Escalating the Struggle Against Taft-Hartley Contemnors

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With the exception of the delay syndrome that characterizes the administration of the Labor-Management Relations Act, the principal stumbling block to effectuating the national labor policy is the inability of the National Labor Relations Board to formulate effective remedies.

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2 Commentators and committee reports have emphasized that additional remedies are essential to enforce the substantive provisions of the Taft-Hartley Act. See, e.g., Brown, Exploring the World of Remedies, in SOUTHWESTERN LEGAL FOUNDATION, LABOR LAW DEVELOPMENTS 69 (1968); McCulloch, New Remedies Under the National Labor Relations Act, in NEW YORK UNIVERSITY TWENTY-FIRST ANNUAL CONFERENCE ON LABOR PROCEEDINGS 223 (1969); High, Recent Innovations in RemediaL Orders of the NLRB, PRACTICING LAWYER, Mar., 1969, at 87; McCulloch, Past, Present and Future Remedies Under Section 8(a)(5) of the NLRA, 19 LAB. L.J. 131 (1968); St. Antoine, A Touchstone for Labor Board Remedies, 14 WAYNE L. Rev. 1039 (1968); Schlossberg & Silard, The Need for a Compensatory Remedy in Refusal-to-Bargain Cases, 14 WAYNE L. Rev. 1059 (1968); Comment, Forced Concession as a Possible NLRB Remedy, 68 COLUM. L. Rev. 1192 (1968); Note, Labor Law—Remedies—An Assessment of the Proposed “Make-Whole” Remedy in Refusal-to-Bargain Cases, 67 MICH. L. Rev. 974 (1969); Note, Toward Remediying Deliberate Unfair Labor Practices Under § 8(a) of the NLRA: An Inquiry into the Pathology of the Wilful Violator, 17 U.C.L.A. L. Rev. 602 (1970); Note, Remedies for Employer Unfair Labor Practices During Union Organizing Campaigns, 77 YALE L.J. 1574 (1968). See also SPECIAL SUBCOMM. ON LABOR OF THE HOUSE COMM. ON EDUCATION AND LABOR, NATIONAL LABOR RELATIONS ACT REMEDIES: THE UNFULFILLED PROMISE . . . , 90th Cong., 2d Sess. (1968); SUBCOMM. ON NLRB
Despite its broad statutory authority, the Board's remedial measures have not proved adequate in coping with recalcitrant employers and unions, and attempts to fashion and invoke imaginative remedies have often met with resistance.

Little attention has been paid to what is potentially the most powerful remedy, the institution of contempt proceedings in a federal court of appeals when it appears that a respondent is violating a court-enforced Board order. The contempt citation as the ultimate sanction is crucial to the regulatory scheme of the Act because it portends that the coercive force of the state will be brought to bear on the contemnor. If the governing body of law hinders effective adjudication of contempt, or if judicial or administrative attitudes and procedures prevent its efficient utilization, then the pinion of the Act has been loosened.

It is particularly appropriate to examine the contempt remedy at this time. The Board, which for years evinced minimal interest in initiating contempt proceedings, seems to have recently rediscovered this option, and the courts appear more willing than formerly to adjudge respon-
udents in contempt. In general, contempt is a sanction to which the Board has infrequently resorted. Until 1964, the peak years were 1941, 1942, and 1943. In 1941 and 1943, the Board filed contempt petitions in fifteen and thirteen cases, respectively, and in 1942, eleven cases were decided, five were settled, and ten were pending adjudication. The next twenty years were a period of remarkable inactivity. While unfair labor practice cases and court decrees continued to increase in number (and there is nothing to indicate a decrease in the incidence of violation of decrees), the Board filed, on the average, only three contempt cases per year and none at all in 1946, 1948, 1949, and 1955. Beginning in 1964, the number of petitions dramatically increased: fourteen in 1964, twelve in 1965, eighteen in 1966, twenty in 1967, twenty in 1968, twenty-three in 1969, twenty in 1970, and seventeen in 1971.

The Board's reluctance to institute contempt proceedings can no doubt be attributed in large part to the frequently hostile treatment accorded the Board in the courts of appeals. Yet there are signs that this is changing. In the eleven years following 1938, which saw the

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7 6 NLRB ANN. REP. 101 (1942); 8 NLRB ANN. REP. 177-78 (1944). Years referred to are fiscal years, which end June 30.

8 7 NLRB ANN. REP. 150-51 (1943).

9 Compiled from NLRB ANN. REP. It is interesting to compare the statistics for 1943 with those for two representative years, 1954 and 1962, with regard to the number of Board unfair labor practice cases on docket, the number of outstanding court decrees, and the number of contempt petitions filed:

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<tr>
<th>Year</th>
<th>1943</th>
<th>1954</th>
<th>1962</th>
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<tbody>
<tr>
<td>Cases on Docket</td>
<td>5,177</td>
<td>8,834</td>
<td>17,943</td>
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<tr>
<td>Outstanding Decrees</td>
<td>411</td>
<td>1,234</td>
<td>1,895</td>
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<tr>
<td>Petitions Filed</td>
<td>13</td>
<td>4</td>
<td>3</td>
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Sources: 8 NLRB ANN. REP. 62, 84, 177-78 (1944); 19 NLRB ANN. REP. 139, 155, 175 (1955); 27 NLRB ANN. REP. 252, 259, 280 (1963).

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<tbody>
<tr>
<td>Cases on Docket</td>
<td>20,805</td>
<td>21,531</td>
<td>22,245</td>
<td>23,698</td>
<td>25,154</td>
<td>25,028</td>
<td>28,127</td>
<td>32,046</td>
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<tr>
<td>Outstanding Decrees</td>
<td>2,247</td>
<td>2,418</td>
<td>2,600</td>
<td>2,806</td>
<td>3,007</td>
<td>3,307</td>
<td>3,484</td>
<td>3,807</td>
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<tr>
<td>Petitions Filed</td>
<td>14</td>
<td>12</td>
<td>18</td>
<td>20</td>
<td>20</td>
<td>23</td>
<td>20</td>
<td>17</td>
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Sources: 29 NLRB ANN. REP. 139, 167, 201 (1965); 30 NLRB ANN. REP. 148, 177, 212 (1966); 31 NLRB ANN. REP. 157, 183, 222 (1967); 32 NLRB ANN. REP. 183, 215, 254 (1968); 33 NLRB ANN. REP. 172, 200, 240 (1969); 34 NLRB ANN. REP. 169, 196, 236 (1970); letter from John C. Truesdale, Acting Executive Secretary, NLRB, to the authors, Apr. 21, 1972 (copy on file at The University of Chicago Law Review) [hereinafter cited as Truesdale Letter].

11 See text and notes at notes 136-61 infra.
first contempt case under the Act,\(^{12}\) fifty cases were decided by the courts, with the Board prevailing in thirty-six cases—seventy-two percent.\(^{13}\) In the next decade, the Board was less successful: from 1950 to 1959, there were adjudications of contempt in twenty-one of the thirty-two cases—sixty-six percent.\(^{14}\) But from 1960 through 1971, the Board has been accorded more hospitable treatment: respondents were held in contempt in seventy-two of the eighty-two cases—eighty-eight percent. And in 1970 and 1971, the Board prevailed in twenty-one of the twenty-three decided cases.\(^{15}\)

The import of these statistics depends, of course, upon many variables, including the nature of the cases the Board has chosen to file. Nonetheless, the Board is meeting with more real success in that the courts are deciding more sophisticated and more complex issues more frequently in the Board's favor than in previous years.\(^{16}\) This article will examine the adequacy of the contempt proceeding as it has traditionally been utilized and will identify the changes needed to adapt it to a more active role in vindicating the law. The procedures and rules developed by the Board and the courts will be outlined, with emphasis upon the procedural rights of the charging party and the alleged contemnor. Finally, the effectiveness of these procedures and rules will be evaluated in order to identify dysfunctional characteristics and to recommend reforms.\(^{17}\)

\(^{12}\) NLRB v. Remington Rand, Inc., 97 F.2d 195 (2d Cir. 1938).

\(^{13}\) Compiled from NLRB ANN. REP. This not unimpressive statistic must be discounted somewhat. Despite the newness of the law and the corresponding uncertainty of its prescriptions, courts exhibited a tendency to decide the cases without written opinion. Only fourteen of the thirty-six contempt cases won by the Board were reported. The efficacy of proceeding in contempt therefore might have appeared less than it really was.

\(^{14}\) Compiled from NLRB ANN. REP. Fifteen of the cases in which the Board prevailed and nine dismissals of its petitions were reported.

\(^{15}\) Compiled from NLRB ANN. REP. and Truesdale Letter, supra note 10. While eight of the ten dismissals appeared in opinion form, only thirty-two of the seventy-two contempt adjudications have been reported.


\(^{17}\) The source of some of the data and conclusions in this article, particularly in sec-
Taft-Hartley Contemnors

I. THE BOARD DECISION TO SEEK CONTEMPT

Although the procedure for instituting contempt proceedings is not specified in either the Taft-Hartley Act or the Board's Rules and Regulations, guidelines have been established. In a 1967 memorandum, the General Counsel directed the regional offices to report promptly to the central office in Washington every charge filed against a respondent "named in or subject to an outstanding decree," to investigate the charge speedily, and to file a follow-up report with recommendations.

Prior to 1967, the regional offices were required to refer to the Washington central office only "meritorious" charges relating to an outstanding court decree. The initial step was thus within the discretion of the regional office. The 1967 memorandum, shifting the discretion to Washington, instructed the regions that a "prima facie" case for a recommendation to the Board for the institution of contempt proceedings would be indicated in two situations: (1) where an outstanding decree literally covers the new violation, even though the violation "is not wholly like or does not grow out of the offense or dispute in the basic case," or (2) where a new Board order or court decree "would add nothing affirmatively or negatively to an already outstanding decree." A contempt recommendation is not warranted, however, if the evidence of a violation is not "clear and convincing" or if "application of the Board's expertise rather than the unsophisticated approach of a special master would more likely afford relief."
Any reference in the memorandum to a “Contempt Section” is somewhat misleading to one unfamiliar with the operation of the Office of the General Counsel in Washington. The “Contempt Section” consists of only two supervisory attorneys of the Appellate Court Branch (recently designated “Chief” and “Deputy Chief”), who refer reports from regional offices to briefing attorneys in the Appellate Court Branch at random. These “chiefs” appear to be without authority, however, since briefing attorneys must be persuaded to accept a contempt case.24

Although no written guidelines govern the processing of contempt cases in Washington, a procedure has become well established. The reviewing attorney usually communicates with the regional attorneys and charging party and sometimes with the respondent. The difference between review at the regional and Appellate Court Branch levels is a matter of emphasis. In the region, investigation and fact finding have priority; the attorney in Washington, who of necessity must rely upon the facts as found by the region, concentrates mainly on their legal ramifications.

When the review is completed by the attorney and his supervisor, regardless of whether the conclusion coincides with that of the region, an oral report and recommendation is communicated to the General Counsel for his approval. If he favors proceeding in contempt, he must submit a detailed memorandum to the Board for its review.25 The institution of contempt proceedings has evidently been made dependent upon formal authorization by the Board because of possible policy considerations.26 Significantly, decisions of the General Counsel not

24 There has apparently never been a separately staffed section devoted exclusively to contempt work. In the early 1940s, contempt cases were assigned to a “Trial Section,” whose attorneys performed a “miscellany of duties.” 4 NLRB ANN. REP. 9 (1940). Over the years, the processing of contempt cases has been transferred in turn to the Injunction or District Court Branch, then to the Advice Branch, and finally to the Appellate Court Branch.

25 20 Fed. Reg. 2175 (1955), as amended, 23 Fed. Reg. 6966 (1958), 24 Fed. Reg. 6666 (1959). However, the Board need not so require. Section 3(d) of the Act broadly provides that the General Counsel “shall have such other duties as the Board may prescribe.” 29 U.S.C. § 153(d) (1970). The Act nowhere restricts the Board’s power to delegate to the General Counsel the authority to determine whether or not to institute contempt proceedings. See note 27 infra.

