

COMMENT

THE NATIONAL LABOR RELATIONS BOARD— DECISIONS OF ITS FIRST YEAR*

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SINCE the enactment of the National Labor Relations Act¹ on July 5, 1935, the National Labor Relations Board appointed pursuant to Sec. 3 (a) has rendered more than one hundred decisions. The constitutionality of the act has been submitted to the Supreme Court for decision² and may soon be determined; but even if the act is held invalid, the body of decisions handed down by the Board is an important source of precedent and experience for possible future administrative and legislative action. This comment will not discuss the constitutionality of the act (treated elsewhere in this issue³), the right of employers to restrain administrative hearings by the Board, or the problems attending enforcement of the Board's orders. It is proposed to discuss here the Board's substantive interpretation of the act insofar as it appears from the Board's decisions.⁴

The public policy expressed in section 1 favors collective bargaining of employees with their employer over individual bargaining which has heretofore generally been protected by law.⁵ Section 7 declares the employees' right to organize and "to bargain collectively through representatives of their own choosing." The unfair labor practices defined in section 8 and the procedure for determining representatives provided in section 9 are all designed to implement the right and to enforce a correlative duty upon the employer. The main problems of the Board have been: (1) to determine in each case whether interstate commerce has been af-

* Decisions of the Board are cited herein by the Board's case number and decision number. Information has been received that the Board is contemplating the early publication of its first annual report which will contain the text of its decisions to date. This comment includes the Board's decisions to and including Dec. 105, issued Oct. 2, 1936.

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¹ 49 Stat. 452 (1935); 29 U.S.C.A. §§ 157-166 (1935).

² C.C.H. Labor Law Serv. ¶ 16,000 (1936). ³ See p. 109 *post*.

⁴ For a discussion of the decisions of the former National Labor Relations Board, see 48 Harv. L. Rev. 630 (1935).

⁵ *Hitchman Coal Co. v. Mitchell*, 245 U.S. 229, 250 (1917); *Adair v. United States*, 208 U.S. 161 (1908); *Coppage v. Kansas*, 236 U.S. 1 (1915).

fect; (2) to define the nature of collective bargaining, fix the appropriate bargaining unit, and ascertain the representatives of the majority;^{5a} (3) to construe (a) "discrimination" in regard to hire or tenure, (b) dominating and fostering of company unions, and (c) interference, restraint, or coercion by an employer generally.

INTERSTATE COMMERCE

In no decision has the Board failed to find that the case before it affected interstate commerce within the meaning of section 1 and section 2. The Board seems to have taken the position that in the present complex and interrelated business structure of this country, the free flow of trade and traffic across state lines is affected by the labor relations of businesses purchasing or selling substantial quantities of goods in other states; however, this position does not seem to be supported by the ruling in *Carter v. Carter Coal Company*.⁶ It has filled its decisions with exhaustive findings stressing the effect of industrial unrest on the free flow of commerce among the states; and it has emphasized every conceivable fact showing the interrelationship of the activities of the business in question with enterprises in other states and with the movement of goods across state lines.

The Board is on firmest ground in the few cases involving interstate transportation and communication.⁷ Closely related are cases involving dock workers,⁸ garage mechanics servicing interstate buses,⁹ employees who repair ocean-going fishing boats,¹⁰ and employees who are engaged in

^{5a} For a discussion of the treatment of similar problems under the Railway Labor Act, 44 Stat 577 (1927); 45 U.S.C.A. §§ 151-63 (1928), see First Annual Report of National Mediation Board 1-24 (1935).

⁶ 56 S. Ct. 855 (1936). Since the rendering of this decision the Board has practically discontinued the issuance of complaints in cases relating to ordinary mining and manufacturing enterprises.

