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Remedies for Employer Unfair Labor Practices
During Union Organizing Campaigns

For more than thirty years, the National Labor Relations Act has theoretically protected the right of workers to bargain collectively. But because present law provides little prompt and effective control of the tactics which both sides are tempted to use, union attempts to organize non-union plants often become no-holds-barred dogfights between employer and union. Recent congressional hearings suggest that the die-hard anti-union employer in particular takes advantage of inadequate enforcement of existing standards of conduct.

I. The Existing Legal Framework

Federal labor law attempts to regulate the union organizing campaign in several ways. Most directly, federal law creates machinery for "representation elections," by which a union is certified as the official bargaining representative for a group of employees. The NLRB supervises these elections, counts the ballots, and guards against any irregularities. An election may be held when at least 30 per cent of the employees in a given unit favor the union. A majority of the employees in the unit must vote for the union in order for it to be certified.

The law attempts to protect the employee's freedom to vote for or against union representation by prohibiting certain "unfair labor prac-
Unfair Labor Practices

tices” which might prejudice or unduly pressure employees. An employer or union that uses inflammatory propaganda commits an unfair labor practice, as does the employer who makes threats, discharges pro-union employees discriminatorily, interrogates employees unduly, or grants special benefits on the eve of the election.

Remedies for unfair practices vary. The Board may issue cease and desist orders; or if the practice is a discriminatory discharge, the Board may reinstate the discharged employee with back pay. In addition, the Board can invalidate election results. A valid election precludes a subsequent election for one year, but if the Board finds that either party has committed unfair labor practices which may have significantly influenced the election result, it can set the election aside at the request of the non-offending party and order another election. Finally, under

15. Id.; see Phelps Dodge Corp. v. NLRB, 315 U.S. 377, 397-403 (1941) (computation of back pay).
18. NLRB v. Shirlington Supermarket, 224 F.2d 619 (4th Cir. 1955), cert. denied, 350 U.S. 914 (1955). See also Politi, NLRB Re-run Elections: A Study, 41 N.C.L. Rev. 209 (1963). As a last resort, the Board has devised the infrequently used Joy Silk Mills order to bargain with the union after the employer's unfair labor practices have dissipated the union's assumed or putative majority. Joy Silk Mills, Inc. v. NLRB, 185 F.2d 782 (D.C. Cir. 1950); Frank Bros. Co. v. NLRB, 321 U.S. 702 (1944). The Board in Bernal Foam Products Co., Inc., 146 N.L.R.B. 1277 (1964), increased this remedy's effectiveness by holding that a union can petition for a bargaining order on the basis of Section 8(a)(6) violations, even though it did not immediately file 8(a)(5) charges as to every alleged unfair practice which the employer committed during the campaign. Bok notes that this remedy has been somewhat sparingly applied, perhaps with good reason. Bok, The Regulation of Campaign Tactics in Representation Elections under the National Labor Relations Act, 78 Harv. L. Rev. 28 (1963). He concludes that: (1) It would be inappropriate to issue a bargaining order in the absence of some fairly clear evidence of a preexisting majority, unless the unfair practices were quite serious and deliberate; (2) Even in these cases the remedy should be used only where there is a reasonable possibility that the union would have ultimately prevailed, in the absence of the employer's unlawful acts; (3) Assuming that these safeguards are observed, the bargaining order still should not be used as a matter of course, to the detriment of informal methods of enforcement by which the employer can be made to expunge the effects of his wrongful acts. Bok, supra, at 138-39. Comment, Employer Pre-election Coercion: A Suggested Approach for Effective Remedial Action, 115 U. Pa. L. Rev. 1111 (1967), points out some of the difficulties of ascertaining whether or not
Section 10(c) of the NLRA, the Board has general power to "effectuate the policies" of the NLRA, which it has relied on occasionally to create new remedies guaranteeing fair representation elections.\textsuperscript{19}

The existing legal framework for regulating organizing campaigns has been sharply and widely criticized.\textsuperscript{20} It is acknowledged that union organizing campaigns are frequently illegally disrupted by employers' unfair labor practices.\textsuperscript{21} Most critics blame these recurring abuses on the inadequate, slow, and unworkable remedies of present labor law.\textsuperscript{22} Existing remedies such as reinstatement with back pay for discriminating employees would have attained a majority but for the employer's unfair labor practices. This troublesome "but for" test is basic to the Joy Silk-Bernel Foam bargaining order remedy.