26 In another context, Chief Judge Bazelon has said that “[t]he decision to seek an adjudication of contempt . . . was as much a question of public policy as any enforcement decision before the Labor Board. Consequently, only the Board was competent to make it.” NLRB v. Kohler Co., 351 F.2d 798, 809 (D.C. Cir. 1965).
to proceed in contempt are discretionary and need not be referred to the Board.

If the Board decides to proceed, it directs the General Counsel to file the contempt petition.27 The attorney in the Appellate Court Branch who originally reviewed the case prepares the necessary court papers, and the case is tried by attorneys from the Branch and regional offices. The regional office that referred the case is expected to render any assistance required in preparing the prosecution of the case.28

II. COURT PROCEEDINGS

The General Counsel initiates the contempt proceeding by filing a petition with the appropriate court of appeals moving that the respondent be ordered to show cause why it should not be adjudged in contempt. Ordinarily the show cause order issues routinely; but in at least four instances, courts have heard argument on this question.29 After the show cause order has issued and the respondent has filed an answer, the court has three alternatives. It may decide the case on the pleadings, hear the case itself, or appoint a special master to take evidence.

A. Decision on the Pleadings vs. Hearings by Court or Master

In six early cases,30 the Board sought decision on the pleadings alone and obtained the requested summary disposition in all but one.31 The
Board lost three of the five cases so decided, and it appears that no contempt cases have been submitted on the pleadings since. Courts have occasionally determined, however, that pleadings alone or pleadings and affidavits are a sufficient basis for decision.

In most cases, the pleadings present a factual controversy, and a hearing is ordered by the court. Infrequently, a court will take evidence itself; but because of heavy dockets, the usual practice is to appoint a master to take testimony and to make findings of fact and conclusions of law. The Board files a "Motion for the Appointment of a Special Master," alleging that issues of fact require a hearing for resolution and normally suggesting the appointment of either a federal district court judge or a hearing examiner from some other federal agency. The selection of a federal judge or hearing examiner eliminates any problem of compensating the master.

B. Civil vs. Criminal Cases

The Board usually seeks a civil contempt adjudication. Criminal contempt cases are brought occasionally, but the courts are reluctant to adjudicate criminal contempt or to impose criminal sanctions. The theory of denominating the suit "civil" is that it is solely remedial in nature and is instituted to obtain the benefits of the underlying decree. Criminal contempt, in contrast, is punitive in nature, serving to vindicate the authority of the court. It has been said that contempt proceedings "are sui generis—neither civil actions nor prosecutions for offenses, within the ordinary meaning of those terms," and this...

32 Edward G. Budd Mfg. Co. v. NLRB, 142 F.2d 922 (3d Cir. 1944); NLRB v. El Paso Elec. Co., 135 F.2d 168 (5th Cir. 1943); NLRB v. Whittier Mills Co., 123 F.2d 725 (5th Cir. 1941).
33 In NLRB v. Hamilton Co., 42 L.R.R.M. 2287 (10th Cir. 1958), and NLRB v. Bank of America Nat'l Trust & Sav. Ass'n, 147 F.2d 287 (9th Cir. 1945), for example, the Board's petition was denied. In NLRB v. Shannon, 229 F.2d 652 (9th Cir. 1956), and NLRB v. Newark Morning Ledger Co., 126 F.2d 667 (3d Cir. 1942), it was granted.
34 See, e.g., NLRB v. Building Serv. Employees Local 224, 876 F.2d 131 (1st Cir. 1989), cert. denied, 389 U.S. 856 (1967); NLRB v. Lambert, 250 F.2d 801 (5th Cir. 1958).
35 The court could, if it chose to do so, assess the costs of the salary of a federal judge or hearing examiner against the contemnor.
36 See, e.g., In re Winn-Dixie Stores, Inc., 386 F.2d 309 (5th Cir. 1967); NLRB v. Star Metal Mfg. Co., 187 F.2d 856 (3d Cir. 1951). When the court decides that a proceeding in criminal contempt is justified, it normally appoints outside counsel to prosecute, and the trial is held in a court of appeals courtroom.
37 See, e.g., NLRB v. Hod Carriers Local 210, 228 F.2d 589 (2d Cir. 1955); NLRB v. Israel Putnam Mills, 197 F.2d 116 (2d Cir. 1952); NLRB v. Berkley Mach. Works & Foundry Co., 189 F.2d 904 (4th Cir. 1951); NLRB v. Rico, 182 F.2d 254 (9th Cir. 1950).
38 NLRB v. Hopwood Retinning Co., 104 F.2d 302, 305 (2d Cir. 1939).
seems particularly true of contempt proceedings brought by the Board.\textsuperscript{41} The primary purpose is to enforce the national labor policy; preserving the benefits of the decree for the charging party is secondary, as is vindicating the authority of the court.\textsuperscript{42} Regardless of whether this traditional classification can withstand analysis, it is the present framework and is significant in determining the elements of the contempt, the standard of proof, and the sanctions to be invoked.\textsuperscript{43} In a criminal contempt suit, the Board must prove that the violation was "knowing, willful and intentional."\textsuperscript{44} No such showing of state of mind is theoretically necessary in civil contempt; courts frequently, however, look to the element of good faith in deciding whether to adjudge a respondent in contempt.\textsuperscript{45} Although the Board as the petitioner always has the burden of proving that the decree has been violated, the standards of proof between civil and criminal contempt differ. In civil contempt, this burden is satisfied by "clear and convincing" evidence; a criminal contempt adjudication must be based on proof "beyond a reasonable doubt."\textsuperscript{46}

C. Remedies

If the respondent is cited for contempt, the court must determine the nature and extent of the decree that it will issue to effectuate its judgment. While the Board is normally requested to submit a decree for consideration,\textsuperscript{47} the court is free to accept, reject, or modify the Board's recommendations\textsuperscript{48} or to refer the case back to the special master for a determination of appropriate sanctions.\textsuperscript{49}

Criminal contempt sanctions are punitive. In United States v. United

\textsuperscript{41} See text and notes at notes 167-74 infra.
\textsuperscript{42} As the Supreme Court stated in Amalgamated Util. Workers v. Consolidated Edison Co., 309 U.S. 261, 269 (1940): "It is the Board's order on behalf of the public that the court enforces. It is the Board's right to make that order that the court sustains."
\textsuperscript{43} Concerning sanctions, see text and notes at notes 51-69 infra.
\textsuperscript{44} See text and note at note 175 infra.
\textsuperscript{45} In re Winn-Dixie Stores, Inc., 386 F.2d 309, 318 (5th Cir. 1967). Intent is irrelevant in civil contempt once it has been determined that the decree has been violated. See text and notes at notes 142-49 infra.
\textsuperscript{46} See text and notes at notes 175-77 infra.
\textsuperscript{47} See, e.g., NLRB v. Satilla Rural Elec. Membership Corp., 393 F.2d 134, 136 (5th Cir. 1968).
\textsuperscript{48} McComb v. Jacksonville Paper Co., 386 U.S. 187, 191-93 (1949); United States v. United Mine Workers, 330 U.S. 258, 303-04 (1947); NLRB v. Vander Wal, 316 F.2d 631, 634 (9th Cir. 1963); NLRB v. Nesen, 211 F.2d 559, 564 (9th Cir. 1954), cert. denied, 348 U.S. 820 (1957). In NLRB v. Star Metal Mfg. Co., 187 F.2d 856, 857 (3d Cir. 1951), the Board's request for permanent mandatory injunction was denied on the ground that it would create a "procedural quagmire."
\textsuperscript{49} See, e.g., NLRB v. Teamsters Local 282, 438 F.2d 100 (2d Cir. 1970).
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Mine Workers, the Supreme Court enunciated the general guidelines to be followed in determining the appropriate penalty:

In imposing a fine for criminal contempt, the trial judge may properly take into consideration the extent of the willful and deliberate defiance of the court's order, the seriousness of the consequences of the contumacious behavior, the necessity of effectively terminating the defendant's defiance as required by the public interest, and the importance of deterring such acts in the future.

Notwithstanding this language, the courts have in practice typically imposed fines for criminal contempt with little or no discussion of the relationship between the offense and the penalty.

The sanctions for civil contempt are remedial and are aimed at securing compliance with the court's decree, deterring future contumacious conduct, and compensating the complainant for losses that have resulted from the respondent's actions. While courts have on occasion imposed a flat fine on a civil contemnor, the usual decree is multifaceted, structured to be responsive to the violation. This decree typically contains the requirement that the contemnor purge himself by doing what he failed to do under the original decree. A respondent that, for example, engages in surface bargaining in violation of a court-enforced bargaining order will be commanded to negotiate in good faith; a union that persists in engaging in secondary boycotts in violation of a court order will be required to cease this activity. In addition, the contemnor is required to file a sworn statement with the court or the Board's Regional Director specifying the steps being taken to comply with the order and to post notices informing employees or members of the contempt adjudication.

51 Id. at 303.
52 In In re Winn-Dixie Stores, Inc., 386 F.2d 309 (5th Cir. 1967), ten thousand dollar and five hundred dollar fines were imposed on company and its president, respectively, for violating a section 8(a)(3) order, with no discussion as to appropriateness. In NLRB v. Essex County News Co., 28 L.R.R.M. 2634 (3d Cir. 1951), a union and its president were fined ten thousand dollars and two thousand dollars, respectively, for failure to post notice, with discussion.
53 See, e.g., NLRB v. Nickey Chevrolet Sales, Inc., 76 L.R.R.M. 2849 (7th Cir. 1971); NLRB v. Crown Laundry & Dry Cleaners, 437 F.2d 290 (5th Cir. 1971); NLRB v. Operating Eng'rs Local 825, 430 F.2d 1225 (3d Cir. 1970). See also note 48 supra.
54 See NLRB v. F.M. Reeves & Sons, 273 F.2d 710 (10th Cir. 1961); NLRB v. Giannasca, 119 F.2d 756 (2d Cir. 1941).
55 Carpenteria Lemon Ass'n v. NLRB, 274 F.2d 492 (9th Cir. 1960).
56 NLRB v. Teamsters Local 676, 450 F.2d 413 (3d Cir. 1971); NLRB v. Operating Eng'rs Local 825, 430 F.2d 1225 (3d Cir. 1970).
57 See, e.g., NLRB v. Ralph Printing & Lithographing Co., 433 F.2d 1058 (8th Cir.
To insure compliance with its order, the court, in addition to requiring strict adherence to the terms of the original decree, often imposes a fine conditioned upon the contemnor's failure to purge himself by a specified date, consisting of a lump sum, an amount to be imposed for each day of any further violation, or both. It is typical of a civil contempt adjudication that sanctions are prospective, except when they are designed to dissipate harm caused others by the contumacious conduct.

While imposition of a fine is clearly discretionary, the fine conditioned upon future noncompliance is often levied when it is anticipated that future or continuing violation is likely, as in refusal-to-bargain cases, or when the recalcitrance of the contemnor appears egregious. The amount of the noncompliance fine is determined upon a consideration of "the character and magnitude of the harm threatened by continued contumacy, ... the probable effectiveness of any suggested sanction in bringing about the result desired ... [and] the amount of defendant's
financial resources and the consequent seriousness of the burden to that particular defendant.” The court may also provide that the Board as the successful petitioner be awarded the costs and expenses of the investigation, preparation, and trial of the case, including salaries. Costs are awarded primarily as a compensatory fine, but the deterrent aspect is not absent.

The court is, of course, not limited to financial sanctions. The most severe sanction in the court’s arsenal is the writ of body attachment, providing for the arrest and detention of the contemnor for failure to comply with the court order.

