TEACHER'S MANUAL to

LABOR LAW IN THE CONTEMPORARY WORKPLACE

Third Edition

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Kenneth G. Dau-Schmidt
Willard and Margaret Carr Professor of Labor and Employment Law
Indiana University–Bloomington, School of Law

Martin H. Malin
Professor of Law and Director of the Institute for Law and the Workplace
Chicago-Kent College of Law, Illinois Institute of Technology

Roberto L. Corrada
Professor of Law and Mulligan Burleson Chair in Modern Learning University of Denver, Sturm College of Law

Christopher David Ruiz Cameron
Justice Marshall F. McComb Professor of Law
Southwestern Law School/Los Angeles

Catherine L. Fisk
Chancellor's Professor of Law
University of California, Irvine, School of Law

for

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Summary of Contents

CHAPTER 1
THE EVOLUTION OF THE CONTEMPORARY WORKPLACE

This first chapter is intended to serve a variety of purposes: prompt student interest in the study of labor law; remind students of the complexity and importance of the employment relationship; give students an introduction to basic tools necessary for policy analysis with respect to the problems of employees and employers; introduce students to a variety of recurring problems in the conduct and regulation of collective bargaining; give students a brief history and outline of American labor law; and introduce current and future problems in the regulation of collective labor relations that will be discussed later in the book. The first chapter can be covered in two carefully constructed lectures, but it is probably better to devote three class hours to this material so as to not unduly rush class discussions.

A. INTRODUCTION

The teacher strikes were selected as the introductory fact situation because it introduces some of the problems of regulating collective bargaining in the contemporary labor market and political environment. The story raises issues of: why employees unionize, employee collective action, bargaining power and the regulation of collective action. The instructor should not feel compelled to discuss all these issues. A better strategy might be to get the students talking about the problem and see where they take you, highlighting where their interests coincide with one of the legal issues they will learn about later in the course.

Once you have explored the problem with the class, you can progress to the text after the story and examine the four basic premises of the book:

1. *Successful employment relationships are of fundamental importance to individuals and the functioning of a healthy society.*

2. *Society should regulate our system of work relations to promote efficiency, equity and employee voice in the resolution of conflicts in the employment relationship.*

3. *Collective action plays a fundamental role in an optimal system for resolving employment conflicts in a productive and fair society.*

4. *Government regulation can help improve the performance of employee collective action in resolving employment conflicts.*

The instructor doesn't need to agree with all these premises to use the book, but we believe they are true and they are useful for motivating why collective bargaining is

important (1 and 3) and why we regulate it in the way we do (2 and 4). Moreover, these premises are flexible enough ("Society should regulate our system of work relations to promote *efficiency, equity and employee voice*") to support all of the positive and normative arguments that are commonly made for why we regulate collective bargaining as we do under the NLRA. It is sometimes useful to refer to these basic premises during the policy discussions that will occur later in the book.

NOTES

The Notes after the introductory story and text add some detail to points in this text and provide alternative starting points for discussion that some instructors may prefer. In note 1, we add some detail on the importance of work, outlining some empirical work on lawyers' experience in their own work. Some of the authors have sometimes found it useful to motivate student's interest in the course by highlighting the importance of the employment relationship by discussing the student's own aspirations for their work life. Students are often very interested to see some of the summary data on income and job satisfaction among lawyers in various types of work and the instructor might even want to provide a hand-out copy of some of the summary tables from Kenneth G. Dau-Schmidt, Jeffrey S. Stake, Kaushik Mukhopadhaya and Tim. Haley, *"The Pride of Indiana": An Empirical Study of the Law School Experience and Careers of Indiana University School of Law--Bloomington Alumni*, 81 ILJ 1427-78 (2006) http://ssrn.com/abstract=875908, or more recent work Kenneth G. Dau-Schmidt, Marc Galanter, Kaushik Mukhopadhaya, and Kathleen Hull *Men and Women of the Bar: An Empirical Study of the Impact of Gender on Legal Careers*, 16 MICH. J OF GENDER & L. 49 (2009) http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1017362. In notes 2 and 3 we provide further discussion of the purposes of regulating the employment relationship to promote efficiency, equity and voice, and the balancing of these purposes when they are in conflict. In note 4 we provide further discussion of the public policy choice among individual bargaining, collective bargaining and regulation as a means of accommodating conflicts in interest between employers and employees. These subjects can also serve as useful introductory discussions foreshadowing future discussion in the course.

B. A BRIEF HISTORY OF AMERICAN LABOR LAW

In this section we trace the history of American labor law. Its objectives are three-fold: to provide a brief but accurate history of the American labor movement; to provide an outline of the economic changes in the employment relationship over the history of our country; and to provide a history of the development of American legal doctrine and statutory law with respect to employee organization and collective bargaining. Within these objectives, there are at least two underlying themes or underlying objectives.

The first theme is that changes in the technology of production, transportation and communication cause changes in the employment relationship, how it is structured and the bargaining power of the parties, and that these changes drive what issues are currently

important in the law and the development of common law doctrines and statutory provisions. In this regard our history traces how artisanal production gave way to industrial production, the artisanal unions declined and industrial unions arose. We also suggest that the employment relationship is currently going through a similar change as traditional industrial production becomes less important and new methods of production arise under the new information technology and in a global economy. We suggest that with these changes, the employment relationship is also changing, and that collective bargaining and our labor laws will also need to change.

The second theme, or underlying objective, is to trace out the reasons why our common law doctrines and statutory provisions developed or were drafted as they were and the purposes behind those doctrines and provisions. For example, we present the traditional argument that the Wagner Act was intended to protect and foster employee collective action to redress inequities in bargaining power and promote industrial peace, while the Taft-Hartley Amendments and the Landrum Griffin Act were intended to redress perceived abuses of union power.

American labor history is an interesting subject in and of itself. When you add an economic and legal analysis, it becomes a useful means for understanding the development and purposes of American labor law, subjects in which all labor lawyers and neutrals should have some grounding.

1. THE ARTISINAL PERIOD: THE TRANSITION FROM EMPLOYMENT RIGHTS BASED ON STATUS TO "FREE LABOR" CONTRACTS

As the title suggests, one of the themes of this section is the transition in the law from employment rights associated with status under the law of master-servant, to employment rights based on contract.

A. THE ORGANIZATION OF PRODUCTION AND LABOR

Artisanal Production in the Nineteenth Century

The excerpts from Katherine V.W. Stone's book, FROM WIDGETS TO DIGITS: EMPLOYMENT REGULATION FOR THE CHANGING WORKPLACE (2004), provide a colorful and useful description of the employment relationship both in the early days of the Republic, when the rules governing the relationship were dominated by status under the law of master servant, and later with the emergence of wage labor and the dominance of the relationship by contract law. The excerpts also give a good outline of the organization of production under artisanal methods. These descriptions give useful background into the origins of our law of the employment relationship and why craft workers began organizing in craft unions.

NOTES

1. The first note briefly outlines and explains the presumption under master servant law that an employee could only be discharged with "reasonable notice." Later in the book we briefly contrast this system with the at-will rule that developed in American jurisdictions.

2. The second note poses the question of why the first craft unions developed? The text presents the traditional historical explanation for the emergence of unions of the divergence of employee and employer interests as the scale of production expanded. The argument goes that in early artisanal production when one master supervised only a few journeymen, all of whom stood a good chance of eventually being a master (and perhaps even marrying the master's daughter) there was no fundamental divergence of interest between employees and employers because each employee eventually became an employer. Even if being an employee was a bad deal, it did not matter much because eventually the person would be an employer and get the better end of the deal. However, as the scale of production grew, and one employer came to employ hundreds of employees, few of whom had any realistic chance of ever being an employer on such a scale and would most likely be employees their whole life. Under such circumstances the employees formed unions to try to redress the imbalance of bargaining power between employers and employees and make sure that employees received a good deal.