19. National Labor Relations Act \textsection 10(c), 29 U.S.C. \textsection 160(c) (1964). The Board has experimented cautiously with several remedies under this section. For example, if the lines of communication between union and employees are unfairly blocked, or if the Board decides that it is necessary to "undo" the effect of an employer unfair labor practice, the Board can give the union special access to employee ears.

The guilty employer can be required to allow a limited number of union "captive audience" speeches on company time. H.W. Elson Bottling Co., 155 N.L.R.B. 714 (1965), enforced as amended, 379 F.2d 225 (6th Cir. 1967). The union can be given limited access to company property, such as the plant parking lot, for solicitation and distribution of union literature. Marlene Indus. Corp., 166 N.L.R.B. No. 59 (July 5, 1967), 65 L.R.R.M. 1226. Or the union may be given access to designated plant bulletin boards for as long as a year. J.P. Stevens & Co., 157 N.L.R.B. 869 (1966), enforced in part, 380 F.2d 292 (2d Cir. 1967).

These remedies are of questionable value where serious coercive unfair labor practices by the employer are involved. It must be clear to the employees, for example, that allowing the union to make speeches does not bring discriminatorily discharged workers back to work.

The effect of an employer's unfair practices can also be alleviated by extensively publicizing Board rulings against the employer. In theory at least, knowledge that the employer has been sanctioned assuages employee fears created by the unfair tactics. The Board's Remedial Notice can be worded stiffly and clearly, to indicate to the employees that the employer has been found guilty of an unfair labor practice. The Remedial Notice in Bilyeu Motor Corp., 161 N.L.R.B. No. 93 (Nov. 15, 1966), 63 L.R.R.M. 1471 is one Notice which is not worded in equivocal legalese. The Remedial Notice can also be mailed to the employees' homes at employer expense. J.P. Stevens & Co., supra. Or the employees can be convened at department meetings, on company time, and the Remedial Notice can there be read to them either by the employer (under Board compulsion) or by a Board representative. Id. (The Court of Appeals refused to enforce the Board's order that it must be the employer who reads the notice aloud.) This group of remedies is also grounded in the notion of "undoing the effect" of the employer's unfair conduct. Where that conduct has consisted of mere words or threats, the approach may be effective. But it would seem insufficient to deal with employer actions such as discriminatory discharge.


21. \textit{See Hearings on H.R. 11725, supra note 5}. \textit{See also} remarks of Frank McCulloch, Chairman of the NLRB, before the Federal Bar Association's 41st Annual Convention, 30 U.S.L.W. 2153 (Sept. 18, 1961): "Some employers, and some unions, repeatedly violate the terms of our statute with knowledge that they are doing so. The number of unfair labor practices, despite the widespread publicity, grows rather than diminishes."

22. \textit{See statement of James M. Pierce, Director of Southern Organization, Industrial Union Dept', AFL-CIO, in Hearings on H.R. 11725, supra note 5, at 62. Bok, supra note 20, at 124.}
Inatorily discharged workers have been justifiably called "too little and too late" and "no more than a license fee for union busting."23

II. Current Proposals for Statutory Change

The need for imaginative and far-reaching reforms has been recognized in many quarters,24 and many proposals have been advanced to augment the NLRB's arsenal of remedies for unfair election practices.25 Several suggestions discussed in recent years would stiffen the penalties for an employer who is guilty of unfair labor practices. Criminal prosecution of the guilty employer has often been considered.20 A related suggestion, which has obvious analogues in other fields of public law (antitrust, for example), is to award punitive and general damages to a union whose organizing drive was disrupted by an employer's unfair labor practice.27 Or employers often found guilty of unfair labor practices could be barred from government contracts for some period of time.23

Because the charge of "too late" usually accompanies the "too little" indictment of existing Board remedies, there have been numerous proposals to speed up the enforcement of NLRB orders against unfair labor practices, not only in the context of organizing campaigns, but in all cases before the Board.29 Other suggestions have been designed to reduce