III. PROCEDURAL RIGHTS OF THE CHARGING PARTY AND THE RESPONDENT

A. Rights of the Charging Party Before the Board

A party protected by a court decree that believes the decree has been or is being violated must submit a complaint to the regional office having jurisdiction over the respondent and whose responsibility it is to police the decree; the agency process then begins. No rules establish any right of the charging party to be heard in connection with the formula-

63 This award is usually made. In NLRB v. Stafford Trucking Co., 79 L.R.R.M. 3083, 3084 (7th Cir. 1972), the respondent was ordered to reimburse the Board for expenditures, including “future costs . . . so long as compliance is not achieved.” See also NLRB v. Nickey Chevrolet Sales, Inc., 76 L.R.R.M. 2849 (7th Cir. 1971); NLRB v. Operating Eng’rs Local 825, 430 F.2d 1225 (3d Cir. 1970); NLRB v. Building Serv. Employees Local 254, 376 F.2d 131, 136 (1st Cir. 1967). Awards, however, are not always and not uniformly made. In NLRB v. Crown Laundry & Dry Cleaners, 437 F.2d 290, 295 (5th Cir. 1971), the court recognized that “contemnors are commonly required to pay the salary and expenses of the Special Master and the expenses incurred by the Board in the investigation, preparation, and presentation of contempt proceedings.” But without explanation, it required the contemnor to pay only one-half of the salaries of Board counsel and employees. In NLRB v. Stafford Trucking Co., 371 F.2d 244 (7th Cir. 1966), the court without explanation excluded attorney’s fees entirely. And in NLRB v. Ralph Printing & Lithographing Co., 379 F.2d 687 (8th Cir. 1967), the court excluded both attorney’s fees and expenses of investigation, again without explanation.
65 See, e.g., NLRB v. Ralph Printing & Lithographing Co., 433 F.2d 1058 (8th Cir. 1970); NLRB v. Interurban Gas Corp., 401 F.2d 743 (6th Cir. 1968); NLRB v. Interurban Gas Corp., 401 F.2d 744 (6th Cir. 1968) (writ issued); NLRB v. Savoy Laundry, 384 F.2d 78 (2d Cir. 1965); NLRB v. Republican Publishing Co., 180 F.2d 487 (1st Cir. 1950); NLRB v. Lightner Publishing Co., 128 F.2d 227 (7th Cir. 1942). Two recent cases threatening writ of body attachment are NLRB v. Indianapolis Transit Mix Corp., 77 L.R.R.M. 2979 (7th Cir. 1971), and NLRB v. Service Roofing Co., 77 L.R.R.M. 2962 (9th Cir. 1971).
66 See text and notes at note 19 supra.
67 See text and notes at notes 18–28 supra.
tion of the region's recommendation. The rationalization of some courts is that since the Board is acting in a prosecutorial rather than an adjudicative role, the elements of due process are not applicable. But sound policy dictates, and the General Counsel evidently agrees, that the charging party should be given some opportunity to present its case directly to the Office of the General Counsel, especially since its participation in the contempt proceeding is otherwise extremely limited. As a matter of general practice, the charging party and the respondent are both accorded the privilege of full communication with the Contempt Section of the General Counsel's Office and, in some instances, of a conference with the General Counsel and/or the Associate General Counsel in charge of the Division of Litigation. Because every violation of a decree is either an unfair labor practice or a refusal to remedy the effects thereof, the charging party should have the same opportunity to confer with the General Counsel's Office as in an unfair labor practice proceeding.

B. Rights of the Charging Party in Court

More uncertainty attends the rights of the charging party once the General Counsel and the Board have passed upon the complaint that a decree has been violated. If the General Counsel or the Board determines not to file in contempt, is the charging party without recourse? What are the rights of the charging party, if any, to be heard on a proposed settlement of the complaint? If a contempt petition is filed, may the charging party intervene?

1. Initiation of Contempt Proceedings. Early in the history of the National Labor Relations Act, the Supreme Court ruled in Amalgamated Utility Workers v. Consolidated Edison Co. that the Board had

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68 Cf. NLRB Statements of Procedure—Series 8, 29 C.F.R. § 101.6 (1971), providing for appeals to the General Counsel from the dismissal of an unfair labor practice charge by a regional director. Such appeals are “fully reviewed by the general counsel with the assistance of his staff.”

69 See, e.g., NLRB v. Bird Machine Co., 174 F.2d 404, 407 (1st Cir. 1949); Wallace Corp. v. NLRB, 159 F.2d 952, 954 (4th Cir. 1947).

70 In an attempt to secure voluntary compliance, the regional office will be in contact with the respondent, thus allowing the respondent the opportunity to counter, at an early stage in the contempt process, the charge that it is in violation of the decree. Normally, the regional office continues to seek compliance throughout the entire proceeding.

71 See note 68 supra.

72 The charging party may be able to obtain a clarification of the court's decree. See United Steelworkers v. NLRB, 389 F.2d 295 (D.C. Cir. 1967), discussed in text and notes at notes 194-95 infra.

73 309 U.S. 261 (1940).
exclusive standing to institute contempt proceedings for failure to comply with a court-enforced Board order. It held that the Board, as "a public agency acting in the public interest,"\textsuperscript{74} is "not to give effect to a 'private administrative remedy.'"\textsuperscript{75} In the Court's view, Congress had established the Board as the "exclusive agency"\textsuperscript{76} for the prevention of unfair labor practices and therefore for the institution of contempt proceedings.\textsuperscript{77}

In 1965, however, the Supreme Court held in \textit{Local 283, UAW v. Scofield}\textsuperscript{78} that either a charging party or a respondent that has been successful before the Board is entitled as a matter of right to intervene in an enforcement or review proceeding if the unsuccessful party challenges the Board's decision. In reaching this conclusion, the Court declared that \textit{Amalgamated} did not imply that the Board's role of vindicating public rights in effectuating the national labor policy "excludes recognition of parochial private interests."\textsuperscript{79} The Court observed, for example, that a charging party may have "vital private rights"\textsuperscript{80} in any proceeding that not only concerns an alleged unfair labor practice but also potentially involves a breach of the applicable collective bargaining agreement. In such a case, a ruling by a court of appeals in a Board enforcement proceeding could have a definite impact upon a subsequent decision by an arbitrator or by another court in a breach-of-contract case under section 301 of the Taft-Hartley Act. The private rights of the charging party can thus be protected only if intervention is permitted in the enforcement proceeding, enabling the court to be apprised of all relevant private rights when it defines the public interest in fashioning

\textsuperscript{74} Id. at 265.  
\textsuperscript{75} Id. at 269.  
\textsuperscript{76} Id. at 264; see National Labor Relations Act § 10(a), 29 U.S.C. § 160(a) (1970).  
\textsuperscript{77} In Keco Indus. v. NLRB, 46 L.R.R.M. 2003 (6th Cir. 1960), the court denied the motion of an employer for an order requiring the taking of testimony under oath to determine whether the employer had complied with a previous court-enforced Board order. Citing Amalgamated Util. Workers v. Consolidated Edison Co., 309 U.S. 261 (1940), the court stated that "[o]rderly, long-established procedure places exclusively in the Labor Board the initiative for compliance with the enforcement of such orders." 46 L.R.R.M. at 2004. It is questionable whether the court accurately assessed the issue in this case if only a request for perpetuation of testimony was involved. Fed. R. Civ. P. 27 provides for perpetuation of testimony \textit{in a district court} "regarding any matter that may be cognizable in any court of the United States." (Emphasis added.) One precondition to such testimony is "that the petitioner expects to be a party to an action cognizable in a court of the United States but is presently unable to bring it or cause it to be brought." 382 U.S. 205 (1965). \textit{Scofield} involved the right of a successful respondent to intervene in a review proceeding. Local 133, UAW v. Fafnir Bearing Co., consolidated with \textit{Scofield}, involved the right of a successful charging party to intervene in an enforcement proceeding.  
\textsuperscript{78} Id. at 218.  
\textsuperscript{80} Id. at 220.
its decree. Nonetheless, the Supreme Court in *Scofield* reaffirmed its holding in *Amalgamated* on the theory that contempt proceedings involve the Board’s expertise in achieving compliance rather than a ruling on the merits of a Board order.

The question is open whether a charging party can mandamus the Board to initiate contempt proceedings. Only one case, *Vapor Blast Independent Shop Workers Association v. Simon*, has discussed the question. The court held that since it is within the Board’s discretion to enter into a compromise settlement with a respondent in lieu of bringing a contempt proceeding, a writ of mandamus would not issue. The logic appears correct; since the institution of a contempt proceeding is discretionary, it cannot be compelled. The court stressed that the Board had not abused its discretion, but explicitly reserved judgment on whether mandamus would be proper if the Board’s action had been arbitrary or capricious. On analogy to the General Counsel’s apparently unreviewable discretion in issuing unfair labor practice complaints, it might seem that even in such an instance mandamus does not lie, and one court has reached a conclusion arguably supporting this view.

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81 305 F.2d 717 (7th Cir. 1962).
82 Without discussion, the court in NLRB v. Western Wirebound Box Co., 70 L.R.R.M. 2226 (9th Cir. 1968), denied a motion to intervene for the purpose of compelling the Board to show cause why there had not been compliance with the decree and why the Board had not sought to compel the respondent to comply.
83 See *Amalgamated Util. Workers v. Consolidated Edison Co.*, 309 U.S. 261 (1940) (by implication); NLRB v. Shurtenda Steaks, Inc., 424 F.2d 192 (10th Cir. 1970); NLRB v. Kohler Co., 351 F.2d 798 (D.C. Cir. 1965). In *Thompson Prods., Inc. v. NLRB*, 133 F.2d 637 (6th Cir. 1943), the company petitioned the court to compel the Board to cease an unfair labor practice hearing and to bring a contempt proceeding in its place. The court denied the petition, holding that the Board has its choice of proceedings.
84 305 F.2d 717, 719 n.2.
85 Mayer v. Ordman, 391 F.2d 889, 892 (6th Cir.), cert. denied, 393 U.S. 925 (1968): “It is clear . . . that refusal by the NLRB to issue a complaint is an exercise of discretion unreviewable by the courts.” Vaca v. Sipes, 386 U.S. 171, 182 (1967) (dictum): “[T]he Board’s General Counsel has unreviewable discretion to refuse to institute an unfair labor practice complaint.” See also *Association of Ry. Employees v. Lockridge*, 403 U.S. 274, 303–04 (1971) (Douglas, J., dissenting). A few courts had indicated, by way of dictum, that the General Counsel’s refusal to issue a complaint might be judicially reviewable if found to be arbitrary or capricious, an abuse of discretion, or a violation of constitutional rights. See, e.g., *Balanyi v. Local 1031, IBEW,* 374 F.2d 723, 726 (7th Cir. 1967); *Retail Store Employees v. Rothman*, 298 F.2d 330, 332 (D.C. Cir. 1962).
86 In *Stewart Die Casting Corp. v. NLRB*, 132 F.2d 801 (7th Cir. 1942), the Board, after petitioning for a contempt adjudication, compromised with the respondent its dispute as to how much money was owed to discriminatees, and the contempt order was discharged. The employees sought to intervene on the ground that the compromise deprived them of amounts up to fourteen percent of their correct back-wage claims. While the court, citing *Amalgamated Util. Workers v. Consolidated Edison Co.*, 309 U.S. 261 (1940), denied
One exception to Board discretion might be made where the charging party has previously intervened in the enforcement proceedings.\textsuperscript{87} The complainant is then a party bound by the decree that is allegedly being violated and for which contempt proceedings would be sought; were it not for the limitation imposed by the national labor policy, the charging party could initiate contempt proceedings. The Supreme Court's emphasis in \textit{Scofield} that "public" and "private" interests do not diverge but rather "interblend"\textsuperscript{88} lends support to the position that under these circumstances, mandamus should lie. The question, therefore, becomes one of accommodating private interests within the framework of Board discretion. On the one hand, the Board's discretion to act according to its views of the public interest ought not to be unduly inhibited. Due consideration must also be given to the Board's work load, its need to husband its resources, and the danger of clogging the courts with increased litigation. But this will mean that in some cases no proceedings against an alleged contemnor will be instituted, in others an unfair labor practice hearing will be held,\textsuperscript{89} and in still others the rights of the complaining party may be compromised.\textsuperscript{90}

A charging party's petition to mandamus the Board to file for contempt is, of course, a challenge to the Board's expertise in achieving compliance with the enforcement decree. Although broad discretion may be desirable in most cases, if the Board refuses to act or enters into a compromise agreement in arbitrary and capricious disregard of the statutory policies, thereby abusing its discretion, a court ought not to ignore private rights completely by denying the benefits of its decree to a party that is bound by and protected under the decree.