3. The third note asks whether it is accurate to think of trade unions price-fixing cartels? Although workers no doubt organize to improve their bargaining power relative to the employer, it is probably much too simple to think of them merely as labor cartels. Unions generally do not set wages by choking back supply, as OPEC does, but instead negotiates wages with powerful employers. The more appropriate analogy to OPEC would be that the union is analogous to the consuming nations binding together to negotiate with OPEC over the price of oil. Unions also serve functions such as representing employees in industrial jurisprudence and administering employee benefits that have no analogies in a simple price-fixing cartel.

4. The fourth note asks why unions developed first among craft workers. The traditional economic explanation examines both the expected benefits and costs of employee organization to the employees. Unlike general laborers, craft workers know they will probably be working in that craft for a long time, perhaps their whole life. Accordingly, they can imagine much larger future benefits from organizing the employees in their craft. Also, skilled workers such as craft workers are harder to replace and thus less vulnerable to discharge during an organizing campaign or replacement during collective action. Accordingly, the expected costs of organizing are less for craft workers than general laborers.

5. The fifth note high-lights the point that immigrants have played an important role in the American labor movement since the founding of the Republic. This point seems important in light of the recent media and academic attention on immigrant labor and the rise of the global economy.

B. COLLECTIVE ACTION DURING THE ARTISINAL PERIOD

In this section we present a brief outline of some of the most important efforts at collective action during the artisanal period. This history gives insight into the early issues in the employment relationship and how workers, employers and the government responded to conflict over these issues.

The first note asks why so many of the first nation-wide strikes were focused on the railways. The traditional explanation is that in the railway industry, skilled workers with a strong community of interest organized in powerful nation-wide employee organizations to deal with powerful national employers. The scale of the employers dictated the scale of employee organization and conflict. Moreover, the wealth of these employers meant that there were market rents worth fighting over. These explanations are useful later when we discuss the Railway Labor Act and why congress move first to address labor conflict in the railway industry rather than in all industries.

The second note draws a parallel between the involvement of German immigrants in the early American labor movement and Hispanic immigrants in the modern American labor movement through their mutual claim on May 1st as a day for collective action.

C. THE JUDICIAL RESPONSE TO COLLECTIVE ACTION: THE DOCTRINES OF CRIMINAL AND CIVIL CONSPIRACY

This section gives an introduction to the doctrines of criminal and civil conspiracy, as they were applied to labor unions during the artisanal period, through note versions of the traditional cases of the *Philadelphia Cordwainers, Commonwealth v. Hunt* and *Vegelahn v. Guntner*. The essential point is that employee collective action was initially treated under the doctrine of criminal conspiracy in American jurisdictions and subject to criminal punishment and injunction, but that later this doctrine was abandoned on favor of treatment under the civil conspiracy doctrine. The cases and notes present a brief outline of the "ends and means" test commonly employed under the civil conspiracy doctrine. To save time, the first two cases are only discussed in note form. *Vegelahn* is presented in full form because it provides a useful opportunity for discussing the role of collective bargaining in the employment relationship and in society as a whole by contrasting the majority opinion with the famous Holmes dissent. Traditionally some professors also use *Vegelahn* to discuss the differing attitudes toward employee organization and collective action between the moneyed classes (as represented by the majority who see collective action as inherently intimidating and unjustifiable) and the workers who undertook such action. However, *Vegelahn* can also be treated in a summary fashion if the professor prefers to spend time on other issues.

NOTES

1. Note one in this section points out that the employer already had potent remedies for intimidation and violence under the criminal law so that it is not clear that

available remedies are inadequate, and the extraordinary remedy of injunction is appropriate.

2. & 3. Notes two and three give a brief outline of the "ends and means" test of the civil conspiracy doctrine. Note two asks whether any form of union picket be lawful under the majority's decision? The probable answer seems "no" given the court's skepticism regarding employee action and its leap to the notion that such collective action is perhaps inherently coercive and unjustifiable. Note three asks whether in Holmes' view the employers and employees are really competitors? Holmes does express the view that the employees are competitors with the employers in the "free struggle for life" and that thus their interference with the employer's business through peaceful collective action is justified under common law doctrine and should not be enjoined.

4. Note four discusses the fact that the ends and means test of the civil conspiracy doctrine was easily manipulated by judges to reach the result they desired. The vagaries of this doctrine and the perceived bias of upper-class judges were part of what led to dissatisfaction with the system of "governance by injunction" in courts discussed later in the course. This dissatisfaction of course later gave rise to the Norris-LaGuardia Act, the National Labor Relations Act and the National Labor Relations Board.

5. Note five uses language in Holmes' dissent to introduce the idea that employee organization is important in society to produce a "countervailing power" to employer power in social and political discourse. Given the modern decline of American unions and the substantial sway "entrepreneurs" held in American social and political debate, at least prior to the recent economic collapse, a discussion of this theory is very timely.

D. THE END OF THE ARTISINAL ERA

This section provides a brief discussion Homestead strike which is commonly seen as an important marker in the transition of American labor relations from artisanal collective bargaining to and industrial system of production.

2. THE LABOR RELATIONS SYSTEM OF THE INDUSTRIAL ERA

A. THE "LABOR PROBLEM" AND THE DEVELOPMENT OF INDUSTRIAL MANAGEMENT PRACTICES

The Labor System of the Industrial Era

This section begins with another excerpt from Katherine V.W. Stone's book outlining the industrial system of production that largely replaced the artisanal system of production. It discusses the problems of motivating and retaining labor and how these problems were addresses with "scientific management," its application to the assembly line and "corporate welfarism." It also discusses the "deskilling" of jobs under scientific management and the problems this created for employees and employers. This reading

lays the groundwork for a later discussion of the boom in industrial organization during the Great Depression and post-war period on the basis that "industrial unionism" fit the industrial system of production because industrial unions organized both skilled and unskilled labor and negotiated and enforced seniority provisions and benefit plans that fit in well with management's aspirations to retain labor under corporate welfarism. The note at the end of the section is to encourage the students to think ahead as to how our system of production has changed in more recent times moving away from the traditional system of the industrial era.

B. THE EARLY INDUSTRIAL PERIOD (1890-1932): THE GILDED AGE, THE PROGRESSIVE ERA AND THE ROARING TWENTIES

I. Labor Relations During the Early Industrial Period

This section gives a brief history of the American labor movement during this period, including a discussion of both the "bread and butter" unionists and the more radical element. The section also introduces the students to the problems of yellow-dog contracts, black-listing and company unions that feature so prominently in the unfair labor practices provision of the Wagner Act.

II. The Courts' Response

"Freedom of Contract"

This section discusses the rise of the idea of freedom of contract in the law and particularly in the employment relationship. In this regard we discuss the rise of the employment-at will doctrine, the power this doctrine gives employers in combination with the doctrine of unilateral contract and, of course, the *Lochner* doctrine, which for a time constitutionally enshrined individual contract and protected it from federal and state legislation absent an appropriate exercise of the (very limited) police power. Our section discusses the employment-at will doctrine more than traditional introductions to the *Lochner* doctrine, but we did this consciously thinking that it gives a more complete picture of the conception of freedom of contract at this time and how it served employer interests. This discussion also serves as a nice connection to employment law courses the professor might teach.

NOTES

The notes in this section explore the possible limitations of the employment at-will doctrine and the *Lochner* doctrine, and accordingly raise questions about the efficiency and equity of an extreme and constitutionally enshrined vision of "freedom of contract."