25. The NLRB has experimented with some new remedies, but in many cases the Board has used these devices only on rare occasions. Even these remedies, however, are often inadequate. See examples discussed in note 19 supra.
26. See, e.g., Bok, supra note 20, at 125-26. Bok notes numerous problems with criminal penalties for employer unfair labor practices: (1) defining a standard of proof; (2) obtaining jury convictions; (3) levying fines which cannot be passed on to consumers; (4) picking the proper party for imprisonment; and (5) requiring fines high enough to have deterrent effect.
27. Bok, supra note 20, at 127, points out that this remedy may have little deterrent effect on large employers, may work inequitably against smaller employers, and raises some problems of measuring damages.
28. Under this plan the "unfair" employer would be placed on a blacklist such as exists for minimum wage violators under the Walsh-Healy and Bacon-Davis Acts. 40 U.S.C. § 276a-2 (1964); 41 U.S.C. § 37 (1964). This is a fairly drastic remedy and has yet to be warmly received on Capitol Hill. If enforced, this of course would constitute the Draconian approach toward government contractors. Toward others, it would be useless.
29. At least one writer has endorsed a more liberal use, especially for reinstatement in discriminatory discharge cases, of the injunction authorized by Section 10(j) of the National Labor Relations Act. See Comment, Employer Pre-election Coercion: A Suggested Approach for Effective Remedial Action, supra note 20. But widespread use of the injunction in unfair labor practice cases would put prime responsibility for enforcing the labor law in this area on the federal courts where Congress expressly did not put it. In addition, the NLRB seems hesitant to use the injunction because of its unsavory history. See McCulloch, New Problems in the Administration of the Labor-Management Relations Act: The Taft-Hartley Injunction, 16 Sw. L.J. 82 (1962). In order to mitigate the harsh effects of delay on an individual employee it has recently been proposed that an employee claiming discriminatory discharge be allowed to borrow up to the amount of his weekly wages.
administrative delay in NLRB proceedings by delegating substantial authority to trial examiners.\textsuperscript{30} In addition to expediting the Board's procedures, some proposals would also inject the Board into the organizing process as an active overseer rather than the merely passive referee it is today.\textsuperscript{31}

Finally, to deal with outsiders who commit with impunity anti-union acts which would be unfair labor practices if committed by the employer, unions have strongly urged Congress to amend the NLRA to create "outsider unfair labor practices" and to broaden the scope of the employer's liability for acts of third parties.\textsuperscript{32}

Many of the existing proposals to deal with organizing campaign violations do no more than tinker with a minor nut or bolt of a basically inadequate machine. For instance, to bombard the workers with NLRB announcements as to their rights, without providing more effective machinery to enforce those rights, will do little to protect them from employer violations. Other more vigorous proposals—such as the increased use by the NLRB of federal court injunctions against unfair

from a federal revolving loan fund. He would be required to repay the loan when back pay was either awarded or denied. See Section 3 of H.R. 11725, in \textit{Hearings on H.R. 11725, supra} note 3. Such a system would undoubtedly aid the employee, but it would do relatively little to erase the direct effects of the discharge on the union's organizing campaign. Discriminatory discharge of key unionists during a campaign would still weaken the union's position and have its intimidating effect on other employees.

30. These proposals would make full review of the trial examiner's decision purely discretionary with the Board; if the Board refused to review the decision, the ordinary enforcement procedures would go into effect immediately. See Reorganization Plan No. 5 of 1961, which was defeated in the House of Representatives, 107 Cong. Rec. 13697-98 (daily ed. July 20, 1961). Section 1 of H.R. 11725 offers essentially the same solution.

31. To keep the Regional Office abreast of campaign tactics, and in the hope of moderating the claims and charges of campaign literature, the Board might require the filing of copies of all campaign literature released by both sides with the Regional Director. See Note, \textit{The Need for Creative Orders under Section 10(c) of the National Labor Relations Act, supra} note 20, at 82. Or a representative of the Regional Office might make frequent "observation" visits to the plant during the organizing campaign. \textit{Id.} A further proposal for rectifying campaign abuses is a labor version of the "Oregon pamphlet plan." See Note, \textit{Employee Choice and Some Problems of Race and Remedies in Répresentation Campaigns, 72 Yale L.J. 1243 (1963).} Claims of the opposing parties to the campaign would be compiled into a pamphlet. Distribution of that pamphlet to the employees would allow them to see opposing arguments in sharp juxtaposition. \textit{Id.} 1261-62. All of the proposals for increased Board supervision of the campaign are attractive, but one may well doubt their effectiveness if the Board has no means of effectively enforcing the declared standards of conduct for organizing campaigns.