2. \textit{Settlement Agreements.} Although it has never been decided whether a charging party has a right to a hearing on a proposed contempt intervention, it reached this conclusion with reluctance, deferring to "the large and autocratic powers of the Board" and the requirement that courts "accept the Act as it is."\textsuperscript{132 F.2d at 804.}

Admittedly, the refusal to initiate contempt proceedings is not a "final order" and hence is not reviewable on that ground. See Lincount v. NLRB, 170 F.2d 306, 307 (1st Cir. 1948): "[T]he phrase 'a final order of the Board' as used in this subsection 'refers solely to an order of the Board either dismissing a complaint in whole or in part or directing a remedy for the unfair labor practices found, that is to an order entered as the culmination of the procedure described in Section 10(b) and (c) of the Act, as amended.'" Cf. Medical Committee for Human Rights v. SEC, 432 F.2d 659, 668 (D.C. Cir. 1970).

\textsuperscript{87} It is now well settled that a successful charging party or a successful respondent has the right to intervene in court of appeals proceedings to enforce or review a Board order. Local 283, UAW v. Scofield, 382 U.S. 205 (1965).

\textsuperscript{88} Id. at 220.

\textsuperscript{89} See Thompson Prods., Inc. v. NLRB, 133 F.2d 637 (6th Cir. 1943).

\textsuperscript{90} See Stewart Die Casting Corp. v. NLRB, 132 F.2d 801 (7th Cir. 1942).
settlement, an argument in favor of such a right may be framed on two grounds. First, the court’s emphasis in *Vapor Blast* that the compromise settlement was not arbitrary or capricious implies that some form of hearing might be allowed in certain instances to prevent an abuse of discretion.

Second, cases outside the context of contempt proceedings have held that a charging party has a right to a hearing on objections to a proposed settlement of a Board complaint prior to the conduct of a hearing before a trial examiner, either as a matter of right or at least when it can show that there are “any material issues of disputed fact” presented by the objections. In *Marine Engineers Benevolent Association v. NLRB*, the Third Circuit ruled that a charging party is entitled to an evidentiary hearing on objections to a proposed settlement of an unfair labor practice proceeding on the theory that it is an “interested” party within the meaning of section 5(b) of the Administrative Procedure Act. In a more recent case, *Concrete Materials v. NLRB*, the Fifth Circuit sustained the charging party’s right to a hearing if the objections to the settlement raise “material issues of disputed fact.” The court concluded that although technically the dispute is between the Regional Director and the respondent, the charging party’s presence may be crucial if it has a sufficient interest and that it should have the opportunity, through participation in some fashion in the settlement negotiations, to have its interests considered prior to any final determination of the dispute.

3. *Intervention.* When the Board does proceed in contempt, the question is presented whether the charging party may intervene. This right has almost never been granted. Intervention in a contempt proceeding was denied in *Stewart Die Casting Corp. v. NLRB* on the ground that “the Board is the duly specified and exclusively named agency to speak for and protect the employees in these proceedings . . . [and the] sole

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91 Marine Eng’rs Benevolent Ass’n No. 13 v. NLRB, 202 F.2d 546 (3d Cir. 1953).
92 Concrete Materials v. NLRB, 440 F.2d 61, 68 (6th Cir. 1971). Contra, Sears, Roebuck & Co. v. Solien, 450 F.2d 353 (8th Cir. 1971); Teamsters Local 282 v. NLRB, 339 F.2d 795 (2d Cir. 1964).
93 202 F.2d 546 (3d Cir. 1953).
94 440 F.2d 61 (5th Cir. 1971).
95 Id. at 68.
96 The charging party was denied intervention in contempt proceedings in NLRB v. Shurteenda Steaks, Inc., 424 F.2d 192 (10th Cir. 1970); NLRB v. Kohler Co., 351 F.2d 798 (D.C. Cir. 1965); NLRB v. Retail Clerks Int’l Ass’n, 243 F.2d 777 (9th Cir. 1956); and Stewart Die Casting Corp. v. NLRB, 392 F.2d 801 (7th Cir. 1968). Only one case has been found in which intervention has been permitted, and in that case the court did not discuss the issue. NLRB v. Star Metal Mfg. Co., 187 F.2d 856 (3d Cir. 1951).
97 182 F.2d 801 (7th Cir. 1942).
guardian, of the rights of the employee." And in *NLRB v. Kohler Co.*, the court denied intervention on the ground that party status was, according to the union, inconsistent with *Amalgamated Utility Workers*, which had held that the Board had exclusive power to initiate contempt proceedings. Reading that case to mean that the decision to proceed in contempt "was as much a question of public policy as any enforcement decision before the Labor Board . . . [and that c]onsequently, only the Board was competent to make it," the court thought that this reasoning applied to the motion to intervene, albeit "[w]ith less force."

The Supreme Court cast serious doubt on the rationale of these cases by its holding in *Scofield* that either a charging party or a respondent that has been successful before the Board has a right to intervene in an enforcement or review proceeding if the unsuccessful party challenges the Board's decision. The Court affirmed the existence within the statutory scheme of private rights that are not completely subsumed under the public interest represented by the Board and which may be deserving of independent representation. Discussing *Amalgamated*, the Court drew a clear line between initiation of a proceeding and intervention:

We find nothing inconsistent in denying the right of a private party to institute a contempt proceeding—where the Board's expertise in achieving compliance with orders is challenged—and, on the other hand, in permitting intervention in a proceeding already in the court for decision. When the court is to rule on the merits of the Board's order, the Act supports the view that it is the court and not the agency which will define the public interest . . . .

Moreover, the Court stressed that it would be ascribing capriciousness to Congress to conclude that a successful party in a Board proceeding should not have the same opportunity as an unsuccessful one to per-

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98 Id. at 803.
99 351 F.2d 798 (D.C. Cir. 1965).
100 309 U.S. 261 (1940).
101 See text and notes at notes 73-77 supra.
102 351 F.2d at 809.
103 A similar approach was taken in *Trbovich v. United Mine Workers*, 92 S. Ct. 630 (1972), in which the Supreme Court upheld intervention under Fed. R. Civ. P. 24(a)(2) to set aside an election of union officers. The Court recognized that the Board may not adequately represent the interests of a private party, if for no other reason than that they may not always have "precisely the same approach to the conduct of the litigation." *Id.* at 636. Note that in proceedings before the Board, the charging party has been accorded party status, which is shared with the General Counsel. *NLRB Rules and Regulations—Series 8, 29 C.F.R. § 102.8 (1971).*
104 382 U.S. at 221.
suade the court in Taft-Hartley appellate proceedings. The charging party should "not be prejudiced by his success before the agency."105

*NLRB v. Shurtenda Steaks, Inc.*106 is the only case decided after *Scofield* in which a court has discussed the question of intervention. The Tenth Circuit held that a charging party that had been successful before the Board but had not intervened in the enforcement proceeding could not intervene in the contempt proceeding "absent extraordinary and unusual circumstances."107 Approaching the issue cautiously, the court was of the opinion that the only reason advanced in *Scofield* for permitting intervention that applied in *Shurtenda* was prevention of unnecessary duplication of proceedings.108 In *Shurtenda*, the union had filed subsequent unfair labor practice charges against the company based on the identical acts upon which the Board was relying in its contempt petition. Were the Board to issue a complaint and litigate the same violations in an administrative proceeding, the possibility would exist for an appeal following a Board decision involving precisely the same issues to be decided in the contempt proceeding. This threat of multiple appeals was obviated when the Board advised the court that it would not "relitigate the same violations in an administrative proceeding should this court decide the issues against it."109

The difficulty with the court's analysis is that the avoidance of multiple proceedings was only one of several factors upon which the Supreme Court relied in *Scofield* and that it was emphasized by the Court in its discussion of the right to intervention of a successful respondent in a review proceeding. In holding that a successful charging party may intervene in enforcement proceedings, the Court stressed the necessity and fairness of according protection to the private interests of such a party.

As noted above, the court in *Shurtenda* implied without explication that in "extraordinary and unusual circumstances," intervention would be permitted. There is also the suggestion that if the Board had acted arbitrarily or was not adequately representing the private interests of the charging party, or if the charging party could have been "of help" in the contempt proceeding, intervention might have been allowed.110

105 Id. at 222. *But see NLRB v. Decaturville Sportswear Co.*, 80 L.R.R.M. 2387 (6th Cir. 1972) (denying a master intervention as of right, rejecting arguments based primarily on *Scofield* and *Trbovich*).

106 424 F.2d 192 (10th Cir. 1970).

107 Id. at 194.


109 424 F.2d at 194.

110 Id. The union stated to the court that it did "'not seek to change or redirect the
In this connection, it should be noted that although the court in *Kohler*
denied the intervention motion of the charging party—union, it did
“suggest to the Master that it would be appropriate for him to permit
the Union to *participate*” in supplemental proceedings to determine
“factual questions: which employees fall into what categories for which
relief may be ordered.” The court reasoned that the very narrow
factual issue of which individual workers were entitled to reinstatement
and back pay and the date of their entitlement did not involve “ques-
tions of policy and law on which Board-Union conflict might arise . . .
[T]he Union could make a substantial contribution to this inquiry . . .[and] Union participation will [not] markedly delay or hinder the
proceedings.”

The *Shurtenda* court also implied that intervention might have been
permitted, absent “extraordinary and unusual circumstances,” if the
union had intervened in the enforcement proceeding and that its failure
in this respect rendered its motion to intervene in the contempt pro-
ceeding “untimely.” If the charging party has intervened at the
enforcement stage, a stronger argument can be made that intervention
in the contempt proceeding should be allowed on the ground that the
latter proceeding is merely ancillary to the former. It is submitted, how-
ever, that the right to intervene at the contempt stage should not
turn on intervention in the enforcement proceeding.

It might be argued that fairness to the respondent and efficiency of
procedure dictate that the charging party not participate in a proceeding
involving the interpretation of a decree that has been shaped solely
by the Board’s concept of the public interest, as balanced against the
rights of the respondent and the charging party. But it does not follow,
from the fact that the charging party has the right to participate in all
proceedings leading to the entry of the enforcement decree, that the
Board’s efforts’ and that it . . . [sought] ‘only to be allowed to participate and present
evidence in support of the Board’s position.’ No claim . . . [was] made that the Board
. . . [had] acted arbitrarily or that it . . . [would] not adequately represent the interest of
the Union.” *Id.* at 193.

111 351 F.2d at 809 (emphasis added).
112 *Id.* In Flambeau Plastics Corp. v. NLRB, 79 L.R.R.M. 2329 (7th Cir. 1972), an
intervention motion of the charging party-union was denied by the master, without
prejudice, of course, to its right to renew the motion before the court. The master con-
cluded that under the order of reference, he had no authority to grant intervention, and
that, in any event, unlike *Kohler*, in which the union had been permitted “to participate”
in the supplemental proceedings on the narrowest of factual issues, “[t]he instant case the . . . Court of Appeals . . . has not by decision removed all possibility of disagreement
between the Board and the Union . . . .” *Id.* at 2330.

113 424 F.2d at 194. “Under *Scofield*, the Union could have intervened in the enforcement
proceedings, but failed to do so. Instead it waited until the Board began contempt pro-
cceedings . . . . The Board obtained the judgment without the help of the Union.” *Id.*
right to intervene at the contempt stage should be conditioned upon the exercise of the right at earlier stages. Efficiency of procedure in fact militates against any such rule; the charging party should be encouraged to participate only in those proceedings in which, in the opinion of the charging party, its private interests will not be adequately represented by the Board. Moreover, even if the charging party has not intervened at the enforcement stage, participation in the contempt proceeding can in no way be prejudicial to the respondent since the charging party in the contempt proceeding cannot affect the existing decree, which is the creation of the prior interaction among the Board, the respondent, and the court. To the extent that the contempt decree might amplify or otherwise modify the enforcement decree, the charging party should surely be as free to intervene at the contempt stage as it is at the enforcement stage.