1. Note one explores the limits of the employment at-will doctrine asking whether employees should be able to be fired for refusing to violate the law or so the employer can avoid paying an earned commission thus "robbing the employee of the

benefit of his bargain." As those who teach employment law know, even in most American jurisdictions the courts will not apply the at-will doctrine this far, instead finding public policy exceptions or implied covenants. The note also raises the question of the efficiency and equity of an extreme at-will rule which leaves employees with "exit" to other jobs as the primary means of communicating dissatisfaction. The work of economists Albert Hirschman and Richard Freeman suggests that mere "exit" is a less efficient means of communication than employee "collective voice." ALBERT O. HIRSCHMAN, EXIT, VOICE, AND LOYALTY: RESPONSES TO DECLINE IN FIRMS, ORGANIZATIONS, AND STATES (1970); RICHARD B. FREEMAN AND JAMES L. MEDOFF, WHAT DO UNIONS DO? (1984); WHAT DO UNIONS DO?: A TWENTY-YEAR PERSPECTIVE (JAMES BENNETT AND BRUCE E. KAUFMAN EDS. 2007)

2. & 3. Notes two and three set out some of the limitations and traditional criticisms of the *Lochner* doctrine. As to limitations, the *Lochner* doctrine conceived of a very limited role for state intervention in business affairs, a limited role that has proven unworkable and even unhealthy during the Great Depression or the recent collapse of the financial markets. It seems that some regulation is necessary to make capitalism work or better yet thrive and certainly it is necessary to have regulation to give capitalism "a human face" and remove the rough edges of the system in its treatment of the less fortunate. Also, under the *Lochner* doctrine it seemed that the courts accepted laws to foster and encourage capital to organize beyond some atomistic level of competition, but did not accept laws that fostered or promoted employee organization or protection. The authors are not sure this inconsistency was ever explained by the courts. The traditional criticisms of the *Lochner* doctrine are presented in note two complete with cites for further reading.

"Governance by Injunction"

In this section we set forth a brief outline of the system of "governance by injunction" that became the de facto national labor policy during the early industrial period and the traditional criticisms of this system. Under this system, judges governed labor relations using the civil conspiracy doctrine to enjoin organizing and collective action. There were many possible bases for injunction: real or imagined violence, sometimes employer instigated; interference with ("yellow-dog") contracts in which employees agree as a condition of employment not to affiliate with unions; court skepticism about union "means and ends" in collective action; or violation of the antitrust laws. Broad efforts to amend the antitrust laws to exclude employee collective action in the Clayton Act were cynically ignored by the courts. The system of governance by injunction allowed employers to use friendly courts to suppress employee collective action, without employee interests even being represented in court or employees receiving the usual procedural protections for enforcement of sanctions. From the larger public policy perspective, the system of governance by injunction was a very poor system for developing a labor policy for a national economy in which the courts usurped legislative power and undermined their credibility with the working class. As reflected in the Railway Labor Act, it was generally recognized that this system was not working

even before the Great Depression, but the collapse of the system of corporate welfarism in the Great Depression and the inadequacy of worker wages and aggregate demand gave powerful impetuous to the desire for change.

III. The Railway Labor Act

Railway Labor Act of 1926

In this section we present a brief history of the Railway Labor Act and its purposes and provisions. The text, borrowed from CHARLES M. REHMUS, RAILWAY LABOR ACT OF 1926 (1977), is pretty straight forward. It is probably worthwhile to note that the initial RLA was the product of compromise between organized labor and management, its purposes are expressly set out in Section II and that the Act puts a high premium on avoiding industrial strife as represented in its mediation and "emergency board" provisions. Later amendments of course incorporated some New Deal provisions, for example prohibiting yellow-dog contracts and company unions and expanding the reach of the Act to other transportation industries such as the airlines. We also briefly discuss the constitutionality of the Act and its acceptance by the Court in the *Tex. & New Orleans R.R. Co.* case. Consistent with our conviction that contemporary labor lawyers have to be familiar with the RLA and public sector labor laws, as well as the NLRA, this history and outline are perhaps longer than those found in traditional labor law case books.

IV. The End of the Early Industrial Period: The Great Depression and the Norris-LaGuardia Act

This section describes the events that immediately preceded the New Deal: the beginning of the Great Depression and the passage of the Norris LaGuardia Act. The circumstances of the beginning of the Great Depression and the decline of corporate welfarism gives a good explanation as to why the New Deal legislation developed as it did: employees could not count on the system of private benefits developed under individual contract, and accordingly the Social Security Act was passed; individual contract was not working well to secure employee interests or the general interests of the economy, accordingly the Wagner Act was passed. However, before Roosevelt was elected Congress enacted the Norris LaGuardia Act to attempt to address the problems of our system of labor relations system previously outlined by taking the courts out of the business of making national labor policy through injunction and specifically addressing the problem of yellow-dog contracts. The traditional points that are generally made about the Norris LaGuardia Act are that it was recognition that the existing system of labor relations was broken and that its solution was to make the government out of the conflict between labor and management by severely limiting the courts' power to enjoin labor activities.

NOTES

1. & 2. Give further elaboration on the Norris-LaGuardia Act. Note two discusses *Jacksonville Bulk Terminals, Inc.* to provide an interesting modern application of the Norris-LaGuardia Act to demonstrate that the Act still has relevance to the practice of labor law in the contemporary workplace.

C. THE MIDDLE OF THE INDUSTRIAL PERIOD (1932-1950): THE NEW DEAL, WORLD WAR II AND ITS IMMEDIATE AFTERMATH

I. The National Labor Relations Act (The Wagner Act)

a.) Legislative History of the Act

The excerpt from FRANK W. MCCULLOCH AND TIM BORNSTEIN, THE NATIONAL LABOR RELATIONS BOARD (1974) provide a contemporary account of the factors leading up to the passage of the Wagner Act.

b.) The Purposes of the Wagner Act

The excerpt from the "Findings and Policies" behind the Wagner Act provides an express statement of the purposes of the Act. We feel that it is important for students to read about and discuss the purposes of the Act to aid them in evaluating arguments for interpretation of the language of the Act. Accordingly, we spend some time on this subject, but it can be done in a more summary fashion if the professor so desires. The bedrock of this discussion should refer back to the express purposes stated in the Act which make it clear that the Wagner Act was intended to foster and encourage collective bargaining as a means of promoting: 1) equity in bargaining power between employers and employees; and 2) industrial peace. Further embellishments such as the desire to strengthen wages and aggregate demand and to promote industrial democracy should also be discussed. It is also useful to discuss the fact that the "Findings and Policies" of the Act were drafted with an eye toward building arguments for the constitutionality of the Act under the *Lochner* doctrine and the Court's then narrow view of the federal commerce clause power.

NOTES

1. The express purposes stated in the "Findings and Policies" of the Wagner Act make it clear it was intended to foster and encourage collective bargaining as a means of promoting: 1) equity in bargaining power between employers and employees; and 2) industrial peace. Further embellishments such as the desire to strengthen wages and aggregate demand and to promote industrial democracy are also relevant.

2. This note provides a discussion of examples in which the Board and courts have used the purposes of the Act to help interpret the language of the Act. These examples help drive the discussion as to why it is important to learn statutory purposes

when interpreting a statute. Following Congress' purposes or intent reinforces our democratic system by giving due deference to the legislature in interpreting the Act.

c.) The Provisions of the Wagner Act

This section provides a brief section by section introduction to the provisions of the Wagner Act. We usually try to help the students organize their comprehension of the Act by pointing out that section 2 provides important definitions for the Act (including who is an employee and an employer covered by the Act), section 7 sets forth the basic statutory right to self-organization and collective action, section 8 specifies several employer unfair labor practices to try to breathe life into the section 7 rights and that section 9 sets forth the statute's union election procedure. It is also common to acknowledge the debt of the Wagner Act's section 7 to the section 7 in the National Industrial Recovery Act (NIRA). It is useful for students to read the provisions of the Act in advance of this discussion.

Notes

1. 2. & 3. These notes provide an opportunity to pique the interest of the students and foreshadow future discussions by raising some of the knottier questions in the interpretation of the provisions of the Act. Firm answers to these questions are not necessary at this point since you will be discussing the cases that answer these questions later in the course. The point is to get the students thinking about these questions now.