32. The unions strongly urge such amendments. See, e.g., \textit{Textile Workers Union of America, "The Hollow Promise" (1967) (copy on file at the Yale Law Journal) (Illustrated tract on the difficulties in the Southern textile industry).} But more neutral proponents of such amendments concede that they may be unworkable. See supplemental statement of Congressman Frank Thompson, Jr. (D.N.J.), one such proponent:

There certainly are administrative problems in these proposals. What would the Labor Board do if it were the Mayor who urged an anti-union vote? A newspaper editor? A minister from the pulpit? And suppose the local police harassed the union organizer pursuant to a city ordinance? Against whom would the charge be directed? \textit{Hearings on H.R. 667, supra} note 3, at 67.

1578
labor practices—might be reasonably effective if a great deal more NLRB and federal court time were devoted to policing the organizing campaign. But for the Board and the courts to enforce promptly and effectively all present standards in all plants across the country would involve unacceptably high costs.

A better solution would concentrate the limited resources of the NLRB enforcement apparatus on preventing those unfair labor practices which are most likely to undermine the workers' freedom of choice on the representation issue. Such a proposal must go beyond after-the-fact remedies and make discriminatory discharge, the employers' most effective union-breaking weapon, impossible at the outset. One feasible way of concentrating NLRB resources would be to limit special NLRB attention at a plant to a short period and to provide during that period a speedy preventive remedy for alleged discriminatory discharges. This Note outlines how such a concentration of resources could be achieved through registering and limiting union organizing campaigns and restricting employer discharges during the short period of the registered campaign.

III. A New Approach: The Registered Organizing Campaign

The approach proposed here involves registering the organizing campaign under the aegis of the NLRB and thus bringing the campaign into the open where rules can more easily be enforced against both sides. For the employees, more intensive NLRB supervision of a union's organizing campaign would provide some education about employee rights under the National Labor Relations Act and effective protection from discriminatory discharges by the employer. For the employer, registration would offer a time limit for the campaign and a subsequent period of freedom from organizing in the event the workers voted not to unionize.

33. See note 29 supra.

34. Under present law, the NLRB has no responsibility to educate workers about their rights under the law. This task is left primarily to the union while management presumably reminds workers of their right to remain unorganized. However, an employer's explanation of federal law to his employees may be so biased as to be a threat, and thus constitute grounds for setting aside an election which the union lost. See, e.g., Dal-Tex Optical Co., 157 N.L.R.B. 1782 (1962). Because they get no clear statement of the law from any neutral party, workers are often unsure or ignorant of their legal rights and duties. See generally testimony of union officials in Hearings on H.R. 11725, supra note 3, at 89, 120-21, 125, 166, 268.

35. Presently, the law sets no time limit on the duration of a union's organizing campaign, nor is there a prohibition on union organizing and agitation even when the union has lost a valid election and hence cannot obtain another election for a year. The National
A. Registering the Campaign

Registration with the Regional Office of the NLRB would mark the formal start of a short organizing campaign period and would bring into operation the protections for the registration period. Normally the advantages of these protections would impel the union to seek the registration umbrella once it decides to conduct a campaign. But it would probably be unwise to require that a union register its campaign as soon as the union contacts the first employee. To void a successful campaign because of pre-registration campaigning would seem too harsh a sanction, and any lesser penalty would probably be ineffective to stop unregistered "undercover" campaigning. Moreover, it is probably desirable to register and control only union organizing campaigns with some chance of success. Nonetheless, since a union would have the power to register at any time, the employer should also be able to register an organizing campaign at his plant. In view of the moratorium provisions to be discussed below, registration should not be granted at the employer's request unless he can show that some organizing activity has been going on at his plant.