C. Rights of the Respondent in Discovery

There has been little controversy in the courts concerning the procedural rights of a respondent, except with respect to discovery against the Board.\textsuperscript{114} It is now settled that in a contempt proceeding, the court has the power to compel this form of discovery and to delegate its power to the master charged with hearing the case.\textsuperscript{115} Board rules restricting discovery in unfair labor practice hearings\textsuperscript{116} do not limit the court's power,\textsuperscript{117} and the proceedings are governed by the Federal Rules of Civil Procedure.\textsuperscript{118}

The Second Circuit, quite properly applying the \textit{Jencks} rule\textsuperscript{119} to Taft-Hartley contempt proceedings, has required the production of pretrial statements made by witnesses who testify at trial, but only after

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\textsuperscript{114} Other procedural rights have been litigated. Alleged contemnors do not have a right to a jury trial, whether the charge is civil contempt, NLRB v. Red Arrow Freight Lines, Inc., 193 F.2d 979 (5th Cir. 1952), or criminal contempt, see United States v. Barnett, 376 U.S. 631 (1964). In Keco Indus. v. NLRB, 46 L.R.R.M. 2003 (6th Cir. 1960), discussed in note 77 supra, the petitioner's request for perpetuation of testimony was denied.

\textsuperscript{115} Olson Rug Co. v. NLRB, 291 F.2d 655 (7th Cir. 1961), and cases cited therein at 659. \textit{See also} Sperandeo v. Milk Drivers Local 537, 334 F.2d 381 (10th Cir. 1964); Harvey Aluminum, Inc. v. NLRB, 335 F.2d 749 (9th Cir. 1964).


\textsuperscript{117} Olson Rug Co. v. NLRB, 291 F.2d 655, 661 (7th Cir. 1961).


the testimony has been taken.\textsuperscript{120} This postponement is generally justified on the ground that it encourages full disclosure to Board investigators and prevents coercion of witnesses that might lead to a refusal to testify or modification of testimony.\textsuperscript{121} The Fifth Circuit, extending the doctrine to require pretrial production in \textit{NLRB v. Schill Steel Products, Inc.},\textsuperscript{122} was of the opinion that the danger of coercion or reprisal would not increase if statements of Board witnesses were released at the discovery stage rather than during the course of the contempt hearing. The court had, however, previously approved the Board's rule that in unfair labor practice hearings before Board trial examiners, there is a requirement to produce the pretrial statements of witnesses only after they have testified at the hearing.\textsuperscript{123} There is simply no logic or policy justification for the court's not following at the contempt stage the procedure it had approved for Board proceedings.

\textbf{IV. CRITIQUE OF BOARD ATTITUDES, PRACTICES, AND PROCEDURES}

The modest resort to contempt proceedings by the Board has been already documented.\textsuperscript{124} The 1967 memorandum of the General Counsel\textsuperscript{125} speaks of encouraging "a more liberal use of the contempt process" by reorganizing procedures\textsuperscript{126} and adopting "a somewhat more 'contempt-minded' attitude toward repeat violators."\textsuperscript{127} Evidently the Office of the General Counsel recognized that inadequate attention had been paid to utilizing the contempt process. Despite these changes, it appears that the internal organization of the Board still hinders the efficient use of contempt, and to the extent that this is true, the Board is not fulfilling its statutory obligation to enforce the national labor policy.

The essence of the problem appears to be a failure to overcome bureaucratic obstacles in the Washington central office. It appears that the filing of twenty to twenty-five contempt petitions per year constitutes

\begin{footnotes}

\textsuperscript{121} \textit{See Intertype Co. v. NLRB}, 401 F.2d 41, 45 (4th Cir. 1968).

\textsuperscript{122} 408 F.2d 803 (5th Cir. 1969).

\textsuperscript{123} \textit{NLRB v. Chambers Mfg. Co.}, 278 F.2d 715, 716 (5th Cir. 1960).

\textsuperscript{124} \textit{See text and notes at notes 7-8 supra.}

\textsuperscript{125} \textit{See text and note at note 19 supra.}

\textsuperscript{126} Memorandum, supra note 19.

\textsuperscript{127} \textit{Id.} Evidence of the effect of the Memorandum is equivocal. \textit{See note 9 supra.} The increased use of contempt appears to have been stimulated earlier, in 1964.
\end{footnotes}
a ceiling on the number of cases the Office of the General Counsel is presently capable of handling and that the few cases filed are not prosecuted in the most efficient manner.

The Board has never really deployed a separate section to meet the demands of the contempt process. Only two supervisors in the Appellate Court Branch are assigned on a full-time, permanent basis to the so-called Contempt Section.\(^\text{128}\) When a report arrives from a regional office, they select at random a briefing attorney to review the report and, eventually, to work on the case if it is decided to initiate contempt proceedings. Attorneys are assigned to other cases in the Branch, but the Chief of the Contempt Section does not have this authority; he must request and persuade a briefing attorney to accept the assignment.

In deciding whether or not to accept, the briefing attorney must weigh conflicting considerations. On the positive side, the case may involve trial work, if it reaches that stage, and this can be tempting, for it is the only opportunity an Appellate Court Branch attorney has for trial experience. This one positive consideration may, however, be outweighed by several negative ones. Few contempt cases result in trials, even when a petition has been filed. Moreover, the appellate attorney knows that trial preparation may be time consuming, involving months or even years, and that a contempt assignment may interfere with the performance of his regular duties of brief writing and oral argument. There is a substantial difference between appellate and contempt work; in the former, an attorney is able more or less to set his own pace, while in the latter, as in all trial work, he can never predict when he may have to ignore everything else and concentrate exclusively on the case. And trial preparation includes its own good measure of drudgery. In weighing these factors, the attorney cannot help but be sensitive to the lesser importance attached by his supervisors to contempt work. Obviously, appellate advocacy is their principal concern. If this work suffers or is ignored, prospects for advancement may be affected and supervisors may think that briefing attorneys involve themselves in contempt work as an excuse to avoid brief writing. Decision making on the basis of such considerations—impossible to substantiate but difficult to dismiss—has no proper place in the administrative process.

One result of this procedure is that recent law school graduates are persuaded to accept a disproportionate share of contempt assignments. These least-experienced attorneys find themselves in the position of reviewing contempt recommendations from the regional offices. Even though the two supervisors oversee their work, the initial evaluation

\(^{128}\) See text and notes at notes 24–28 supra.
made by these inexperienced attorneys can have substantial influence because of the voluminous records often accompanying regional reports.

Moreover, regardless of whether the attorney persuaded to take the contempt case is a new recruit or a veteran of the Appellate Court Branch, it is likely that his skills lie in brief writing and oral advocacy rather than in trial work. The attorney has little basis upon which to estimate the potential success of a case, and if the initiation of contempt proceedings is approved, this inexperience is a continuing major problem. This difficulty is handled on an ad hoc basis. Sometimes, depending in part on the reputation of the regional office, the Appellate Court Branch will request that its attorney be assisted by the regional attorney who originally investigated the case and who normally will have had trial experience. Sometimes a Branch supervisor or briefing attorney with trial experience may be persuaded to handle the case.

Although this situation has not gone entirely unnoticed within the Office of the General Counsel, attempts to relieve it have been inadequate. One suggestion has been to assign briefing attorneys exclusively to contempt work for a specified period of time—for example, six months. This halfway measure ignores the realities of contempt cases, which, especially when they reach the trial stage, may last for years. And it fails to solve many of the pressing problems outlined above. The best solution would be to create a permanent staff of attorneys assigned exclusively to contempt work. A permanent contempt section would be composed of experienced trial attorneys recruited primarily from regional offices, augmented by Board attorneys desirous of full-time assignment to contempt work. Creation of such a section would considerably ameliorate the problems discussed above, including the inadequate analysis of regional office recommendations, the difficulties of trial preparation, and the caliber of trial performance. Attorneys would not be subject to conflicting and enervating demands and would develop an expertise in handling contempt cases.129

Another problem that has not received sufficient attention is the extremely limited role the Board itself plays in connection with contempt cases. As previously explained130 the Board has in large part dele-

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129 Ways could also be found to make better use of the limited resources presently available. Cases exist in which trials are unnecessary because the facts are settled or undisputed. The Board should renew its earlier, long-abandoned attempts to have the courts decide these cases solely on the pleadings. Moreover, a sustained effort should be made to persuade courts to appoint board trial examiners as masters in cases that cannot be decided on the pleadings, since so much valuable time and energy is expended by Board attorneys in attempting to familiarize uninitiated court-appointed masters with elementary labor law. See text and notes at notes 183–210 infra.

130 See text and note at note 25 supra.
gated the decision to bring contempt proceedings to the General Coun-
sel. Although it seems clear that the Board has this power,131 it is ques-
tionable whether this delegation is prudent. The discretion of the
General Counsel is subject only to the restraint that the Board must ap-
prove his proposal to institute a contempt case. Under the present sys-
tem, the Board does not pass upon cases in which the General Counsel
decides not to follow the recommendation of the regional office that con-
tempt proceedings be instituted. This is of particular significance since
the violation of a decree is often not clear-cut; much may depend on the
interpretation of disputed facts and ambiguous language expressed
at a high level of abstraction. The General Counsel, moreover, has no
clear rules to serve as a guide in making this highly significant decision.
An inordinate degree of discretion is, therefore, reposed in one
man.132

If contempt proceedings are to become more effective, it is essential
that the Board enunciate a comprehensive policy. Either the Board
should participate more directly in the decision to file contempt peti-
tions, or, if it continues its delegation of power to the General Counsel,
it should promulgate well-defined guidelines that will promote more
frequent resort to contempt suits.133

131 See note 27 supra.

132 The infrequency of contempt proceedings and the recent decision, embodied in
the Memorandum, supra note 19, to make "more liberal use of the contempt process,"
suggest that in the past, only the clearest violations of decrees were likely to induce
the initiation of contempt proceedings. See text and notes at notes 18-23 supra.

133 Some courts have expressed qualms about the increasing use of contempt. In NLRB
v. Reed & Prince Mfg. Co., 196 F.2d 755, 759 (1st Cir. 1952), for example, Chief Judge
Magruder, denying a Board petition for a show cause order, commented that "[a]s
more and more employers come under enforcement decrees in such broad terms, the courts
of appeals will gradually supplant the Board as the primary trier of facts when future
unfair labor practices are alleged, if the Board elects generally to proceed as it has done
in this case, by filing a petition for adjudication in civil contempt." The implication is
that the Board, by filing more contempt cases, will subvert the administrative scheme.
This danger seems very much overstated. When the Board must choose between its own
forum and that of the courts, it is keenly aware that it cannot expect the courts to
function with the same degree of expertise and specialization that it possesses. Nor can
it expect the courts to apply legal principles not previously formulated in its own forum.
Moreover, changed circumstances frequently render decrees inapplicable, no matter how
broadly worded they may be, and present evidentiary standards and frequent reference
to a master hamper, if not thwart, the Board in contempt proceedings. See text and notes
at notes 175-210 infra. The Board has been entrusted with primary responsibility in the
regulation of labor relations. The decision to institute contempt proceedings is properly
a matter within the Board's discretion, Amalgamated Util. Workers v. Consolidated
Edison Co., 309 U.S. 261 (1940), and the Board's decision is entitled to respect, NLRB v.
V. CRITIQUE OF COURT ATTITUDES, PRACTICES, AND PROCEDURES

A. Judicial Reluctance to Invoke the Contempt Power

The courts at times manifest a reluctance to hold respondents in contempt, even though the evidence for such a finding is sufficient. One court, for example, expressed its concern that the parties to a civil contempt proceeding would not be accorded the "broad evidentiary rights created by Section 10(b) of the Act...—'in any such proceedings [before the Board] the rules of evidence prevailing in courts of law or equity shall not be controlling.' The court also went on to reach the surprising conclusion that a company, originally found to have violated the Act by showing favoritism to a union with which it did not have a union security agreement, was not in contempt of the resultant decree when it thereafter showed favoritism to a union with which it had such an agreement, finding the later conduct to be "essentially different in kind" from that proscribed by the decree.

