing any claimed violation of the contract, including a violation of the anti-discrimination clause.

On April 3, 1968, a group of Company employees covered by the agreement met with the secretary-treasurer of the Union, Walter Johnson, to present a list of grievances including a claim that the Company was discriminating on the basis of race in making assignments and promotions. The Union official agreed to certain of the grievances and to investigate the charge of racial discrimination. He appointed an investigating committee and prepared a report on the employees' grievances, which he submitted to the Retailer's Council and which the Council in turn referred to the Company. The report described "the possibility of racial discrimination" as perhaps the most important issue raised by the employees and termed the situation at the Company as potentially explosive if corrective action were not taken. It offers as an example of the problem the Company's failure to promote a Negro stock employee regarded by other employees as an outstanding candidate but a victim of racial discrimination.

Shortly after receiving the report, the Company's labor relations director met representatives and agreed to "look into the matter" of discrimination, and see what needed to be done. Apparently unsatisfied with these representations, the Union held a meeting in September attended by Union officials, Company employees, and representatives of the California Fair Employment Practices Committee (FEPC) and the local anti-poverty agency. The secretary-treasurer of the



Union announced that the Union had concluded that the Company was discriminating, and that it would process every such grievance through to arbitration if necessary. Testimony about the Company's practices was taken and transcribed by a court reporter, and the next day the Union notified the Company of its formal charge and demanded that the union-management Adjustment Board be convened "to hear the entire case."

At the September meeting some of the Company's employees had expressed their view that the contract procedures were inadequate to handle a systemic grievance of this sort; they suggested that the Union instead begin picketing the store in protest. Johnson explained that the collective agreement bound the Union to its processes and expressed his view that successful grievants would be helping not only themselves but all others who might be the victims of invidious discrimination as well. The FEPC and anti-poverty agency representatives offered the same advice. Nonetheless, when the Adjustment Board meeting convened on October 16, James Joseph Hollins, Torn Hawkins, and two other employees whose testimony the Union had intended to elicit refused to participate in the grievance procedure. Instead, Hollins read a statement objecting to reliance on correction of individual inequities as an approach to the problem of discrimination at the store and demanding that the president of the Company meet with the four protestants to work out a broader agreement for dealing with the issue as they saw it. The four employees then walked out of the hearing.

...On Saturday, November 2, Hollins, Hawkins, and at least two other employees picketed the store throughout the day and distributed at the entrance handbills urging consumers not to patronize the store. Johnson encountered the picketing employees, again urged them to rely on the grievance process, and warned that they might be fired for their activities. The pickets, however, were not dissuaded, and they continued to press their demand to deal directly with the Company president.

On November 7, Hollins and Hawkins were given written warnings that a repetition of the picketing or public statements about the Company could lead to their discharge. When the conduct was repeated the following Saturday, the two employees were fired.

[T]he NLRB Trial Examiner found that the discharged employees had believed in good faith that the Company was discriminating against minority employees, and that they had resorted to concerted activity on the basis of that belief. He concluded, however, that their activity was not protected by § 7 of the Act and that their discharges did not, therefore, violate § 8(a)(1).

The Board, after oral argument, adopted the findings and conclusions of its Trial Examiner and dismissed the complaint. Among the findings adopted by the Board was that the discharged employees' course of conduct was no mere presentation of a grievance but nothing short of a demand that the [Company] bargain with the picketing employees for the entire group of minority employees.

The Board concluded that protection of such an attempt to bargain would undermine the statutory system of bargaining through an exclusive, elected representative, impede elected unions' efforts at bettering the working conditions of minority employees, "and place on the Employer an unreasonable burden of attempting to placate self-designated representatives of minority groups while abiding by the terms of a valid bargaining agreement and attempting in good faith to meet whatever demands the bargaining representative put forth under that agreement."