II. The Courts' Response: The Constitutionality of the Wagner Act

NLRB v. Jones & Laughlin Steel Corp. is not only an important labor case, it is *the* pivotal case in a titanic struggle between the Court and our elected officials and the seminal case in the modern theory of legislative power under the American constitution. It is not by happen stance that the constitutional test of America's first major law dedicated to fostering employee self organization and collective bargaining would play such a pivotal role in American jurisprudence. The state's role in fostering a system for accommodating differences in interests between employers and employees goes to fundamental questions of human rights, contract, property, the distribution of wealth and power in our society and the appropriate role of the state.

Important points to cover:
- the political controversy of the "Court-packing plan" leading up to the decision
- the Court's recognition of employee self organization as "a fundamental right" stating that "Employees have as clear a right to organize and select their representatives for lawful purposes as the respondent has to organize its business and select its own officers and agents."
- the Court's recognition that Congress can legislate to foster and protect that right under the commerce clause and subject to the due process clause

- the significant expansion of federal legislative power under the commerce clause
- the limitation of the sweep of the due process clause and the end (?) of substantive due and the *Lochner* doctrine

Notes

1. Discusses the "switch in time that saved nine." Just thought the students should be familiar with and understand this phrase which is commonly used in discussing the New Deal cases. The professor can refer back to the material discussing the politics of the New Deal and the Court discussed just before the case if necessary.

2. Asks for a discussion of the federal government's commerce clause power under *Jones & Laughlin Steel Corp.* In this case the Court states that "The congressional authority to protect interstate commerce from burdens and obstructions is not limited to transactions which can be deemed to be an essential part of a "flow" of interstate or foreign commerce." According to the Court "The fundamental principle is that the power to regulate commerce is the power to enact "all appropriate legislation" for its "protection or advancement" (*The Daniel Ball*, 10 Wall. 557, 564). That power is plenary and may be exerted to protect interstate commerce "no matter what the source of the dangers which threaten it." *Second Employers' Liab. Cases*, 223 U.S. 1." The limiting test for this power seems to be "Although activities may be intrastate in character when separately considered, if they have such a close and substantial relation to interstate commerce that their control is essential or appropriate to protect that commerce from burdens and obstructions, Congress cannot be denied the power to exercise that control. *Schechter Corp. v. U. S.*, supra."

The question also asks about whether even this broader federal power is now adequate when our economy is enmeshed in a global economy. An argument can be made that, as our economy grew from a regional to national economy, the thrust of regulatory power had to shift from the states and localities to the federal government; accordingly, now that the economy is organized on a global basis, it may be inevitable that international authority or coordination is needed to effectively regulate it.

3. Provides a comparative analysis of labor relations law and practice in the United States and the UK that raises the point that the most peaceful and profitable collective labor relations are conducted within the context of a larger societal agreement on a rational system for settling organization and collective bargaining disputes.

4. Raises the questions of what we mean by "the law" and how should we resolve conflict between proper deference to the law and civil disobedience by powerful corporate executives. In general lawyers should never advise their clients to violate the law. However, 'the law" includes both statutes and the Constitution. If a lawyer honestly feels that a statute impinges on a client's constitutional rights the lawyer can advise the client to follow the Constitution rather than the statute.

5. Discusses how the post-New Deal Court reinterpreted the Clayton Act's sections 6 and 20 so that they fulfilled their original legislative purposes of exempting employee collective action from the antitrust laws. As discussed later in the book, the antitrust laws can still have an impact on labor relations when unions combine with employers to fix product price, or when "independent contractors" rather than employees combine to negotiate wages.

III. The Rise of Industrial Unionism under the Wagner Act: From the Great Depression to World War II

This material gives a brief historical account of the tremendous boom in organizing that occurred under the Wagner Act, labor relations during World War II and the post-war strikes that gave impetuous to the public's desire to amend the National Labor Relations Act to check union power. The intent is to provide the students with some context as to why the Taft-Hartley amendments were proposed and adopted.

IV. The Taft-Hartley Amendments to the NLRA

a.) Legislative History of the Amendments

We provide another excerpt from FRANK W. MCCULLOCH & TIM BORNSTEIN, THE NATIONAL LABOR RELATIONS BOARD (1974) for a contemporaneous account of the passage of the Taft-Hartley amendments over President Truman's veto. The intent is to give the students so idea of the conflicts of the time and the reasons for the passage of the Taft-Hartley amendments.

b.) Provisions of the Taft-Hartley Amendments

Provides an outline of the changes to the National Labor Relations Act in the Taft-Hartley amendments, including: the specification of the right *not* to organize in section 7; the provision of union unfair labor practices in section 8(b); the addition of the "free speech clause" in section 8(c); the definition of the obligation to bargain in section 8(d); changes in the section 9 election procedures, including the provisions for employer election petitions and decertification petitions; the creation of the General Counsel for the NLRB; the addition of the "right to work" provisions in section 14(b); the addition of the national emergency strike provisions; and the provisions in section 301 allowing the enforcement of collective bargaining agreements in federal court.

Notes

1. Discusses the relative frequency of employer and union unfair labor practices. From a practical perspective, employers control the status quo and gain more from unfair labor practices than unions. Accordingly, it is not surprising to find that there are many more allegations of employer unfair labor practices each year. In Graph 1 we present the average number of unfair labor practice charges made against employers and unions for

each presidential term from Franklin Delano Roosevelt in 1937-40 to George W. Bush in 2005-06. The point of averaging them over each four-year term is to smooth out inconsequential annual variations over such a long period of time. The point of averaging them over Presidential terms is to allow the viewer to note possible impacts based on the politics of who controls the administration. The Graph demonstrates that alleged employer unfair labor practices occur in much greater numbers now than in the 1940's and 50's, although they are down from a high achieved in the early 1980's. The increase since the 1950's is even more pronounced if you take into account that there are fewer elections, covering fewer eligible voters, now than in the 1050's (see Figure 2 near the end of the Statutory Supplement).

2. Introduces the idea of union security agreements, their purpose and the possibility of state "right to work" laws under section 14(b). The note also discusses the possible negative impact that right to work laws may have on union organizing and the empirical evidence n this regard.

3. Briefly discusses the emergency strike provisions of the Taft-Hartley Amendments, how little they are used and the fact that some noted legal scholars have suggested they have little impact on American labor relations.

4. Briefly discusses the recent case on the Board's quorum requirement and the possible implications of those cases for past decisions by the Board.

D. THE LATE INDUSTRIAL PERIOD (1947-1970): POST-WAR AMERICA

This section discusses the economics of production and labor relations during the post-war period. As presented by the authors, this is the "golden age" of employee representation under the NLRA. During this time the American economy was dominated by large vertically integrated employers, who sought to retain employees for long periods of time and were largely protected from international competition. This was a very fertile ground for American industrial unionism under the NLRA since unions could deliver higher wages and play a useful role in the administration of the employer's work rules and benefits. After the 1970's, international competition increased, and the new information technology allowed employers to organize horizontally and outsource work across the globe. As a result, there was constant downward pressure on wages and employers began to more vigorously resist union efforts to limit employer flexibility or the provision of benefits supporting long-term employment.

I. Labor Relations During the Late Industrial Period: The Cold War, the Seizure of the Steel Plants, the AFL-CIO Merger

This section presents a brief history of the major events in the history of the American labor movement during the pot-war period. The cold war is discussed to give a partial context to the Landrum-Griffin Act (corruption is discussed later in the section on the Act). The seizure of the Steel plants is discussed because it provides an interesting

role reversal for labor and management in the government's response to work stoppages (here an "employer strike"). The AFL-CIO merger is discussed because of its own significance to the American labor movement.

II. Labor Legislation of Post-War America: the Landrum-Griffin Act and Public Sector Labor Relations Acts

a.) The Landrum-Griffin Act

Origins of the LMRDA

This excerpt from MARTIN H. MALIN, INDIVIDUAL RIGHTS WITHIN THE UNION (1988) provides back ground on the reasons for the passage of the Landrum-Griffin Act and a brief outline of its major provisions. In places, we also added edit notes to the excerpt that draw on Clyde S. Summers work in *American Legislation for Union Democracy*, 25 Mod. L. Rev 273 (1962) to provide more detail. As outlined in the section, the primary motivation for the passage of the Landrum-Griffin Act was Congress' concern that unions, now the legal representative of workers in organized units, fulfill their promise of providing industrial democracy by being free of corruption and antidemocratic practices. It is also acknowledged that at least some of the supporters of the Act wanted to weaken unions, and to this end the restrictions on picketing and boycotts included in the Act were added.