The courts have frequently emphasized the seriousness of a civil contempt citation and have often declined, as a discretionary matter, to find a respondent in contempt. In NLRB v. Standard Trouser Co., the Fourth Circuit indicated that "contempt of court is indeed a very grave thing and we are not disposed to make strained and extreme construction[s]... in order to spell out some theoretical and abstract violation of the court's order, with facts such as are before us." The dismissal of Board allegations of postdecree section 8(a)(1) and 8(a)(3) violations was based upon credibility findings of the special master, who accepted blanket disavowals of the acts alleged and the defense that five union leaders had been discharged solely because of poor productivity.

More recently, the Fourth Circuit in NLRB v. Heck's, Inc. adopted a technical and narrow view of its original decree when the respondent repeated the violations in other stores in its chain. The decree, to which the Board and company had consented, required the company to cease and desist from interrogating employees about their union activities and from "in any like or related manner interfering with, restraining or coercing its employees in the exercise of their rights under the

134 For examples of lenience in criminal contempt proceedings—arguably easier to justify—see NLRB v. Hod Carriers Local 210, 228 F.2d 589 (2d Cir. 1955); NLRB v. Berkley Mach. & Foundry Works, 189 F.2d 904 (4th Cir. 1951).
135 NLRB v. Pacific Greyhound Lines, 106 F.2d 867, 871 (9th Cir. 1939).
136 Id.
137 162 F.2d 1012 (4th Cir. 1947).
138 Id. at 1015.
139 388 F.2d 668 (4th Cir. 1967).
Act.\textsuperscript{140} It was also required that the usual notice incorporating the routine broad cease-and-desist order be posted at the store where the violations occurred. Ignoring the broad order aimed at ending violations by the company, the court seized upon the fact that the posting was limited to the one store and refused to find the company in contempt.\textsuperscript{141}

The defense of "good faith" has sometimes led a court not to adjudicate a respondent in contempt.\textsuperscript{142} As the court stated in \textit{NLRB v. Brashear Freight Lines}\textsuperscript{143} after finding a clear violation of the affirm-
tive command of its decree, “[t]he record does not show a contemptuous attitude by the respondent, nor does it disclose any purpose to obstruct the administration of justice. It has apparently acted in entire good faith. In these circumstances, we are not disposed to impose any penalty.”

It has long been recognized, however, that unless the acts alleged to be violative of the decree are ambiguous, intent is generally not a factor in civil contempt. In the past few years, it appears that the courts of appeals have shown increasing willingness to affirm this principle. In *NLRB v. Fairview Hospital*, the respondent and its executive directress were found in contempt of an order to reinstate a former employee. The defense was that the employee, an orderly, “had been breaking into the medicine room and stealing drugs and that he had sexual relations with hospital personnel on hospital premises” and that “the retention of the employee constitute[d] a hazard to the operation of the hospital and . . . [was] inimical to the welfare, mental health and treatment of the patients.” But the court deferred to the master’s findings that these reasons were not the real grounds for the discharge, noting that “the existence of valid grounds for punitive action is no defense unless such action was predicated solely on these grounds . . . .” The court refused to consider the contention that there should be no contempt decree because the directress had acted in good faith solely to protect the best interests of the patients in the hospital.

Judicial resistance to the Board’s utilization of contempt proceedings reached its zenith in two refusal-to-bargain cases, *NLRB v. Norfolk Shipbuilding & Drydock Corp.* and *NLRB v. Aldora Mills.* In the former case, the court declined to issue a show cause order upon the filing of the Board’s petition, instead setting down the motion for hearing. The court was of the opinion that its process in contempt proceedings “should not be used as an adjunct of collective bargaining but should issue only when there was probable cause to believe that parties had in

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144 Id. at 200.
145 See McComb v. Jacksonville Paper Co., 336 U.S. 187 (1949); In Re Winn-Dixie Stores, Inc., 386 F.2d 309 (5th Cir. 1967); West Tex. Util. Co. v. NLRB, 205 F.2d 442 (D.C. Cir. 1953); NLRB v. Lawley, 162 F.2d 798 (5th Cir. 1950); NLRB v. Whittier Mills Co., 123 F.2d 725 (5th Cir. 1941).
146 See, e.g., NLRB v. Crown Laundry & Dry Cleaners, 437 F.2d 290 (5th Cir. 1971); NLRB v. Fairview Hosp., 433 F.2d 1217 (7th Cir. 1971); NLRB v. Ralph Printing & Lithographing Co., 433 F.2d 1058 (8th Cir. 1970).
147 443 F.2d 1217 (7th Cir. 1971).
148 Id. at 1218.
149 Id. at 1219.
150 195 F.2d 652 (4th Cir. 1952).
151 197 F.2d 265 (5th Cir. 1952).
fact been guilty of real contempt of court.” The court in *Aldora Mills*, reiterating this language, found no probable cause to assert that the employer had contumaciously refused to bargain in good faith since the employer had reason to believe, on the basis of notifications from its employees, that the union had lost its majority. But the Board had refused to entertain a decertification petition, and the same court had previously decided in *NLRB v. Sanson Hosiery Mills* that an employer has no authority to decide whether a certified union has lost its support. The court distinguished *Sanson Hosiery Mills* on the dubious ground that “it was an enforcement, not a contempt proceeding, and that what was said and held there was intended to apply, and did apply, only to the facts of the proceeding for enforcement then under review.” It emphasized that the company had “acted in the utmost good faith and in the sound belief . . . that it was proper under the act and our decree” for it to refuse to bargain.

*Aldora Mills* was followed in *NLRB v. Warren Co.*, the court declaring that “the board is not entitled to a contempt order enforcing the court’s decree, if, in the court’s opinion, such a contempt adjudication will result in a violation of the act and of the public policy for which it stands.” The Supreme Court, however, reversed, holding that it was “the statutory duty of the Court of Appeals on petition of the Board to adjudge [the company] in contempt of its enforcement decree.” The Court continued:

That Act contemplates cooperation between the Board and the Courts of Appeals both at the enforcement and the contempt stages in order to effectuate its purposes. It consigns certain statutory functions to each, and where the Board has acted properly within its designated sphere, the court is required to grant enforcement of the Board’s order. The decree, like the order it enforces, is aimed at the prevention of unfair labor practices, an objective of the Act, and so long as compliance is not forthcoming that objective is frustrated. It is for this reason that Congress gave the judicial remedy of contempt as the ultimate sanction to secure compliance with Board orders. The granting or withholding of such remedial action

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152 195 F.2d at 634.
153 197 F.2d at 267.
154 195 F.2d 350 (5th Cir. 1952).
155 197 F.2d at 267.
156 Id.
158 Id. at 485.
160 Id. at 112.
is not wholly discretionary with the court. This is true not only under the National Labor Relations Act but also under general principles of equity jurisprudence.\(^{161}\)

The Supreme Court’s decision in *Warren* is certainly authority for the proposition that reluctance to adjudicate a respondent in contempt of a court-enforced Board order is a very serious matter and is to be eschewed. Since a contempt proceeding is the truly effective enforcement stage in the prevention of unfair labor practices, barriers to its use thwart effectuation of the national labor policy. The consequences of a civil contempt adjudication are neither so dreadful nor severe as suggested by the judicial homilies on the subject. Sanctions are primarily prospective; fines are often merely compensatory.\(^{162}\) And a respondent in doubt as to the limits of its freedom to act under a decree can always request the court to modify the decree to clarify its terms.\(^{163}\)

Refusal to resort to contempt inevitably means control over the alleged contemnor’s activities will be exercised only through Board unfair labor practice proceedings. Professor Jaffe has pointed out that a respondent’s likelihood of prevailing actually decreases if this route is taken.\(^{164}\) Delay is the real advantage a respondent secures from a failure to exercise the contempt power. Instead of the “three bites at the apple” permitted under the statutory framework,\(^{165}\) the alleged contemnor may succeed in consuming the fruit before the labor law is enforced.\(^{166}\)

Taft-Hartley contempt proceedings involve concerns in addition to those typical of civil or, for that matter, criminal contempt proceedings.\(^{167}\) Civil contempt actions are normally instituted to protect the rights of private parties; this purpose, although present to some degree in Board-initiated proceedings, is not primary. The beneficiary of a

\(^{161}\) *Id.* at 112-13 (emphasis added, footnotes omitted).

\(^{162}\) See text and notes at notes 58-65 supra.


\(^{164}\) Jaffe, *supra* note 141, at 884.

\(^{165}\) That is, hearings before the Board, enforcement proceedings before the court, and contempt proceedings.

\(^{166}\) For example, when a court ordered back pay to dischargees in May, 1964, it was inexcusable for a respondent to be permitted to delay making payment until held in civil contempt in June, 1971. See *NLRB v. Indianapolis Transit Mix Corp.*, 77 L.R.R.M. 2082 (2d Cir. 1971).

Taft-Hartley Decree May Not Initiate Contempt Proceedings Under Present Law, and Intervention Has Not Been Permitted, Even with the Board’s Approval. Since the role of the Board in contempt proceedings is to enforce the national labor policy, these proceedings should be designed and conducted to facilitate the enforcement of that policy. At present, this is not done. The legal standards of proof, the habitual assignment to masters, and the failure to utilize the Board’s expertise combine to thwart this goal.

The civil contempt proceeding should serve in part to declare the law embedded in the decree. Although the courts have discretion in special circumstances not to invoke the contempt power, the discretion must be exercised sparingly. This lesson is not one for the courts alone; the Board has frequently been reluctant to bring cases in which the courts could exercise the declaratory function. An excellent illustration is United Steelworkers v. NLRB (H. K. Porter), involving a controversy over the interpretation of a court-enforced Board order. The union asserted that the company had been ordered to agree to a contractual dues checkoff provision, but the company interpreted the decree as ordering it merely to negotiate in good faith concerning some procedure for the collection of dues on employer premises—for example, by stewards during nonworking hours. The union moved for a clarification of the decree, but the court denied the motion and “invited the Board to test the competing interpretations of the decree through its contempt process.” The union requested the initiation of contempt proceedings, but the Board refused. Only then did the court grant the union’s motion to clarify the decree.

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168 Amalgamated Util. Workers v. Consolidated Edison Co., 309 U.S. 261 (1940); see text and notes 73–80 supra.
171 See, e.g., NLRB v. Building Serv. Employees Local 254, 376 F.2d 131 (1st Cir. 1967).
172 389 F.2d 295 (D.C. Cir. 1967). Upon remand, since the company’s opposition to checkoff was based solely upon its desire to thwart consummation of a collective bargaining agreement, it was ordered to agree to a checkoff provision. 172 N.L.R.B. No. 72, 68 L.R.R.M. 1357 (1968), enforced, 414 F.2d 1123 (D.C. Cir. 1969). The Supreme Court later reversed, holding that it was ultra vires for the Board to compel agreement to a substantive contractual provision. 397 U.S. 99 (1970).
173 389 F.2d at 298.
174 The court adopted the company’s interpretation that it was bound to bargain with the union only as to some arrangement for dues collection. The court clearly stated, however, that the Board was empowered in certain instances to order an employer to grant a checkoff system.
B. Standards of Proof

The Eighth Circuit has accurately described the standards of proof applied in Taft-Hartley contempt proceedings:

The rule as to quantum of evidence in civil contempt proceedings is in no way affected by the situation that such proceeding is in connection with an enforcement decree of an order of the Board. . . .

The rule is that contempt need not be shown beyond a reasonable doubt but that something more than a bare preponderance of evidence is necessary. . . . This Court has stated that a "degree of certainty" is required which leaves no fair ground of doubt. . . . Other courts of appeals have expressed the rule as requiring clear and convincing proof. . . . Whatever qualifying adjective may be used in the various opinions, they are unanimous that a heavy burden of proof rests upon the party urging contempt.175

Insistence on the "clear and convincing proof" standard in civil contempt proceedings promotes results that are paradoxical when viewed in the context of the regulatory framework. This standard is, of course, more stringent than the "preponderance of testimony" standard that the Board must apply in determining whether unfair labor practices have been committed.176 The result of the varying standard of proof is that conduct that would be found in a Board hearing to violate the terms of the decree may not be found contumacious in a contempt proceeding.177 This makes for uncertain enforcement of the national labor policy and a diminution of the authority of the court decree.