⁷ Bus operators: *In re* Washington Coach Co., C. 63, Dec. 68, order held enforceable (C.C.A. 4th October 6, 1936), C.C.H. Labor Law Serv. ¶ 16315 (1936), *cert.* granted, Oct. 26, 1936; motor transport lines: *In re* Protective Motor Service Co., C. 25, Dec. 52; *In re* Clifford M. DeKay, C. 112, Dec. 102; steamship lines: *In re* Internat'l Mercantile Marine Co., R. 24, Dec. 34; *In re* Lykes Bros. Steamship Co., C. 36-38, Dec. 90; *In re* Luckenbach Steamship Co., R. 41, Dec. 100; *In re* Black Diamond Steamship Corp., R. 107, Dec. 103; ferry between two states: *In re* Delaware-New Jersey Ferry Co., IV. C. 2, Dec. 6; news service: *In re* Associated Press, R. 26, Dec. 58 and 67, 85 F. (2d) 56 (C.C.A. 2d 1936) *cert.* granted, Oct. 26, 1936; telegrams and radiograms: *In re* Mackay Radio and Telegraph Co., C. 16, Dec. 17.

⁸ *In re* Agwilines, Inc., C. 103, Dec. 83.

⁹ *In re* Pennsylvania Greyhound Lines, Inc., C. 1, Dec. 1; *In re* New England Transportation Co., I. R. 2, Dec. 8.

¹⁰ *In re* Harbor Boatbuilding Co., C. 45, Dec. 26.

the business of assembling packages for railroad shipment to other states.¹¹

*In re St. Joseph Stockyards Company*¹² deals with an employer operating a stockyard similar in almost every respect to the stockyard in *Stafford v. Wallace*¹³ in which the Packers and Stockyards Act of 1921 was upheld. The identical stockyard was involved in *St. Joseph Stockyards Company v. United States*,¹⁴ upholding the right of the Secretary of Agriculture to fix maximum rates. Both of these cases held that interstate commerce was affected and afford a strong basis for the Board's jurisdiction, unless a court should differentiate them on the ground that the employer-employee relationship does not have a similar bearing on interstate commerce.

The overwhelming majority of the cases which have come before the Board involve manufacturing and mining enterprises. In some, the operations themselves are carried on across state lines.¹⁵ In justifying its jurisdiction in other cases, the Board has emphasized the nationwide character of certain enterprises where the employees of one or two branch plants have been involved. Such are the large steel companies, owning mines, mills, fabricating plants, boat and barge lines, railroads, warehouses, and sales offices in many states, with the product of the enterprise moving repeatedly across state lines from the beginning of its fabrication to its final disposition.¹⁶ So-called partial fabrication cases introduce an additional element on which the Board has relied. Such is the manufacture of unfinished hosiery,¹⁷ unfinished cloth and yarn,¹⁸ and unfinished metal parts and supplies.¹⁹ The unfinished product in each case is shipped across state lines for further fabrication into a finished product which is often in turn moved across state lines. The Board has relied upon *Duplex Printing Press Co. v. Deering*²⁰ and *Aeolian Co. v. Fischer*,²¹

¹¹ *In re Nat'l New York Packing and Shipping Co.*, C. 83, Dec. 84 (order held enforceable, C.C.A. 2d, Nov. 2, 1936).

¹² C. 43, Dec. 87.

¹³ 258 U.S. 495 (1922).

¹⁴ 298 U.S. 38 (1936).

¹⁵ *In re Bell Oil and Gas Co.*, C. 48, Dec. 44 (an oil pressure system with pipe lines across a state boundary); *In re Pioneer Pearl Button Co.*, C. 64, Dec. 69.

¹⁶ *In re Jones & Laughlin Steel Corp.*, C. 57, Dec. 43; but see *N.L.R.B. v. Jones & Laughlin Steel Corp.*, 83 F. (2d) 998 (C.C.A. 5th 1936) (held *not* interstate commerce); *In re Chrysler Corp.*, R. 16, Dec. 10 (automobile plant); *In re Aluminum Co. of America*, R. 4, Dec. 41; *In re Samson Tire and Rubber Corp.*, R. 34, Dec. 98a.

¹⁷ *In re Blood & Co.*, R. 20, Dec. 29.