The excerpt outlines the major provisions of the Landrum-Griffin Act, including: the Union Members' Bill of Rights, the reporting requirements, the union election provisions and the fiduciary duty that is imposed on union officers. Union elections and the regulation of union trusteeships is discussed more in notes 3 and 4 below.

Notes

1. Note 1 tries to provide a frank but balanced discussion of the problem of labor "racketeering" in what is perhaps the most notorious case, that of the Teamsters and Jimmy R. Hoffa. Unfortunately, Hoffa may be the only labor leader most students can name.

2. Note 2 discusses the use of federal RICO trusteeships to try to reform some unions. To our knowledge these trusteeships were thought to be quite successful.

3. Note 3 discusses union elections and the fact that, although always important, improprieties are actually rare, and most unions have more officer turnover that the US Congress.

4. Discusses some of the past abuses of union trusteeships by union presidents to squelch dissent and how regulation under the Landrum-Griffin Act has helped remedy this problem.

b.) Public Sector Labor Relations Acts

Because of the growing importance of public sector labor laws to the practice of labor law, we include a brief description of the history and development of public sector labor law in the United States. As shown in Graph 2 as the percent of workers organized in the private sector has declined in recent years, the percent of workers organized in the public sector has increased. Indeed, in 2006 forty-eight percent of the almost 17 million employees represented by unions were public employees. U.S Bureau of Labor Statistics, Table 3 (2006). As a result, roughly half of the labor law work in the United States now involves state and federal public employment labor laws. This section discusses why the right to organize and take collective action was recognized later in the public sector, and why interest in organization has grown dramatically among public sector employees since the 1960's. We also briefly describe some of the relevant federal and state laws.

Notes

1. Provides a comparative analysis noting that many European countries accepted public sector organization before the US, and in fact make fewer distinctions in their treatment of private and public employees.

2. Discusses how public sector employment has grown as a percent of the civilian workforce since 1929, primarily at the state level.

3. Introduces the students to the ideas of mediation, fact-finding and arbitration as methods of helping to determine substantive contract terms. Although these tools for resolving disputes can also be used in the private sector, they play a bigger role in the public sector where there are often constraints on strikes or recourse to other economic weapons.

4. Discusses union security agreements in the public sector and the recent Janus decision in the Supreme Court.

5. Briefly discusses the recent teacher strikes, how such strikes can occur even though they are illegal, bargaining power and the problems of regulating collective bargaining.

6. Discusses some interesting problems that arose out of the criminalization of collective bargaining by some public sector workers in Indiana.

3. THE RISE OF THE NEW INFORMATION TECHNOLOGY AND THE GLOBAL ECONOMY: THE MARKET DRIVEN WORKFORCE AND THE CHALLENGES OF ORGANIZING IN THE CONTEMPORARY WORKPLACE

A. THE ORGANIZATION OF PRODUCTION IN THE NEW ECONOMIC ENVIRONMENT

The dominant theme of this section is that recent changes in trade and technology herald a change from industrial production and organization to new methods of production and organization, much like that which occurred when the American economy changed from artisanal production to industrial production. Just as the changes in trade and technology of the late 1800's that lead to a shift from artisanal production to industrial production resulted in changes in the employment relationship, the necessary methods of employee representation and the optimal governing labor law, so too the changes in trade an technology of the 1970-80's have lead to a shift from traditional industrial production to global production in the information age resulting in changes in the employment relationship, the necessary methods of employee representation and the optimal governing labor law. In the late industrial era after World War II, American employers were dominated by large vertically integrated producers who were largely insulated from international competition and sought to encourage long-term employment through employee benefit plans. Traditional industrial unionism fit this method of production well since unions could play a useful role in raising wages and helping to secure and administer employee benefits. Employee organization and representation under the NLRA worked pretty well under these circumstances. Now in the age of global trade and information, American employers are dominated by employers who are horizontally organized on a global level, out-sourcing work to the cheapest supplier. Employers are more subject to the machinations of the global labor market and are interested in flexibility in the employment relationship, not long-term relationships. As a result, traditional bread and butter industrial organization works more poorly in this new economic environment and strong arguments can be made for changes both in the ways employees are represented and in the governing national laws.

Along with this fundamental change in methods of production and the employment relationship, we have also experienced other changes, some of which also have historical precedents. Among those changes are: the change from a manufacturing based economy to a service based economy (which has some parallels to our prior shift from an agrarian economy to an industrial economy); the entry of new workers and immigrants into the economy (which of course is a common theme in our history); the rise of the "big box" and on-line retailers; the near doubling of the relevant labor force with the rise of globalization and the entry of the Russians, Chinese and Indians into the global economy; and the acceleration of automation based on information technology.

Finally we introduce a brief discussion of the problem of increased inequality in income and wealth associated with the rise of the global economy, automation and the decline of the American labor movement. Graph 3 demonstrates how wage growth and productivity growth in the American economy have diverged since about 1980 with wages remaining very flat despite significant improvement in productivity with the new information technology. Later in the text we give figures on the increasing divergence in the income distribution between the top quartile and the rest of the American workforce. Further discussion of this phenomenon and the threat it poses to our economy and

democracy can be found in THOMAS PIKETTY, CAPITAL IN THE TWENTY-FIRST CENTURY (2014), Emily Eakin, *Capital Man*, THE CHRONICLE OF HIGHER EDUCATION, THE CHRONICLE REVIEW, April 17, 2014, http://chronicle.com/article/Capital-Man/146059/.

Notes

1. Discusses the recent impact of international trade on the American economy and America's workers. The material elaborates on the basic point that, while free trade may be wealth maximizing, it is not pareto optimal in that there are winners who gain a larger share of the national product (capital, managers and some workers) and others who are losers and receive a smaller share of the national product (for example manufacturing workers displaced by trade with China). The point is also made that, although it is hoped that displaced workers will eventually transition to other jobs in which the United States enjoys a comparative advantage, so far the transition times and costs have been longer and larger than anticipated and many workers are still suffering in transition. Suggestions as to how to best help these workers tend to revolve around taxing the winners in international trade to pay for retraining and relocation costs for displaced workers.

2. Presents statistics on the recent waves of immigration to the United States and the constituents who make up those waves. The number of immigrants currently in the United States as a percent of the total population is relatively large by historic standards rivaling the percentage reached back in the 1890s. Immigrants today are predominantly from Central and South America or Asia with Asian immigrants now out numbering Hispanic immigrants each year. Hispanic and Asian immigrants often enter the country in very different ways and have very different characteristics with the Hispanic immigrants on average having lower levels of education and income than the rest of the American public and the Asian immigrants having higher levels of education and income than the rest of the American public. Although there is evidence that these immigrants generally work as compliments to native workers, there is some evidence that they compete with low skilled and very high skilled workers and have lowered wages in those markets.

3. Discusses both some of the negative and positive contributions the American labor movement has made to race relations and the civil rights movement.

4. Discusses the recent problems men have suffered in education. One possible tack for discussion would be to relate these problems to your own school. Are Black males well represented in your school? As well represented as Black females? Why not? Nationwide Are there programs in your school where male students and faculty still dominate (likely candidates include computer science, math, physics, engineering and business)? Are there programs in your school where women students and faculty dominate (likely candidates are communications, education, language and literature, library science, psychology, fine arts, medical sciences, nursing, optometry, pharmacy and veterinary sciences)? Does your school have programs to help women get into and succeed in male dominated programs (for example Women in Science and Engineering

(WISE))? Does it have similar programs to help male students in female dominated programs? Does your school still have student groups for women and a Dean of Women's Affairs even though male students are now in the minority and suffer a higher drop out rate? Does your "Gender Studies" program include adequate representation of men and include faculty who examine problems from the male perspective?