The consequences of application of the stricter standard are illustrated most graphically in cases in which the Board's expertise and specialization might play an important, if not decisive, role. Refusal-to-bargain cases are frequently of this kind, and a survey of contempt cases bears this out. Through 1970, of the twenty-six reported contempt cases lost by the Board, fourteen involved an alleged refusal to bargain; of the fifty reported cases in which the Board prevailed, twenty-two concerned this issue. Thus, while forty-four percent of the contempt cases won by the Board were refusal-to-bargain cases, fifty-four percent of the

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175 Kansas City Power & Light Co. v. NLRB, 137 F.2d 77, 79 (8th Cir. 1943) (citations omitted). See also NLRB v. Nickey Chevrolet Sales, Inc., 76 L.R.R.M. 2849 (7th Cir. 1971); NLRB v. Standard Trouser Co., 162 F.2d 1012 (4th Cir. 1947); NLRB v. Tupelo Garment Co., 122 F.2d 603 (5th Cir. 1941).

176 National Labor Relations Act § 10(c), 29 U.S.C. § 160(c) (1970). It may be true that different standards of proof are mere verbal formulae and that use of one standard as opposed to another might not affect the outcome of most cases. Use of the "preponderance" standard by the courts, however, might create a judicial mood favoring findings of contempt and influence decisions in close cases.

177 Cf. Jaffe, supra note 141, at 917–18.
cases that were lost dealt with this purported violation. The implication of these statistics is borne out by further examination. Of the twenty-two cases the Board has won, fifteen were decided without reference to a special master on the basis of the pleadings and oral argument. Violations of law were clear. But the Board tends to lose contempt cases involving bargaining orders in which it argues that the violation is a sophisticated evasion of the decree.

It is inevitable that the courts will decide some questions of law and fact with which the Board is more familiar and that are better handled, ceteris paribus, at the administrative level. Unfortunately, this phenomenon of judicial adjudication by application of standards of proof differing from those governing the administrative determinations encourages attempts to evade court decrees by those who would profit by the difference, thus subverting the established administrative framework.

178 NLRB v. Warren Co., 350 U.S. 107 (1955); NLRB v. Merrill, 414 F.2d 1323 (10th Cir. 1969); NLRB v. Savoy Laundry, 354 F.2d 78 (2d Cir. 1965); NLRB v. Vander Wal, 316 F.2d 631 (9th Cir. 1963); NLRB v. F.M. Reeves & Sons, 273 F.2d 710 (10th Cir. 1961); Carpinteria Lemon Ass'n v. NLRB, 274 F.2d 492 (9th Cir. 1960); NLRB v. Shannon, 229 F.2d 652 (6th Cir. 1956); West Tex. Util. Co. v. NLRB, 206 F.2d 442 (D.C. Cir. 1953); NLRB v. Israel Putnam Mills, 197 F.2d 116 (2d Cir. 1952); NLRB v. Star Metal Mfg. Co., 187 F.2d 856 (5th Cir. 1951); Great S. Trucking Co. v. NLRB, 139 F.2d 984 (4th Cir. 1944); NLRB v. Knoxville Publishing Co., 124 F.2d 652 (6th Cir. 1942); NLRB v. Boss Mfg. Co., 118 F.2d 187 (7th Cir. 1941); Bussmann Mfg. Co. v. NLRB, 111 F.2d 783 (8th Cir. 1940). In NLRB v. F.M. Reeves & Sons, 273 F.2d 710 (10th Cir. 1961), the company granted unilateral wage increases during negotiations and insisted on a performance bond. In NLRB v. Merrill, 414 F.2d 1323 (10th Cir. 1969), the employer had attended only one bargaining session—for a portion of one day—in the period of four and one-half months after the enforcement decree; it then broke off bargaining, claiming a good faith doubt as to the union's majority status. In NLRB v. Israel Putnam Mills, 197 F.2d 116 (2d Cir. 1952), the employer met with the union representatives, but solely to inform them that it was intransigent, even concerning "non-monetary matters." In Great S. Trucking Co. v. NLRB, 139 F.2d 984 (4th Cir. 1944), the employer sought to justify its refusal to bargain on the ground that the union had lost its majority status—after the decree had been entered but before the company took the remedial action required. And in NLRB v. Star Metal Mfg. Co., 187 F.2d 856 (5th Cir. 1951), the respondents admitted being in civil contempt and also pleaded guilty to criminal contempt.

179 E.g., NLRB v. Laney & Duke Warehouse Co., 424 F.2d 109 (5th Cir. 1970). See W.B. Johnston Grain Co. v. NLRB, 411 F.2d 1215 (10th Cir. 1969); NLRB v. American Aggregate Co., 335 F.2d 253 (5th Cir. 1964); NLRB v. Norfolk Shipbuilding & Drydock Corp., 195 F.2d 632 (4th Cir. 1952); cf. NLRB v. Johnson Mfg. Co., 80 L.R.R.M. 2012 (5th Cir. 1972) (company held in contempt, contrary to master's findings, on ground that clear and convincing evidence supported Board contention that postdecrees proposals and positions paralleled surface bargaining proscribed in enforcement decree).

180 See Jaffe, supra note 141, at 881.

181 For a discussion of the perils attendant on the resulting "shift in primary jurisdiction," see Note, supra note 167, at 607.
C. Selection and Role of Special Masters

The utilization of the special master by the courts of appeals has proven to be another major problem area.\textsuperscript{183} The lack of labor relations expertise and specialization on the part of most special masters, together with the policy predilections of many, have hampered if not thwarted Taft-Hartley enforcement. Taken in conjunction with the stringent proof requirements imposed upon the Board as the petitioner,\textsuperscript{184} this factor severely debilitates the contempt process.

For the standard to review findings of the master, the courts have looked to rule 53(e)(2) of the Federal Rules of Civil Procedure,\textsuperscript{185} which provides that "[i]n an action to be tried without a jury the court shall accept the master's findings of fact unless clearly erroneous."\textsuperscript{186} Reliance has been placed upon the traditional path of words that the master, "who saw and heard the witnesses and could observe their demeanor while testifying, is in a better position than a court to pass on the credibility of witnesses."\textsuperscript{187} Yet the soundness of according this degree of finality to a master's findings is highly questionable. Much depends on the identity of the master, but the Board has been lax in dealing with this critical question, typically suggesting a district court judge or a trial examiner from some other federal agency.\textsuperscript{188} The master is thus likely not to be a specialized expert in the field of labor law, even though he is called upon to resolve controversies of the kind normally decided by the Board—disputes in which subtle questions of labor law and fact are interwoven.

\textsuperscript{183} See text and notes at notes 34–35 supra.

\textsuperscript{184} See text and notes at notes 175–77 supra.

\textsuperscript{185} Fed. R. Civ. P. 53(e)(2).

\textsuperscript{186} NLRB v. Ralph Printing & Lithographing Co., 433 F.2d 1058, 1063 (8th Cir. 1970); W.B. Johnston Grain Co. v. NLRB, 411 F.2d 1215, 1217 (10th Cir. 1969); NLRB v. Alamo Express, 395 F.2d 481, 482 (5th Cir. 1968); NLRB v. Standard Trouser Co., 162 F.2d 1012, 1014 (4th Cir. 1947); Polish Nat'l Alliance v. NLRB, 159 F.2d 38, 39 (7th Cir. 1946); NLRB v. Arcade-Sunshine Co., 132 F.2d 8 (D.C. Cir. 1942); NLRB v. Remington Rand, 130 F.2d 919, 925 (2d Cir. 1942). Cf. NLRB v. Giannasca, 119 F.2d 756, 758 (2d Cir. 1941):

Certainly the evidence permitted that conclusion, and if the master had found the opposite, we should have affirmed him. The issue of bad faith is always difficult to decide; it is seldom possible to be sure of another's state of mind, and the findings of the tribunal of first instance should be especially cogent. We cannot find such a clear preponderance in the case at bar as to overrule the master upon this point.

For a recent case in which a court rejected a master's findings, see NLRB v. Johnson Mfg. Co., 80 L.L.R.M. 2012 (5th Cir. 1972).

\textsuperscript{187} From 1966 through 1969, twenty-eight cases were referred to masters. These masters consisted of thirteen federal district judges, eleven trial examiners (U.S. Civil Service Commission), two local attorneys, one senior federal circuit judge, one former state court judge, and one law school dean. Compiled from NLRB Ann. Rep.
Judge Clark, speaking for the Second Circuit in *NLRB v. Giannasca*, forcefully expressed the dangers in committing excessive responsibility to masters:

Experience, I think, now shows that there is serious question as to the wisdom of committing the last and perhaps most delicate step of labor law enforcement—proceedings in contempt—to somewhat alien professional interests as in effect a court of first instance. I suggest that so to do is unfair to the dignity of this court in maintaining respect for its orders and to the public interest which we are to safeguard. If the Board acts in a public capacity to give effect to the declared policies of the act, . . . so obviously do we also. Further, we lose the very quality of expertness and exercise of wise discretion in difficult and troubled situations which is the essential basis for committal of such matters to agency control. . . . Moreover, the long wait while the new tribunal is familiarizing itself with the law and the facts—here delaying settlement of an active labor dispute for a year after seeming agreement, though the underlying facts were substantially undisputed—underlines perhaps the chief problem of administrative procedure, that of delay in effective action.

Although Judge Clark’s position has been rejected elsewhere, its relevance remains undiminished, and its correctness cannot be gainsaid. Judge Clark suggested that the “trained examining staff of the Board itself” be directed to take testimony in contempt proceedings, subject to the court’s review of “the trend and effect of the testimony.” This proposal, which would avoid the problem of the special master’s lack of expertise and specialization, has been almost completely ignored by both the Board and the courts.

There is no statutory restriction upon a court’s discretionary power in choosing a special master. The only objection to the appointment of uninvolved trial examiners assigned to the Board—that they might have a pro-Board animus—is not a serious one and is far outweighed by the countervailing consideration that Board examiners are highly

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189 119 F.2d 756 (2d Cir. 1941).
190 Id. at 759.
191 See, e.g., *NLRB v. Satilla Rural Elec. Membership Corp.*, 393 F.2d 134, 136 (5th Cir. 1968):

The special master over the board’s objection, found that the subsequent pay raises granted after the respondent considered negotiations at an end, were not a separate violation of the judgment of this court as being in bad faith. While, if we were passing on the motives and intent of the parties as the finder of facts, we might, as we do, say that in light of the whole proceedings, the company’s conduct with respect to the granting of the pay raises was suspiciously like an effort to minimize the value of the union, we cannot determine that the findings of the special master in this regard were wholly erroneous.

192 119 F.2d at 759.
skilled triers of fact and enjoy the expertise required to deal with the subtleties of a highly specialized field. There is no basis for assuming the existence of bias on the part of Board examiners not previously involved in the case, and appellate court review would provide an adequate safeguard. Although the Board in its memorandum in Corning Glass Works v. NLRB\textsuperscript{193} objected to referral of compliance questions to the Board itself on the ground that this would destroy the adversary relationship between the Board and the respondent, this objection does not apply to referral of such questions to a Board trial examiner.\textsuperscript{194} If Board examiners are able to render decisions without bias, the adversary relationship between Board and respondent would be preserved and the impartiality and integrity of the decision-making process maintained.

Another alternative is appointment of labor law or labor relations professors or professional labor arbitrators. Although this proposal has the merits of combining expertise with impartiality, it has seldom been urged by the Board.