¹⁸ *In re Gate City Cotton Mills*, X.R. 1, Dec. 2; *In re Dwight Mfg. Co.*, R. 9, Dec. 23.

¹⁹ *In re Internat'l Nickel Co.*, R. 30, Dec. 59.

²⁰ 254 U.S. 443 (1921).

²¹ 35 F. (2d) 34 (D.C. N.Y. 1929), 40 F. (2d) 189 (C.C.A. 2d 1930).

in which conspiracies to obstruct the installation of printing presses and organs respectively were held to affect interstate commerce, to sustain its jurisdiction in *In re Timken Silent Automatic Company*,²² where employees installed and serviced oil burners transported from another state.

In the great bulk of cases, however, the Board has dealt with typical mining and manufacturing enterprises.²³ It has emphasized the quantity of goods purchased and sold in other states, and in addition it has laid stress on numerous additional factors, such as: nationwide advertising of the employer's product;²⁴ existence of railroad spurs or sidings at a factory and engagement of employees in loading or unloading railroad cars;²⁵ existence of teletype communication with a plant in another state;²⁶ ownership or leasing of warehouse space in another state;²⁷ purchases f.o.b. shipping point and payment of inbound freight charges;²⁸ fabrication pursuant to special order for a plant in another state.²⁹ It seems doubtful, however, that these additional factors will be sufficient to sustain the Board's jurisdiction in these cases.

COLLECTIVE BARGAINING

The duty to "bargain collectively in respect to rates of pay, wages, hours of employment, or other conditions of employment" is referred to as "that long-observed process whereby negotiations are conducted for the purpose of arriving at collective agreements governing terms of employment for some specified period."³⁰ In line with the expressed purposes of the act favoring collective bargaining, the Board has placed the highest duty upon the employer to bargain and negotiate. A mere meeting with the representatives or a mere consideration of grievances is not enough;³¹ nor is mere willingness to meet sufficient where the employer announces in advance that he will never execute an agreement. The employer must

²² C. 10, Dec. 25.

²³ *In re Fruehauf Trailer Co.*, C. 2, Dec. 4; *id.* 85 F. (2d) 391 (C.C.A. 6th 1936), holding interstate commerce is not involved.

²⁴ *In re Nat'l Casket Co.*, C. 11, Dec. 81.

²⁵ *In re Columbia Radiator Co.*, C. 66, Dec. 71; *In re R.C.A. Mfg. Co.*, R. 39, Dec. 97.

²⁶ *In re Internat'l Nickel Co.*, R. 30, Dec. 59.

²⁷ *In re Vegetable Oil Products Co.*, C. 44, Dec. 82.

²⁸ *In re Dwight Mfg. Co.*, R. 9, Dec. 23.

²⁹ *In re Oregon Worsted Co.*, C. 65, Dec. 76.

³⁰ *In re St. Joseph Stock Yards Co.*, C. 43, Dec. 87.

³¹ *In re Timken Silent Automatic Co.*, C. 10, Dec. 25; *In re Canton Enameling & Stamping Co.*, C. 47, Dec. 31.

submit counter-proposals if the union's proposals are unsatisfactory to him.³² The Board has said:

It is hardly necessary to state that from the duty of the employer to bargain collectively with his employees there does not flow any duty on the part of the employer to accede to the demands of the employees. However, before the obligation to bargain collectively is fulfilled, a forthright, candid effort must be made by the employer to reach a settlement of the dispute with his employees. Every avenue and possibility of negotiation must be exhausted before it should be admitted that an irreconcilable difference creating an impasse has been reached.³³

And even after the reaching of an impasse, any change in the situation, such as the arrival of a federal conciliator or the calling of a strike³⁴ has been held to be such a change as to require a resumption of negotiations. Even after the union calls a strike to enforce its demands, the employer's duty to bargain collectively is not necessarily terminated, and it is immaterial that the strike may have been undemocratically called.³⁵ Nor may the employer refuse to bargain collectively on the ground that the union's demands are so great that he will not meet them. Thus the union may demand a closed shop³⁶ or a change in management³⁷ and the duty to bargain collectively still remains. If the union had demanded, for example, not merely a change of management but a transfer of the ownership of the assets of the business or a substantial change in business policy not related to labor relations, would the Board have reached the same result? Perhaps the test is whether the union's demands have a sufficiently reasonable basis to characterize them as having been made in good faith with a view to entering into bargaining negotiations.