5. Tries to provide a brief discussion of the growing income inequality we suffer in the United States and the threat this poses to or economy and democracy.

B. LABOR RELATIONS IN THE NEW ECONOMIC ENVIRONMENT

This section discusses how the traditional NLRA system of collective bargaining is not well suited to the current economic environment. The first problem discussed is that with the new methods of horizontal organization and out-sourcing in production, and the power of the "Big Box" and online retailers, the NLRA definitions of employee and employer do not always adequately identify who wields economic power in a relationship and thus might be an appropriate party for collective bargaining. Second we discuss how in the global economy American employers have increased incentive to resist employee organization, and ample opportunity to do so. Finally, we discuss how the traditional methods of "Bread and Butter unionism" do not hold as much relevance for the employees of today where there is constant downward pressure on wages and less employer interest in log-term employment relationships and benefits. The implications are that both our labor laws and the American labor movement have to change to address these problems in order to preserve the vitality of employee collective representation in the American economy.

Notes

1. 2. & 3. Discuss whether there has been a change in attitude toward employee organization since the 1980's among any of the primary players: employees, employers and the government. The traditional analysis has been that President Reagan's discharge of the PATCO strikers heralded a new attitude of hostility or indifference on the part of government toward employee organizing and that this encouraged American employers to resist employee organization. Our discussion suggests that, although Reagan's actions undoubtedly marked a recent low point in government and union relations, American employer resistance increased before this incident and is perhaps driven more by economics than President Reagan's actions. Despite government and employer hostility, it still seems that the majority of American workers are interested in some sort of collective representation in the workplace, although this might not be traditional unionism.

C. OPPORTUNITIES FOR UNIONS IN THE NEW ECONOMIC ENVIRONMENT

Discusses the fact that, although the current economic environment is inhospitable to traditional employee organization, this environment also provides some opportunities for organized labor. Information technology will be a boon to employee organizing. Information and coordination are important tools for employee organization and collective action. The new technology provides means for employees to collect and distribute information of which their fore-parents could only dream. In addition, as employers move toward more ephemeral employment relationships, the employee's primary attachment will be to his or her profession or professional association. Unions have an opportunity to build the primary long-term employment relationship with many employees. Finally the new economic environment raises issues of inequity and the devolution of risk onto employees that will have to be addressed. Unions can seize on these issues as important subjects on which employees need collective representation.

Notes

1. This note discusses the recent efforts to amend the NLRA including the Labor Law Reform Act of 1977, the Workplace Fairness Act of 1992, the TEAM Act of 1995 and most recently the Employee Free Choice Act. The intent is to provide the students some background on recent legislative efforts which will support a discussion of the merits of these efforts and the likelihood both of their success and that they will adequately address the problems of organized labor in the current economic environment. Copies of some of the Workplace Fairness Act, the TEAM Act and the Employee Free Choice Act are included in the Statutory Supplement to support this discussion. There is also discussion of other possible proposals such as a national right to work law.

2. This note discusses the history, organization and objectives of "Workers Centers" and how they might be a complement or substitute for traditional unions in the new economic environment. Questions in the note are designed to elicit discussion of the phenomenon.

CHAPTER 2
COLLECTIVE ACTION IN THE WORKPLACE

A. INTRODUCTION

Due to the expansion of the recognition of Section 7 rights and collective action beyond the union context in the last several years, we chose to move Chapter 3 from the first edition to Chapter 2 in this one. We have also emphasized collective action more in the Chapter, perhaps emphasized by moving treatment of strikes up from Chapter 6 to the end of this Chapter. Like the other chapters of this text, Chapter 2 begins with a broad contemporary fact pattern through which to analyze collective action and representation. Other texts rely primarily on older cases to introduce this subject matter, perhaps implying that collective action may be a thing of the past. For that reason, the recency of the facts upon which the hypothetical is based, was particularly important.

Chapter 2 is occupied primarily with the task of introducing students to the contours of collective action as understood under the regime of the NLRA, and particularly through representation in a labor union. Thus, the chapter begins, in the first part (B) broadly with the idea of concerted activity and mutual aid and protection. Note that there is some brief material in this chapter to introduce students to the idea that conduct may also be "unprotected," but that the bulk of the course material on unprotected conduct is to be found in Chapter 6 ("Economic Weapons"), which takes up Section 8(a)(3) and emphasizes collective conduct. Part (C) is completely new in this edition and takes up the various challenges to collective action that have arisen mainly in nonunion contexts and related to new forms of collective activity and new NLRB precedents responsive to those. Part (D) is primarily focused on strikes as perhaps the most powerful form of collective activity.

The chapter may be taught with an introductory class focusing on the Somali workers problem that begins the chapter and the questions asked on page 124. Another approach is simply to assign the introductory problem and beginning questions to students to read but to wait to take up the problem as different questions are asked about it throughout the chapter. Under that approach, the first class of the chapter will begin with (B)(1) Concerted Activity.

The introductory problem is referenced throughout the chapter. See p. 132 note 2, pp. 142-143 note 3 (at the end), pp. 172-173 end of note 2, p. .

Notes (pp. 124-126)

Somali Worker problem and notes 1-3, p. 124: The idea of the Somali Workers problem is to raise issues that will come up in the chapter. Many of the issues raised are not easy and are not susceptible to easy answers, nor do we expect most professors who

begin here to simply answer the questions and move on. One approach here is to orient the students around the statute, emphasizing that there is a place to start with these questions. Section 7 of course provides protection for concerted activity but the term is not defined in the statute. To the extent that concerted activity is protected by the NLRA, it is preemptive not only of state/local law but also workplace rules. This may be a good place to get students thinking about the definition of labor organization versus labor union. Assigning Section 2(5) defining labor organization will allow students to get their mind around the questions in note 1 regarding the characterization of the "association" of Somali workers.

Of course, some of the questions raised in these notes may not be fully satisfactorily answered until after later chapters in the casebook. The issue of replacement workers is an example. Most students come into a labor course believing that if workers leave their job, they may be terminated. The teachings of section 7, therefore, are somewhat counter-intuitive and worth spending some time on. Students may also believe that these protections only apply if workers are represented by a labor union and that employers have an unqualified right to do whatever they need to do to continue operations. The problem and notes are intended to be used to challenge these notions, especially as related to use of electronic media to discuss workplace issues. We like this as a starting point to immediately engage this new generation of students.

Note 1, p. 124, raises questions about the definition of labor organization and minority unions.

Note 2, p. 124, raises the very topical issue of employee punishment for use of electronic media to discuss workplace issues. The answers to these questions are found primarily in part (C).

Note 3, p. 124, raises the central issue of protection and parameters of Section 7 rights. These are taken up in part (B) immediately following.

Note that whether or not the beginning class for this chapter involves the Somali Workers problem and notes, it is highly recommended that these pages be reconsidered at the end of the chapter as review or underview.

Historical Material, pp. 124-126: This material is covered in more detail in chapter 1, but it is useful to recall Holmes's *Vegelahn* dissent in which he talks about capital's privileged right in our society to combine, and suggests labor should be able to combine as well. Some think this was an important precursor idea to union legitimacy and federal labor laws passed in the 1920s and 1930s. Few students have thought about labor unions in this way and it's worth kicking around.

B. CONCERTED ACTIVITY FOR MUTUAL AID AND PROTECTION

1. CONCERTED ACTIVITY

Dictionary definition of concerted. Both meanings have made their way into NLRA case law. It may be useful to ask students to identify cases and materials they encounter as falling within one definition or within both. *Ignore the sentence about two passages*. Instead ask the students to contrast the Lynd reading with the Court's opinion in *Washington v. Aluminum* and *City Disposal.*

Communal Rights (pp. 126-127)

Lynd defines concerted activity as "solidarity," and invokes examples from the Polish worker struggle for union recognition and individual workers seeing themselves as part of a collective. Lynd openly disagrees with Justice O'Connor's characterization, found later in her dissenting opinion in *City Disposal* (see pp. 139-142), that the individual working for personal gain and collective action are incompatible. The Lynd reading provides a good starting off point for the discussion of concerted activity and collective action. Note that it is helpful to have the students read Lynd, *Washington Aluminum*, and *City Disposal* prior to a broad class discussion of the matter.