B. Time Limit and Moratorium

The prime objective of the registration scheme is to concentrate in a short period the frenzy of organization and to subject that frenzy to certain checks and controls necessary to keep the campaign above a minimal level of rationality. To achieve this objective, the registered campaign period must be as short as possible and still allow the employees adequate time to consider their alternatives. A period of from two to four weeks would probably be appropriate for most bargaining campaigns.

At the end of the short period set for the registered campaign, the union would be required to demonstrate support or get out of the plant.

Labor Relations Act § 9(c)(3), 29 U.S.C. § 159(c)(3), prohibits only elections for a year after a valid election. Nothing prevents the union from campaigning during the year for support in a subsequent election.

36. The act of registering should bring the proposed safeguards into effect at once; but registration should be provisional until an NLRB Regional Director determines that the union has chosen an appropriate bargaining unit to try to organize. A finding that the unit is not appropriate should terminate the registration; however, unless the union was acting in bad faith in the first registration, such termination should not preclude a new registration for a different, and this time "appropriate," bargaining unit. The current statutory provisions on the subject of the determination of the appropriate bargaining unit are National Labor Relations Act § 9(b), 29 U.S.C. § 159(b) (1964) (authorizing the NLRB to determine the appropriate bargaining unit) and National Labor Relations Act § 3(b), 29 U.S.C. § 153(b) (1964) (authorizing delegation to regional directors of NLRB powers to determine appropriate bargaining unit; such a delegation has been effected, see 29 C.F.R. § 101.21(a)).
If the union had obtained support from a certain minimum percentage of the employees (such as 30 per cent under present law), an NLRB-supervised representation election should be held as soon thereafter as possible.

To achieve the objective of concentrating a union organizing campaign in a short period, the campaign would also have to preclude another election for a substantial period. Under present law, if the union obtained and won an election it would be the sole bargaining agent for at least a year. Likewise, if the union failed to obtain sufficient support to compel an election and then to win, union organizing campaigns and petitions for elections would also be prohibited for a year.

Since unions could attack the employer with one registered campaign after another if only the campaigning union were barred by a recent unsuccessful campaign, an unsuccessful organizing campaign by one union would probably have to bar organizing activities by all unions for the prescribed period.

As an incentive for employer compliance with NLRB rules, the bar to subsequent organizing campaigns should not apply if the employer is found guilty of serious Labor Act violations.

The time limit and moratorium should call a halt to endless campaigns of attrition in which the union and employer are incessantly at loggerheads. Instead, one short regulated campaign would be followed by either recognition of the union or a year-long moratorium on the contest.

C. Apprising Employer and Employees of Their Rights and Duties

Once a campaign is registered, the NLRB should apprise both the employer and his employees of their rights and duties under the National Labor Relations Act. The practical fundamentals of labor law could be communicated to management during a personal visit by one or more representatives of the Regional Office while employees could be informed of their rights at one or more meetings conducted by NLRB representatives. Ideally the Board should prepare and distribute

57. See note 6 supra.
59. If such a rule adopted, other unions should be allowed to join a registered campaign either in concert with or in competition with the registering union. The union which registered the campaign would have a significant advantage over competing unions since it would have chosen the time for the campaign and would be prepared to commit its organizing resources. Since the campaign period is very short, others unions may find it difficult to gear up their own campaigns. It may be desirable, however, to give some advantage to the union which first decides to organize a plant.
to management and employees a pamphlet setting forth in simple terms the basic rights and duties of employees, employer, and union, and describing the avenues of redress open to each for violations of their rights.

As first steps toward rationalizing the organizational campaign, both the presence of a government representative at an early stage and the distribution to all parties of a clear, authoritative announcement of the rules of the organizing game would have great value in exerting pressure for a clean campaign.

D. Employee Tenure During the Organizing Campaign

To remove the employer's chief unlawful weapon against an organizing union—the discharge for union activity—employees should be given a form of tenure during both the organizing campaign and the representation election campaign that follows. During the campaigns, the employer should have the right to discharge employees only after (1) giving prior notice, (2) stating in writing and under oath the reason for the discharge, and (3) if challenged, satisfying an NLRB trial examiner that the discharge was not a discriminatory anti-union move. Enforcement of these procedural requirements against the employer ought to be swift and severe since compliance with the procedures is easy for the employer, easy to prove or disprove, and important to the operation of the whole registration scheme. Criminal penalties and compensatory damages coupled with substantial punitive damages to the employee would be effective sanctions for breach of any of the three requirements.