These decisions seem clearly in accordance with the underlying purpose of Congress in granting unions legal protection and fortification of their right to bargain collectively. A union which is unable even to induce the employer to enter into bargaining negotiations must perforce be economically weak, and will usually disintegrate following repeated failures. A strong union can by its own economic strength compel the employer not only to negotiate with it but to grant substantial concessions in wages, hours, or working conditions. It is therefore the weak union

³² *In re* Edward E. Cox, Printer, C. 37, Dec. 45.

³³ *In re* Sands Mfg. Co., C. 33, Dec. 46.

³⁴ *In re* Jeffrey-Dewitt Insulator Co., C. 21, Dec. 50.

³⁵ *In re* Consumers' Research, Inc., C. 52, Dec. 85; *cf. In re* Bell Oil and Gas Co., C. 48, Dec. 44; *In re* Alaska Juneau Co., C. 91, Dec. 94.

³⁶ *In re* Internat'l Filter Co., C. 56 and R. 21, Dec. 40; *In re* Alaska Juneau Co., C. 91, Dec. 94.

³⁷ *In re* Consumers' Research, Inc., C. 52, Dec. 85.

which needs the legal assistance of the act to grow and become effective in advancing the interests of its members. However, the implementation granted by the act is limited to the imposition of a duty on the employer to bargain. The concessions in wages, hours, or working conditions, which are the real objects of union organization and which preserve and foster the union's growth, can still be obtained only by the union's own strength. Thus, although it appears on the surface that the Board's decisions provide the union with an effective instrument for obtaining concessions, nevertheless the real economic advantages obtained from the Board's interpretation of the act are much less efficient.

BARGAINING UNIT

The Board has held that the union or other bargaining agency must represent a majority of the employees in the appropriate bargaining unit before the employer will be compelled to bargain collectively.³⁸ Representation is determined not by membership alone, but may be proved by the execution of powers of attorney³⁹ or by enrollment on a strike benefit list.⁴⁰ Where the union has at one time been, but because of the employer's anti-union activities has ceased being, the representative of the majority, it has been held that the employer must still bargain collectively with the union as the exclusive representative.⁴¹ This simply represents an application of the maxim that none shall profit by his own wrong.

Section 9(b) directs the Board to determine the unit, be it the "employer unit, craft unit, plant unit, or subdivision thereof." The problem of determining the appropriate bargaining unit is of course of the greatest importance. For example, a union organized on craft or semi-craft lines may have a majority in only one division of a plant, and the organization of that division can be preserved, let us say, against a plant-wide company union, only by a holding that the division constitutes the appropriate bargaining unit.

In its determinations of appropriate bargaining units the Board has tacitly given prime consideration to the rules of the interested existing bona fide labor organizations governing eligibility to membership as to tasks performed. Wherever there has been a conflict between a bona fide labor organization and an employer, or between a bona fide labor organization and a labor organization which the Board suspects of being a com-

³⁸ *In re Segall-Maigen, Inc.*, C. 35, Dec. 65; *In re Alaska Juneau Co.*, C. 91, Dec. 94.

³⁹ *In re St. Joseph Stock Yards Co.*, C. 43, Dec. 87.

⁴⁰ *In re Rabor Co.*, C. 29, Dec. 37.