On respondent's petition for review the Court of Appeals reversed and remanded. The court was of the view that concerted activity directed against racial discrimination enjoys a "unique status" by virtue of the national labor policy against discrimination....The issue, then, is whether such attempts to engage in separate bargaining are protected by 7 of the Act or proscribed by § 9(a).

Central to the policy of fostering collective bargaining, where the employees elect that course, is the principle of majority rule. If the majority of a unit chooses union representation, the NLRB permits it to bargain with its employer to make union membership a condition of employment, thus, imposing its choice upon the minority.

In vesting the representatives of the majority with this broad power, Congress did not, of course, authorize a tyranny of the majority over minority interests. First, it confined the exercise of these powers to the context of a "unit appropriate" for the purposes of collective bargaining, i.e., a group of employees with a sufficient commonality of circumstances to ensure against the submergence of a minority with distinctively different interests in the terms and conditions of their employment. Second, it undertook in the 1959 Landrum-Griffin amendments to assure that minority voices are heard as they are in the functioning of a democratic institution. Third, we have held, by the very nature of the exclusive bargaining representative's status as representative of all unit employees, Congress implicitly imposed upon it a duty fairly and in good faith to represent the interests of minorities within the unit. And the Board has taken the position that a union's refusal to process grievances against racial discrimination in violation of that duty is an unfair labor practice....

\* \* \*

The decision by a handful of employees to bypass a grievance procedure in favor of attempting to bargain with their employer...may or may not be predicated upon the actual existence of discrimination. An employer confronted with bargaining demands from each of several minority groups who would not necessarily, or even probably, be able to agree to remain real steps satisfactory to all at once. Competing claims on the employer's ability to accommodate each group's demands, e.g., for reassignments and promotions to a limited number of positions, could only set one group against the other even if it is not the employer's intention to divide and overcome them....In this instance we do not know precisely what form the demands advanced by Hollins, Hawkins, et al, would take, but the nature of the grievance that motivated them indicates that the demands would have included the transfer of some minority employees to sales areas in which higher commissions were paid. Yet the collective-bargaining agreement provided that no employee would be transferred from a higher-paying to a lower-paying classification except by consent or in the course of a layoff or reduction in force. The potential for conflict between the minority and other employees in this situation is manifest. With each group able to enforce its conflicting demands—the incumbent employees by resort to contractual processes and minority employees by economic coercion—the probability of strife and deadlock is high; the making headway against discriminatory practices would be minimal.

\* \* \*

Accordingly, we think neither aspect of respondent's contention in support of a right to short-circuit orderly, established processes eliminating discrimination in employment is well-founded. The policy of industrial self-determination as expressed in § 7 does not require fragmentation of the bargaining unit along racial or other lines in order to consist with the national labor policy against discrimination. And in the face of such fragmentation, whatever its effect on discriminatory practices, the bargaining process that the principle of exclusive representation is meant to lubricate could not endure unhampered.

\* \* \*

Reversed.

### CASE QUESTIONS

1. Why did the picketers think that the union's response had been inadequate?
2. In becoming members of the union, which had a contract that included an antidiscrimination clause along with a no-strike clause and a no-lockout clause, did the protesting employees waive all right to pursue discrimination claims in court?

## **19.5 Summary and Exercises**

## Summary

Federal labor law is grounded in the National Labor Relations Act, which permits unions to organize and prohibits employers from engaging in unfair labor practices. Amendments to the National Labor Relations Act (NLRA), such as the Taft-Hartley Act and the Landrum-Griffin Act, declare certain acts of unions and employees also to be unfair labor practices.

The National Labor Relations Board supervises union elections and decides in contested cases which union should serve as the exclusive bargaining unit, and it also investigates allegations of unfair labor practices and provides remedies in appropriate cases.

Once elected or certified, the union is the exclusive bargaining unit for the employees it represents. Because the employer is barred from interfering with employee communications when the union is organizing for an election, he may not prohibit employees from soliciting fellow employees on company property but may limit the hours or spaces in which this may be done. The election campaign itself is an intricate legal duel; rewards, threats, and misrepresentations that affect the election are unfair labor practices.