Once the employer has given notice, declared the reason for the discharge under oath, and been challenged by the union, the dispute must be resolved quickly and authoritatively; in addition, any possible adverse effect of the determination process on the party found to be in the right must be minimized. For example, a Regional Office official could make an initial determination solely on the basis of affidavits from the employer, employee, and union as to whether the proposed discharge was an act of anti-union discrimination. If the prior notice of discharge had to be filed a week or so before the discharge, the decision on the affidavits could be made prior to the effective date of the discharge.

If either the union or employer challenged the initial finding, an expedited hearing could be held before a trial examiner. Pending the hearing and decision, the discharge should be suspended and the employee should be allowed to remain on the job as living proof that the organizing campaign rules are being enforced by the NLRB. At the hearing, the employer should have the burden of showing absence of
anti-union motivation in the disputed discharge. Because the organizing campaign should not be dragged out while further appeals are taken, the decision after the expedited hearing should be final for purposes of the organizing campaign. If the union wins, the discharge should be quashed; and if the employer wins, the union should not later be allowed to claim that the coercive effect of this discharge ruined the election. There would seem to be no reason, however, to preclude either the discharged employee or the employer from appealing in the normal way a decision on the affidavits or after an expedited hearing, so long as the decision quashing or allowing the discharge was allowed to stand until reversed on appeal.

E. Possible Further Regulation of the Registered Campaign

A registered organizing campaign might be the object of other regulations and requirements in addition to the vital safeguards against discriminatory discharges. For example, the law might require that certain economic claims made by the employer or the union during the campaign be supported with proof by the party making the claim. Registration would also provide an appropriate point to apply the recently developed rule that the employer must give the union a list of employees' names and addresses at a reasonable time before a representation election.

If the close NLRB supervision and the employee tenure provisions reduced the psychological power of the employer over his employees sufficiently, organizational picketing by the union might be prohibited

40. Such a showing would usually involve proof of the existence of a valid justification for the discharge (e.g., economic pressure on the employer to reduce the size of the work force or serious breach of discipline by the employee) plus proof that the discharge was consistent with discharge practices before the union campaign began.

41. To promote certainty, the occurrence of an "allowed" discharge, even if later shown to have been discriminatory, should not be held to invalidate the results of the organizing campaign and following election.

42. National Labor Relations Act §§ 10(e) (enforcement), 10(f) (review); 29 U.S.C. §§ 160(e)-(f) (1964); see Ball v. NLRB, 299 F.2d 683, cert. denied, 369 U.S. 838 (1962) (comparing 10(e) and 10(f) as to choice of forum).

43. The employer may now be required to substantiate claims that he cannot pay higher wages, in a post-certification bargaining situation. NLRB v. Truitt Mfg. Co., 351 U.S. 149 (1956). Extending this rule to the period of the registered organizing campaign would give the employees more information on which to base a rational decision. This would not necessarily work to the union's advantage in all cases. As the Court pointed out in Truitt, "Claims for increased wages have sometimes been abandoned because of an employer's unsatisfactory business conditions. Employees have even voted to accept wage decreases because of such conditions." 351 U.S. at 152. A union organizing campaign, by the same logic, might be slowed down by disclosure of the employer's precarious economic position.

as a further step to rationalizing the organizing campaign. Such picketing today serves as an important union counter-weapon to the various employer strong-arm tactics which are outlawed more in theory than in fact; but with a registered campaign the picketing might become an unnecessary and undesirable relic of a more barbaric and less rational era in labor relations.


46. Professor Cox offers this justification for allowing picketing under the present law of organizing campaigns:

Concerted activities which demonstrate the power of the union may be an important part of the electioneering not so much because of economic coercion but because the publicity and demonstration of the union's power go far to offset hitherto unorganized employees' fear of running counter to the employer's wishes, a fear often kept alive and strengthened by his artful use of his freedom of expression. In other words, the expression of opinion which follows a campaign in which unions are free to picket may be more reliable than a poll without competing pressures.