⁴¹ *In re Columbian Enameling & Stamping Co.*, C. 14, Dec. 14; *In re Segall-Maigen, Inc.*, C. 35, Dec. 65; *In re Alaska Juneau Co.*, C. 91, Dec. 94.

pany union, the Board has always decided in favor of the bargaining unit supported by the bona fide labor organization. In cases of conflict between two bona fide labor organizations both of which form a part of the American Federation of Labor, the Board has declined to pass on the question of a bargaining unit, saying that the two unions should have recourse to their parent organization for a decision on the conflict of jurisdiction.⁴² A more difficult problem which may present itself in connection with the drive for industrial unions would require the Board to choose between the industrial form of organization and the craft form, without being able to send the problem back to a common parent organization for decision.

Where employees have expressed a desire to organize along narrower than plant lines, the Board has usually recognized the criteria established by the employees themselves, and has assigned in addition reasons such as the following: a higher or at least a different degree of skill is required;⁴³ rates of pay and working conditions are different;⁴⁴ the employees constitute a "homogeneous and distinct" group;⁴⁵ the employees in other departments have expressed no desire for representation or organization;⁴⁶ and the employer has recognized the appropriateness of the requested unit in the past.⁴⁷

ELECTIONS

The duty of the employer to bargain collectively raises the additional problem of determining who are the representatives of the majority. Section 9(c) provides a method by which the Board may determine and certify in advance the representatives of a majority, and for this purpose may order an election by secret ballot. This procedure is entirely separate from a proceeding by the Board charging a violation of section 8(5) for refusal to bargain collectively.

Where the Board conducts a hearing and finds from the evidence presented that a certain union or group has already been designated by the majority, the Board will certify the representatives without the holding

⁴² *In re* Aluminum Co. of America, R. 4, Dec. 41; *In re* Axton-Fisher Tobacco Co., R. 5, Dec. 48; *In re* Standard Oil Co. of California, XXI. R. 3, Dec. 49.

⁴³ *In re* Internat'l Mercantile Marine Co., R. 24, Dec. 34; *In re* Internat'l Filter Co., C. 56 and R. 21, Dec. 40; *In re* Edward E. Cox, Printer, C. 37, Dec. 45.

⁴⁴ *In re* Delaware-New Jersey Ferry Co., IV. C. 2, Dec. 6; *In re* Canton Enameling & Stamping Co., C. 47, Dec. 31; *In re* R.C.A. Mfg. Co. R. 39, Dec. 97.

⁴⁵ *In re* Internat'l Filter Co., C. 56 and R. 21, Dec. 40.

⁴⁶ *In re* Internat'l Filter Co., C. 56 and R. 21, Dec. 40; *In re* American Tobacco Co., R. 32, Dec. 99.

⁴⁷ *In re* Bell Oil & Gas Co., C. 48, Dec. 44; *In re* Edward E. Cox, Printer, C. 37, Dec. 45.

of an election.⁴⁸ But in cases where the evidence does not clearly disclose whether representatives have been designated by a majority, *i.e.*, where the employer questions the union representation,⁴⁹ where there are conflicting claims of two organizations not both members of the American Federation of Labor,⁵⁰ or where all parties consent to the holding of an election,⁵¹ a secret election will be ordered.

In the holding of an election, the Board has ruled that a majority of the employees eligible to vote must participate⁵² but that only a majority of the votes cast is necessary for designation.⁵³

INTERFERENCE, RESTRAINT AND COERCION

To insure collective bargaining and to permit employees to organize in furtherance of the purposes set forth in section 1, it is essential that the employees be free to associate themselves in bona fide labor organizations. To this end, section 8(1) has made it an unfair labor practice for an employer "to interfere with, restrain, or coerce employees" in the exercise of their right to organization and collective bargaining as set forth in section 7.

A. DISCRIMINATION

The form of interference most often found in practice and in the decisions of the Board is "discrimination in regard to hire or tenure of employment or any term or condition of employment to encourage or discourage membership in any labor organization," which is made an unfair labor practice by section 8(3). The Board's problem in this connection is twofold: (1) to determine whether the acts complained of have the effect of discrimination; (2) to determine whether the employer's motive was to discourage union activity and membership.