NLRB v. Washington Aluminum Co. (pp. 129-132)

Case: Plant employees came to work on a bitterly cold winter day only to find the plant furnace had broken down the night before and had not been fixed. The foreman said to one of the workers, "if those fellows had any guts at all, they would go home." The foreman's statement was conveyed to the other employees. After some discussion, all but one of the employees decided to go home in hopes their action would force the company to restore heat to the plant. The foreman informed the general foreman of a walkout due to the cold, who discussed it at length with the company president. The president terminated the employees that walked out.

The NLRB held the walkout was a concerted activity within the meaning of Section 7 of the NLRA. The Court of Appeals reversed because the workers did not give the employer an opportunity to avoid the work stoppage by presenting a specific demand. The Supreme Court granted cert. The Court reversed the Court of Appeals, holding that the walkout was a concerted activity within the meaning of Section 7. The Court found Section 7 does not require a specific demand to remedy a condition. Individually, several employees complained to company officials of the cold, and as a group, the employees were unorganized and without a bargaining representative. The Court found they took the most direct course they could to bring about improvement of their working conditions, which satisfied Section 7. The Court also found the existence of a "labor dispute" because there was evidence of a running dispute between the employees and the company over a term and condition of employment, the heating of the shop.

NOTES (pp. 132-133)

Note 1 emphasizes a central tenet of the case, and of labor law in general: Section 7 rights extend to all workers, not just unionized workers. The point cannot be

emphasized enough because, as stated, it seems somewhat counter-intuitive to most students, and can be extremely important to remember in counseling clients, both management and worker alike.

Note 2 refers back to the Somali worker problem at the beginning of the chapter. Although the situations are not exactly the same, it seems clear that the Somali workers will be protected as well. Remember, those workers arguably walked out not only to protest the promotions but also because of the difficulties caused by rules imposed regarding prayer breaks. The promotions seemed only to literally be the straw that broke the camel's back. However, the inhumane condition of "unbearable coldness" may be distinguishable in that it was a physical hardship for the workers in *Washington Aluminum*, but the same cannot be said about the conditions for the Somali workers. They were, after all, allowed to pray, even though praying was made difficult. In the discussion here, one might pose whether the Somali worker problem is closer to *Washington Aluminum* if prayer were prohibited by management altogether. The history of complaining about the temperature seems more important to the Court in deciding whether the dispute was a labor dispute. In fact, the Court characterizes the prior individual complaints as relatively insignificant, and does not penalize workers for walking out as a collective/concerted response to the cold. The Court does not seem to be suggesting that the first "concerted" action of complaint be something less than a walkout.

Note 3 poses facts that end up being a close call. There are facts in the problem that may be invoked by either side. The Circuit Court reversed the NLRB emphasizing that things could have been rearranged rather quickly. Although it seems to be a factual question, the question about employee rationality, raised in *Washington Aluminum*, might be posed to the class. How much rationality should be demanded of workers in making walkout determinations like this as a matter of labor policy? If the law demands too much here, might Section 7 rights and enforcement be chilled?

NLRB v. City Disposal Systems, Inc. (pp. 133-142)

Case: Under the collective-bargaining agreement, the company's truck drivers are to drive an assigned truck unless it is in disrepair. A garbage truck driver was terminated when he told supervisors who asked him to drive a particular truck that he would not drive that truck because it had faulty brakes. The NLRB held the refusal was a concerted activity. The Court of Appeals reversed. The Supreme Court granted cert. The Court reversed the Court of Appeals, holding that the driver was engaging in a concerted activity.

Under the NLRB's *Interboro* doctrine, a single employee's assertion of rights under a collective-bargaining agreement affects all covered employees. The Court adopted this broader interpretation of the meaning of "concerted activities" when the assertion of rights goes beyond mere griping, as in this case. Of those courts that have rejected the *Interboro* doctrine, none have rejected the possibility that an individual employee may be engaged in a concerted activity. The Court reasoned that as long as the

employee's assertion was based on a reasonable and honest belief he is being asked to perform something he is not required to under the collective-bargaining agreement, the assertion constitutes concerted activity, even if the employee is alone or has not filed a formal grievance. The Court found that the driver in this case had a right not to drive unsafe trucks under the collective-bargaining agreement and his refusal actions were reasonably clear and well directed toward enforcement of that right.

Dissent: Justice O'Connor disagreed with the Court's adoption and application of the *Interboro* doctrine, which she viewed as an act of undelegated legislative power by the NLRB. She argued that an individual employee's act of self-interest in alleging an employer's violation of the collective bargaining agreement in and of itself cannot constitute a concerted activity. A concerted action requires employees acting together in expressing mutual concern, and there is no evidence in this case that the truck driver discussed the safety problem with other employees or sought assistance from the union in this matter.

NOTES (pp. 142-145)

Note that *City Disposal* was a 5-4 decision with Justice O'Connor joined by Burger (the Chief Justice), Powell, and Rehnquist in dissent. Needless to say, if the case had come up much later than 1984 the dissent would probably have been the majority decision. Likely it would be the majority if the case were before the Court today.

As mentioned before, the Lynd reading, *Washington Aluminum*, and *City Disposal* are meant to be taken together. It is interesting to juxtapose in class Lynd's definition of concerted activity and the dissent's in *City Disposal.* Lynd takes on O'Connor directly in the excerpt. Ask students which view they prefer and why. One approach is to change the facts of *Washington Aluminum* so that only one worker goes home.

Without a collective bargaining agreement is the action still concerted? Note 3 (pp. 142-143) addresses this issue. What if there had not been a collective bargaining agreement in *City Disposal*? Still concerted? What if the truck driver had talked to other truck drivers before refusing to drive the truck? Concerted then? Does the driver's concern and discussion with another driver several days before count toward making the current refusal concerted?

Note 1 discusses the issue of whether the invocation of statutory rights (as opposed to collectively bargained rights) by an individual worker is sufficient to make worker action concerted. For now, the answer is no, though, as the note indicates, not as an inherent matter. Interpretation by the NLRB could possibly be upheld either way. Note 2 extends the note 1 discussion by adding the element of employee filing in the enforcement of a statutory scheme. This involves another close question splitting the Board and the Fourth Circuit in the *Krispy Kreme* case.

Note 3. See discussion two paragraphs above.

Note 4 is added because the issue often arises in the workplace. Many employers do not like employees to discuss among themselves their salaries or benefits. Some have explicit policies prohibiting such discussions. At the law school of one of the casebook coauthors, the Dean inserted a confidentiality clause prohibiting salary discussion by faculty members. Section 7 pretty clearly protects these discussions, but the law is so poorly known and publicized that many states have been impressed with the need for explicit legislation protecting these discussions.

At least one coauthor likes to introduce immediately after *City Disposal* a short excursus on all the processes that might have been available to the truck driver in the case. He finds it worth taking time now to talk about unfair labor practices, potential Section 301 litigation, and arbitration under the contract. A useful chart, replicated in the casebook supplement, has been produced by Dennis Lynch surrounding the set of facts in *City Disposal.* Dennis O. Lynch, *Deferral, Waiver, and Arbitration under the NLRA: From Status to Contract and Back Again,* 44 U. Miami L. Rev. 237, 252 (1989).

Note 5, new in edition 2, introduces students to the NLRB website and to Board advice memoranda. These are important sources of law that we felt should be introduced to students relatively early in the course.

Note 6 introduces the idea that worker discussions about work on various social media can be protected by Section 7. The *Bettie Page* case is an early one exploring these issues. Importantly, the case also discusses protecting workers who seek to find out about their legal rights as workers.