Only once has a court remanded a contempt case to the Board instead of appointing a special master or deciding the case on the pleadings. In NLRB v. Retail Clerks International Association,\textsuperscript{195} the court directed the Board to take testimony and to make findings on what the court termed “the primary and controlling fact issue raised on the contempt proceeding.”\textsuperscript{196} This issue was whether “location managers” had been intended to be included within the category of “supervisory employees” in a consent decree entered into between the Board and the union.\textsuperscript{197}

In remanding this question for determination by the Board, the court limited the reach of its decision in several respects. First, it noted

\textsuperscript{193} 129 F.2d 967 (2d Cir. 1942).
\textsuperscript{194} There continues to be a controversy over the “independence” of trial examiners, and perhaps the office should be strengthened with respect to compensation and tenure. Even if it is assumed that the Supreme Court’s approval of Civil Service Commission regulations governing examiners in Ramspeck v. Federal Trial Examiners Conference, 345 U.S. 128 (1953), may have gone “a long way toward frustrating the purposes of Congress [in enacting the Administrative Procedure Act, 5 U.S.C.A. §§ 551-59 (1967, Supp. 1972)] to give examiners independence,” id. at 144 (Black, J., dissenting), the present system still more than adequately assures that NLRB examiners are sufficiently “independent” of the agency to serve as masters in contempt proceedings. See 2 K.C. DAVIS, ADMINISTRATIVE LAW TREATISE ch. 10 (1958, Supp. 1970); W. GELLHORN & C. BYSE, ADMINISTRATIVE LAW: CASES AND COMMENTS, 884-88 (5th ed. 1970); L. JAFFE & N. NATHANSON, ADMINISTRATIVE LAW: CASES AND MATERIALS, 1026-29 (3d ed. 1968).
\textsuperscript{195} 186 F.2d 371 (9th Cir. 1951), enforced, 203 F.2d 165 (9th Cir. 1953), reconsidered and reaff’d on the merits, 211 F.2d 799 (9th Cir. 1954).
\textsuperscript{196} 203 F.2d at 167.
\textsuperscript{197} 186 F.2d at 371.
that the fact that the underlying decree was based upon a stipulation of the parties made it a particularly appropriate case for remand. Second, it stressed that the record was devoid of evidence that would throw light on the crucial issue.\textsuperscript{198} Third, it made clear that a remand is "not usual in a contempt proceeding" and added that "[t]he findings of the Board in the supplementary proceeding before it should in any case be accepted with caution."\textsuperscript{199} Although the court commented rather defensively that "[w]e do not say that the course we have taken here will or should be followed in all cases of this nature," it did state that "there should be some flexibility" in the general rule that the Board should not have any decision-making role in a contempt proceeding.\textsuperscript{200}

Emphasizing, moreover, that the power of punishment remained with itself, the court rejected the argument that "reference of questions to the Board in a contempt proceeding would in effect be entrusting to the Board enforcement of its own order."\textsuperscript{201} Finally, the court denied that it would be bound to follow the findings of the Board if supported by substantial evidence on the record considered as a whole.

The major problem with the opinion is its vagueness concerning when and in what manner the court should exercise its discretion to remand to the Board. It does suggest, however, that "there is reason for taking such a course where the single fact question involved is one with which the Board is eminently equipped and qualified to deal."\textsuperscript{202}

\textsuperscript{198} Id.
\textsuperscript{199} 203 F.2d at 168-69.
\textsuperscript{200} Id.
\textsuperscript{201} Id. at 168-69 n.2.
\textsuperscript{202} Id. at 168. It would appear that the court was not limiting this procedure to cases involving a single factual question, but the court's position is at best ambiguous. The procedure to which the court resorted in this case is reminiscent of the interlocutory order procedure articulated by Judge Learned Hand in 

*NLRB v. New York Merchandise Co.*, 134 F.2d 949 (2d Cir. 1943). The latter case was decided two years after 

*NLRB v. Giannasca*, 119 F.2d 756 (2d Cir. 1941), and the questions which Judge Clark had found disturbing in *Giannasca* still went unanswered. Judge Hand thought that he had found a means of avoiding the problem:

If the practice which we have outlined above is followed, references to masters upon true proceedings to punish employers for contempt will be likely either to disappear, or to be short and few, for the Board will have decided all the issues as the initial tribunal, as it should. Contumacy of the enforcement order will be extremely rare. 134 F.2d at 953. The interlocutory order procedure is called into play when the Board defers issuing a remedial order (e.g., back pay or reinstatement orders as in 

*NLRB v. New York Merchandise Co.*, supra) until after its order to cease and desist from an unfair labor practice has been enforced. This initial enforcement order "cannot . . . support a proceeding to punish for contempt" based upon a failure to take the proper remedial measures since "it is cardinal . . . that no one shall be punished for the disobedience of an order which does not definitely prescribe what he is to do." Id. at 952. The order is final only "as to any of its other provisions that require no further definition," id.; only in that case is a contempt proceeding appropriate. The initial enforcement
Some courts, perhaps recognizing the disrupting and distorting impact wrought by an ill-equipped master, have explicitly restricted his responsibilities.\textsuperscript{203} Other courts, though paying lip service to the "clearly erroneous" standard, have nonetheless avoided it either by concluding that the master's findings were "clearly erroneous,"\textsuperscript{204} by overruling the master without such an express characterization,\textsuperscript{205} or by correcting the master's application of the law to the facts.\textsuperscript{206} Closer judicial scrutiny of the master has thus become more prevalent in recent years. But this is not an adequate solution to the problem. "Clearly erroneous" is too flexible a standard for this sensitive area; that which exceeds the criterion for some judges will not for others, and the fundamental difficulties raised by the identity of the master remain unresolved. One might suppose that no problems exist with respect to conclusions of law since the courts are not bound by any requirement of deference to the master. But this assumption is unrealistic since no order is said to be interlocutory. Although this procedure is productive of delay since it can easily be taken advantage of by a recalcitrant respondent, Judge Hand thought that it "should involve no greater delay than to proceed through a master as for contempt."\textsuperscript{Id.} Judge Hand's approach has helped to avoid in contempt proceedings the raising of difficult fact questions regarding remedial decrees that would require reference to a special master. As long as the distinction between provisions that are definite and provisions that need to be explicated further is not rigidly and dogmatically maintained, the procedure should be implemented, for it preempts for the Board much that might otherwise be considered in a contempt proceeding. But doctrinaire and unimaginative adherence to the distinction has led to at least one instance of prolonged evasion of a decree. See, e.g., NLRB v. Deena Artware, Inc., 198 F.2d 645 (6th Cir. 1952), cert. denied, 345 U.S. 906 (1953), \textit{contempt show cause order denied}, 207 F.2d 798 (6th Cir. 1953), \textit{petition to adjudge in contempt dismissed}, 261 F.2d 503 (6th Cir. 1958), \textit{rev'd}, 361 U.S. 398 (1960), \textit{motions for discovery granted}, 310 F.2d 470 (6th Cir. 1962). For a perceptive discussion of this case in particular, the interlocutory order procedure in general, and the dangers of an inflexible approach, see Jaffe, \textit{supra} note 141, at 903-14.

\textsuperscript{203} In NLRB v. Weirton Steel Co., 146 F.2d 144, 145 (3d Cir. 1944), the court foreclosed the master from recommending conclusions of law, stating that "[t]hat is a responsibility which rests upon the Court and which we shall assume and discharge." In NLRB v. Red Arrow Freight Lines, 193 F.2d 979 (5th Cir. 1952), the master was instructed to take testimony, but was foreclosed from making conclusions even of fact. The Board in both cases had alleged employer domination of a union.

\textsuperscript{204} See, e.g., NLRB v. Nickey Chevrolet Sales, Inc., 76 L.R.R.M. 2849 (7th Cir. 1971); NLRB v. My Store, Inc., 345 F.2d 494 (7th Cir. 1965).

\textsuperscript{205} See, e.g., NLRB v. Operating Eng'rs Local 825, 430 F.2d 1225 (8d Cir. 1970); NLRB v. American Aggregate Co., 335 F.2d 253 (5th Cir. 1964).

\textsuperscript{206} See, e.g., NLRB v. Kohler Co., 351 F.2d 798, 802-04 (D.C. Cir. 1965); NLRB v. Berkeley Mach. Works & Foundry, 189 F.2d 904, 905 (4th Cir. 1951). In the latter case, the court stated:

\begin{quote}
While we accept the findings of the special master to the effect that respondents were not guilty of bad faith in the sense of willful disobedience of the court's order in their negotiations with the union, we think it clear upon the record that the respondents have failed to bargain collectively with the union as contemplated by the National Labor Relations Act ... and the Labor-Management Relations Act of 1947, ... and as the court had directed in its decree.
\end{quote}
clear demarcation between questions of law and fact exists. Whoever makes the findings of fact will often have practical control over the outcome of the case.

Judge Clark in Giannasca concluded that if the Board examiners were not to be utilized, there was "no other proper course than the taking of . . . testimony before the court itself or some of its members." Although this option has actually been chosen in a few cases, it seems practicable only when a relatively limited factual inquiry is required. Court of appeals judges are no doubt preferable to special masters. But the average appellate court judge is not likely to possess either the well-honed fact-finding skills of an experienced trier of fact or the labor relations expertise and specialization of a Board trial examiner.

CONCLUSION

This examination of the Taft-Hartley contempt proceeding—the only real sanction in the enforcement of agency orders—has demonstrated the modest resort to contempt by the NLRB and past judicial reluctance to invoke the contempt power. In part, this is a problem endemic to the administrative-judicial structure designed by Congress for the administration of the Act, and one result of this study is to bolster previous recommendations for procedural reform in labor law. It might be salutary, for example, to provide that Board

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207 In Polish Nat'l Alliance v. NLRB, 159 F.2d 38, 39 (7th Cir. 1946), Judge Sparks, dissenting, commented:

I am quite willing to be bound by the master's purely factual findings, but when he concludes from those facts that appellant violated the terms of our decree, his conclusion is one of law, by which we are not bound. That, precisely, is the legal question before us for decision, and it requires a legal interpretation of the words "substantially equivalent position."

But Judge Sparks's colleagues on the bench evidently did not agree. The majority opinion concluded:

Ordinarily a master's findings are not to be set aside unless clearly erroneous . . . . With this statement of the rule in mind, we cannot say that the master's findings are clearly erroneous; simply because we might have reached a different conclusion is no reason to set aside a master's report. The report of the master is therefore confirmed.

208 J. Frank, COURTS ON TRIAL 23, 32-33 (1949).

209 119 F.2d at 759.

210 NLRB v. Building Serv. Employees Local 256, 376 F.2d 131 (1st Cir. 1967); NLRB v. Lambert, 250 F.2d 801 (5th Cir. 1958).

211 See Bartosic, supra note 1; Fields, 40,000 Cases (Proposal for Five Regional Labor Boards), 78 LAB. REL. REP. 68 (1971); Lyne, The National Labor Relations Board and Suggested Alternatives, 22 LAB. L.J. 408 (1971); Morris, Procedural Reform in Labor Law—A Preliminary Paper, 35 J. AIR L. & COM. 537 (1969); Shutkin, One Nation Indivisible—A Plea for a United States Court of Labor Relations, 20 LAB. L.J. 94 (1969). According to NLRB Chairman Miller, there is no means that mortal men can devise which can preserve due process and still permit a three-step judicial process (the present system) to operate with the kind of promptness which I think necessary to really substantially improve the effec-
orders be self-enforcing\textsuperscript{212} and to transfer contempt proceedings to a labor court or the Board's own forum.

Yet significant reform in the labor law field has always been slow in coming.\textsuperscript{218} It is thus likely that the present Board-court structure will continue in the immediate future and that the Board will be left the task of fashioning innovative remedies and sharpening traditional ones. By describing and critically analyzing current Board and judicial attitudes, practices, and procedures, this article has sought to establish the need for sharpening one remedy—the contempt proceeding—and to determine the areas to which the whetstone should be applied.

\begin{itemize}
\item The administrative administration of our statute. That is why I have been preaching for many months now the need for a reform of our labor judiciary. That is one area in which I opt not for continuity, but for change.
\end{itemize}


\textsuperscript{213} For example, Reorganization Plan No. 5 of 1961—submitted by President Kennedy pursuant to the Reorganization Act of 1949, ch. 226, 63 STAT. 203—would have allowed the Board to grant greater finality to trial examiner decisions in complaint cases. But the plan was rejected by the House of Representatives. 107 Cong. Rec. 13069–78 (1961).