The Board has held discrimination to include discharge,⁵⁴ failure to reinstate or rehire,⁵⁵ temporary lay-off,⁵⁶ and preference in assignment of

⁴⁸ *In re* Blood & Co., R. 20, Dec. 29; but see *In re* Dwight Mfg. Co., R. 9, Dec. 23.

⁴⁹ *In re* Gate City Cotton Mills, X.R. 1, Dec. 2; *In re* Belmont Stamping & Enameling Co., R. 23, Dec. 30 and 57; *In re* Associated Press, R. 26, Dec. 58 and C. 84, Dec. 67.

⁵⁰ *In re* Wayne Knitting Mills, Inc., R. 2, Dec. 3; *In re* Bendix Products Corp., R. 8, Dec. 20; *In re* Lykes Bros. Steamship Co., R. 36, R. 37, R. 38, Dec. 90.

⁵¹ *In re* Baer Co., C. 8, Dec. 9.

⁵² *In re* Chrysler Corp., R. 16, Dec. 10, 63.

⁵³ *In re* Associated Press, R. 26, Dec. 58 and C. 84, Dec. 67, citing *Virginia Ry. Co. v. System Federation No. 40*, 84 F. (2d) 641 (C.C.A. 4th 1936), *cert. granted*, C.C.H. Labor Law Serv. ¶ 16,000 (1936).

⁵⁴ *In re* Jones & Laughlin Steel Corp., C. 57, Dec. 43, 83 F. (2d) 998 (C.C.A. 5th 1936).

⁵⁵ *In re* Clinton Cotton Mills, C. 5, Dec. 5; *In re* Columbia Radiator Co., C. 66, Dec. 71.

⁵⁶ *In re* Pennsylvania Greyhound Lines, Inc., C. 1, Dec. 1.

jobs.⁵⁷ Failure to reinstate or rehire extends to employees whose work has ceased as a consequence of or in connection with any current labor dispute or any unfair labor practice as defined in section 2(3). In this connection the Board has construed labor disputes to be "current" which have lasted from three months to a year.⁵⁸ The test of currency seems to be whether there is still a possibility of settlement.

There may be discrimination in "hiring," the Board has held, even though the discriminatory failure to hire is directed against a person who is not an employee.⁵⁹

The factual problem of determining the employer's motive is much more difficult, as are all inquiries into a mental state. It may be said that after proof has been made of a discharge following union activity, especially where the employer has a record of hostility toward the union, the Board has placed the burden upon the employer to prove absence of unlawful motive.⁶⁰ This may be due not only to the difficulty of proving the employer's state of mind where the employer can with relative ease cover up proof of his motive, as years of experience with anti-blacklisting statutes have demonstrated,⁶¹ but also to the Board's desire to eliminate obstacles to the accomplishment of the purposes announced in the act. In a majority of cases, the employer has attempted to justify his act on grounds of inefficiency; and in such cases the Board has required the employer to produce clear proof that inefficiency was the sole reason for his conduct.⁶² Even though an employee may have been inefficient, nevertheless if he would have been retained but for his union activity, the Board has found against the employer.⁶³ In a case where a non-union employee was discharged, the Board found a violation where the employer was motivated by an erroneous belief that the employee was a member of the union⁶⁴ or was engaged in organizing a union among his employees.⁶⁵

From a reading of the decisions it might appear that the Board's rulings in these cases have not been in accordance with traditional rules of law

⁵⁷ *In re Mackay Radio & Telegraph Co.*, C. 16, Dec. 17.

⁵⁸ *In re Carlisle Lumber Co.*, C. 93, Dec. 104; *In re Beaver Mills*, R. 12, Dec. 12; *In re Alabama Mills*, C. 76, Dec. 86.

⁵⁹ *In re Algonquin Printing Co.*, C. 7, Dec. 21.

⁶⁰ *In re United Aircraft Mfg. Corp.*, C. 31, Dec. 18.

⁶¹ Witte, *The Government in Labor Disputes* 213-18 (1932).