The basic policy of the labor laws is to foster good-faith collective bargaining over wages, hours, and working conditions. The National Labor Relations Board (NLRB) may not compel agreement: it may not order the employer or the union to adopt particular provisions, but it may compel a recalcitrant company or union to bargain in the first place.

Among the unfair labor practices committed by employers are these:

1. Discrimination against workers or prospective workers for belonging to or joining unions. Under federal law, the closed shop and preferential hiring are unlawful. Some states outlaw the union shop, the agency shop, and maintenance-of-membership agreements.
2. Interference with strikes. Employers may hire replacement workers during a strike, but in a strike over an unfair labor practice, as opposed to an economic strike, the replacement workers may be temporary only; workers are entitled to their jobs back at the strike's end.

Among the unfair labor practices committed by unions are these:

1. Secondary boycotts. Workers may not picket employers not involved in the primary labor dispute.
2. Hot cargo agreements. An employer's agreement, under union pressure, to refrain from dealing with certain people or purchasing their products is unlawful.

## EXERCISES

1. After years of working without a union, employees of Argenta Associates began organizing for a representation election. Management did not try to prevent the employees from passing out leaflets or making speeches on company property, but the company president did send out a notice to all employees stating that in his opinion, they would be better off without a union. A week before the election, he sent another notice, stating that effective immediately, each employee would be entitled to a twenty-five-cents-an-hour raise. The employees voted the union down. The following day, several employees began agitating for another election. This time management threatened to fire anyone who continued talking about an election on the ground that the union had lost and the employees would have to wait a year. The employees' organizing committee filed an unfair labor practice complaint with the NLRB. What was the result?
2. Palooka Industries sat down with Local 308, which represented its telephone operators, to discuss renewal of the collective bargaining agreement. Palooka pressed its case for a no-strike clause in the next contract, but Local 308 refused to discuss it at all. Exasperated, Palooka finally filed an unfair labor practice claim with the NLRB. What was the result?
3. Union organizers sought to organize the punch press operators at Dan's Machine Shop. The shop was located on a lot surrounded by heavily forested land from which access to employees was impossible. The only practical method of reaching employees on the site was in the company parking lot. When the organizers arrived to distribute handbills, the shop foreman, under instructions from Dan, ordered them to leave. At a hearing before the NLRB, the company said that it was not antiunion but that its policy, which it had always strictly adhered to, forbade nonemployees from being on the property if not on company business. Moreover, company policy barred any activities that would lead to littering. The company noted that the organizers could reach the employees in many other ways—meeting the employees personally in town after hours, calling them at home, writing them letters, or advertising a public meeting. The organizers responded that these methods were far less effective means of reaching the employees. What was the result? Why?

## SELF-TEST QUESTIONS

1. Which of the following is not a subject of mandatory bargaining?
  - a. rate of pay per hour
  - b. length of the workweek
  - c. safety equipment
  - d. new products to manufacture
  
2. Under a union shop agreement,
  - a. an employer may not hire a nonunion member
  - b. an employer must hire a nonunion member
  - c. an employee must join the union after being hired
  - d. an employee must belong to the union before being hired
  
3. Which of the following is always unlawful under federal law?
  - a. union shop
  - b. agency shop
  - c. closed shop
  - d. runaway shop
  
4. An employer's agreement with its union to refrain from dealing with companies being struck by other unions is a
  - a. secondary boycott agreement
  - b. hot cargo agreement
  - c. lockout agreement
  - d. maintenance-of-membership agreement
  
5. Striking employees are entitled to their jobs back when they are engaged in
  - a. economic strikes
  - b. jurisdictional strikes
  - c. both economic and jurisdictional strikes
  - d. neither economic nor jurisdictional strikes



**SELF-TEST ANSWERS**

1. d
2. c
3. c
4. b
5. a