⁶² *In re United Aircraft Mfg. Corp.*, C. 31, Dec. 18; *In re Columbia Radiator Co.*, C. 66, Dec. 71.

⁶³ *In re Nat'l New York Packing & Shipping Co.*, C. 83, Dec. 84.

⁶⁴ *In re Fashion Piece Dye Works*, C. 22, Dec. 19.

⁶⁵ *In re Pusey, Maynes & Breish Co.*, C. 28, Dec. 38.

or with the facts proved; nevertheless it can probably be safely said that the Board's conclusions are founded on the realities of the situation and are designed to promote the expressed purposes of the act.

B. COMPANY UNIONS

Another common type of interference is the promotion of the company union, which the act has proscribed in section 8(2) by declaring it to be an unfair labor practice for an employer to "dominate or interfere with the formation or administration of any labor organization or contribute financial or other support to it." Freedom of association and the concept of collective bargaining are decidedly limited when the association is dominated by the very employer with whom it is proposed to deal at arm's length. It is difficult to destroy the influence of the company union when the company union has the paternal recognition and support of the employer; thus the Board has employed three methods which have the effect of combating it: (1) defining the appropriate bargaining unit so as to liquidate the company union's voting strength; (2) specifically finding a violation of section 8(2); (3) where the serious practical difficulty of obtaining evidence prevents a finding of violation of section 8(2), finding a violation of section 8(1) based on the same facts which were unsuccessfully presented in an effort to establish a violation of section 8(2).⁶⁶

An unsuccessful attempt to encourage or dominate a labor organization has been held as much a violation as a successful attempt.⁶⁷

C. OTHER INTERFERENCE

Wherever the Board has found the existence of an unfair labor practice involving a company union (section 8(2)) or discrimination (section 8(3)), by definition it has found an "interference, restraint, or coercion" under section 8(1). There are however other acts constituting interference under section 8(1) which can not be classified under section 8(2) or section 8(3). Such are open surveillance of union meetings and urging employees not to form a union;⁶⁸ employment of detectives to spy on employees engaged in union organization;⁶⁹ acts in the nature of unlawful discrimination which do not support a finding of violation of section 8(3);⁷⁰ a refusal to bargain collectively with a labor organization even though there has been no showing that the organization represents a majority of the employees, but where no other organization represents a majority;⁷¹ and by influence on a Citizens' Committee, town businessmen, and police, causing

⁶⁶ *In re Atlanta Woolen Mills*, C. 13, Dec. 24, Dec. 75.

⁶⁷ *In re Canvas Glove Mfg. Works*, C. 24, Dec. 42.

⁶⁸ *In re Pennsylvania Greyhound Lines, Inc.*, C. 1, Dec. 1.

⁶⁹ *In re Fashion Piece Dye Works*, C. 22, Dec. 19.

⁷⁰ *In re Greensboro Lumber Co.*, C. 17, Dec. 51.

⁷¹ *In re Alaska Juneau Co.*, C. 91, Dec. 94.

economic discrimination against union members and internal disruption of the union.⁷² The variety of acts of interference depends only upon the ingenuity of a hostile employer, and the Board has been quick to brand them as unfair labor practices.

PROCEDURE

A. EVIDENCE

Section 10(b) provides that rules of evidence prevailing in courts of law or equity shall not be controlling before the Board. The courts have however announced certain broad rules relating to the admission and exclusion of evidence before administrative bodies, such as the Federal Trade Commission,⁷³ and the Board will no doubt be bound by these rulings.

Certain problems of evidence have presented themselves for decision which are in a measure peculiar to the problems of the Board. Employers have objected that it is improper for the Board to consider evidence of any acts which occurred before July 5, 1935, the effective date of the act. But the Board has held that such evidence is admissible as proof of motive and intent after that date.⁷⁴

It has excluded evidence of communist sympathy on the part of the employees and communist affiliation of a union, particularly where the evidence showed that the employer retained employees solely on the basis of ability to perform their tasks.⁷⁵ The Board has likewise rejected evidence of a union's acts of violence and the employees' hostility toward the employer and toward strikebreakers,⁷⁶ on the theory that had the employer complied with the act, such activity would have been averted.

In order to protect employees from unfair labor practices which might follow, the Board has consistently permitted the introduction in evidence of union cards or lists to prove the union's majority without requiring that they be disclosed to the employer or his counsel.⁷⁷ This accords with the practice of the Federal Trade Commission which declines to release the names of persons filing complaints.⁷⁸

⁷² *In re* Brown Shoe Co., Inc., C. 20, Dec. 66.

⁷³ *Bene v. Federal Trade Comm'n*, 299 Fed. 468 (C.C.A. 2d 1924); *Federal Trade Comm'n v. Pacific States Paper Trade Ass'n*, 273 U.S. 52 (1927).

⁷⁴ *In re* Pennsylvania Greyhound Lines, Inc., C. 1, Dec. 1.

⁷⁵ Cf. Judgment of the L. Arb. G., Frankfurt-am-Main of November 27, 1933, Arb.R. Samml., Vol. XIX, LAG., p. 207; *International Survey of Legal Decisions on Labour Law*, 1933, p. 151 (1935).

⁷⁶ *In re* Consumers' Research, Inc., C. 52, Dec. 85; *In re* Mackay Radio & Telegraph Co., C. 16, Dec. 17.

⁷⁷ *In re* Internat'l Mercantile Marine, R. 24, Dec. 34; *In re* Samson Tire & Rubber Corp., R. 34, Dec. 98.

⁷⁸ Henderson, *Federal Trade Commission* 65 (1924).

B. RELIEF

Typical relief afforded in cases other than petitions for certification is an order, usually couched in the words of the statute, directing the employer to cease the particular unfair labor practice or practices of which he has been found guilty. Under the authority of section 10(c) permitting the Board to "take such affirmative action . . . as will effectuate the policies" of the act, the Board has issued specific directions to the employer. It has ordered the employer to bargain collectively with the designated representatives. In discrimination cases, it has ordered the reinstatement of discharged employees, usually with back pay from the date of discharge to the date of reinstatement, less the employee's earnings in the interval. But where the employees have struck following or concurrently with the employer's refusal to bargain collectively, reinstatement will usually be ordered without back pay.⁷⁹ Where a trial examiner issued an intermediate report finding the discharge not to have been discriminatory, no back pay was ordered for the period between the intermediate report and the Board's order for reinstatement.⁸⁰ In cases involving a company union, the Board has not merely ordered the cessation of unfair labor practices, but has affirmatively ordered the employer to withdraw recognition.⁸¹ It has also ordered an employer to reduce to a written and binding memorandum the terms upon which agreement was reached during negotiations with the union.⁸² Throughout all its orders it has been the purpose of the Board to place the parties in the position they would have occupied had the employer not committed the unfair labor practice.

For an understanding of the decisions of the Board, one must bear in mind the postulate upon which the Board has stated the act to be based:

That union organization is the exclusive concern of labor; that employees may advance that objective in any legitimate and orderly manner; and that they are entitled to the protection of the Board if the employer interferes with or coerces them in the exercise of their right to organize are elementary principles of the legislation under which this Board is constituted.⁸³

⁷⁹ *In re* Cleveland Chair Co., C. 18, Dec. 74.

⁸⁰ *In re* E. R. Haffelfinger Co., C. 46, Dec. 64; *In re* Mann Edge Tool Co., C. 61, Dec. 80.

⁸¹ *In re* Atlanta Woolen Mills, C. 13, Dec. 24 and 75.

⁸² *In re* St. Joseph Stock Yards Co., C. 43, Dec. 87.

⁸³ *In re* Protective Motor Service Co., C. 25, Dec. 52; *cf.* *Texas and N. O. R. Co. v. Brotherhood*, 281 U.S. 548, 571 (1930).