2. MUTUAL AID AND PROTECTION

Introduction: Identifies the broad issues regarding interpretation of Section 7 "mutual aid and protection" as involving subject matter and identity. First, how attenuated can the relationship between the labor issue and the localized workplace be? Second, and very related to concertedness, by the way, is identity –to whom does "mutual aid and protection" refer? Can "mutual aid and protection" be invoked by an individual? What if the aid and protection only benefits the individual, and therefore is not strictly "mutual?" *Weingarten* seems to suggest yes precisely because the broader right to representation applies mutually. The overall right is implicated when invoked in each individual case, no matter how individual the particular representation in any given case. One might ask whether the *Weingarten* issue is more easily resolved under Staughton Lynd's conception of the overall Section 7 protection.

Quite a lot of NLRB attention has been given to the *Weingarten* issue in the last couple of decades. It would seem that if the right springs from Section 7, it should apply regardless of whether a worker is represented by a union. The issue of whether the *Weingarten* right should apply to nonunion workers has plagued the Board. The *IBM* case is only the latest word on the topic.

IBM Corp. (pp. 147-153)

Case: A former employee of IBM, whose workers here are not represented by a union, complained of harassment. The employer conducted two rounds of investigatory interviews with three employees. For the second set of interviews, the workers requested to have a coworker or attorney present during the interview. IBM denied the request. About a month following the interviews, all three employees were discharged. The Board, after reviewing the fluctuating history of Board case law respecting applying *Weingarten* to the nonunion setting, held the *Weingarten* right does not apply to nonunion workplaces, and therefore the workers involved had no right to the presence of a coworker in the investigatory interviews.

The Board explained its changed stance by invoking changing policy considerations with the events of September 11th and rising instances of workplace violence and corporate abuse. Accordingly, the Board overruled its decision in *Epilepsy* and instead chose to return to the doctrine established by the earlier *DuPont* case. According to the Board, in nonunion settings, employers are allowed to contract and deal with individual employees, and their investigations of individual employees also require discretion, confidentiality, and candidness that would be disturbed by the presence of a coworker that does not have the same obligation of confidentiality that a union representative does. As a result of such policy considerations, the Board held that nonunion employees are never entitled to the presence of a coworker in investigatory interviews that might lead to disciplinary action.

Dissent: Member Liebman's dissent disagreed with the majority's policy argument. Liebman arged that there was no legal basis for overruling *Epilepsy*, which the concurring opinion of two members (omitted from the book) also agreed was a permissible interpretation of the NLRA. Liebman disagrees with the majority's characterization of the difference between union and nonunion workplaces and with the alleged harm that may come from allowing coworker representation. According to Liebman, the majority never explains the need for a brightline rule and provides no basis for its conclusion that employers will be hampered from conducting an effective investigation if employees are entitled to coworker representation.

NOTES (p. 153)

Note 1. This is as good a time as any to talk about the way that larger politics plays out on the Board. The particular doctrines besides *Weingarten's* applicability to nonunion workers that have been subject to change in the past based on the political makeup of Board Members are discussed in the note.

Note 2. *Weingarten* representation right is not generally available in the public sector (California is a notable exception) or under the Railway Labor Act.

Eastex, Inc. v. NLRB (pp. 153-156)

Case: Eastex, Inc. prohibited its employees from distributing a union newsletter in nonworking areas of the company property during nonworking hours. The newsletter was divided into four parts: 1) & 4) dealt with unions and union solidarity; 2) dealt with a "right to work" initiative at the state legislature involving a constitutional amendment and urged worker action, and 3) dealt with a presidential veto of a minimum wage increase, and urged workers to vote against their "enemies." The NLRB determined that distribution of the newsletter was protected under Section 7. The Supreme Court granted cert.

The Court agreed with the Board and held distribution of the newsletter was protected as a concerted activity for the purpose of mutual aid or protection under Section 7 of the NLRA. The Court explained that the scope of the NLRA definition of employee and of section 7 extended worker protected action to include employees and employees of another employer. The Court rejected Eastex's argument that the newsletter distribution was not for the purpose of mutual aid or protection under Section 7 because it did not relate to a specific dispute between the company and its employees. The Court said Section 7 protects workers who are seeking to improve their working conditions through administrative, judicial, or other political forums. The Court determined that as long the relationship between the activity and the employees' interests as employees does not become so attenuated that it cannot fairly be deemed to fall within the protection of Section 7, it does. The Court specifically found that both "right to work" and minimum wage legislation were sufficiently connected to the particular workers involved to constitute "mutual aid and protection."

NOTES (pp. 156-159)

Note 1 explores the dividing line between what is protected as being for mutual aid and protection because it is not "too attenuated" and what is not. The dividing line between *Tradesmen* and *Five Star Transp.* seems to suggest that the difference may be whether the activity helps workers as workers or workers as union members.

Note 2 discusses the *Motorola* case decided after *Eastex.* The dividing line suggested by the Fifth Circuit—whether the employees are acting as workers or as members of an outside political organization—seems difficult to square with *Eastex.*

Note 3 discusses the fact that Section 7 protection does not extend to work stoppages indefinitely, even if the initial worker action is protected. A controversial case, *Quitflex Mfg. Co.,* sets out a ten-pronged test for helping to decide whether a work stoppage is protected or not.

Note 4 presents a series of problems related to *Washington Aluminum* (4a), to *Eastex* (4b-c), and to both (4d). With respect to Immigration Day walkout, General Counsel Ron Meisburg issued an Advice Memorandum. See *Guideline Memorandum Concerning ULP Charges Involving Political Advocacy,* GC 08-10 (July 22,

2008)(Ronald Meisburg, General Counsel). The Advice Memo sets up a two pronged test for determining the legitimacy under the Act of worker political advocacy: 1) Is there a nexus between employment related issues and the worker advocacy involved? (Guided by *Eastex* principles, the GC concludes that there was a clear nexus re: immigration walkout because the Congress and Administration were considering new laws that would have an impact on undocumented workers in the workplace); 2) Are the means used by the workers to carry out political advocacy protected? (GC Memo sets out three guidelines here: i. Nonwork time in nonwork areas = protected, ii. On-duty advocacy = governed by lawful and neutrally applied work rules, iii. Leaving work = governed by lawful and neutrally applied work rules).

Holling Press, Inc. (pp. 159-166)

Case: Catherine Fabozzi worked for Holling Press Inc. After her sexual harassment complaint to the union steward was determined to be unfounded, Fabozzi took her complaint to the State Department of Human Rights. Later, Fabozzi asked a fellow employee to testify before the state agency about a comment the employee had heard. Fabozzi told the employee that she could be subpoenaed to testify in any event. Shortly thereafter Fabozzi was fired for "attempting to coerce coworkers into corroborating an unsubstantiated charge of sexual harassment against one of her supervisors."

To answer the question of whether Fabozzi was engaged in protected activity and her termination was thus a violation of Section 8(a)(1), the Board separately analyzed whether the conduct was, first, concerted and, then, engaged in for the purpose of "mutual aid or protection." The Board found that Fabozzi's conduct was concerted because she appealed to other employees for help. But, since she charted a course of action that was individual in nature, her conduct was not for mutual aid or protection. Specifically the Board noted that her requests to coworkers were not made to accomplish a collective goal but instead to advance her own cause. The Board noted that it was significant that the assistance she attempted to elicit was not done on a quid pro quo basis. Nor was there any evidence that other employees had similar problems.

The Board asserts that this holding is not contrary to *Eastex* and disagrees with the dissent's reading of the language. The majority reads *Eastex*, as stated in *Myers*, to require both concert and mutual aid and protection. In *Eastex* the element of mutual aid or protection was shown by the employees having a common interest in the subject matter. Here, the mere fact that Fabozzi enlisted a coworker to assist her with the complaint, does not expand the scope of the complaint beyond its original purpose which was self-serving and not to benefit others for mutual aid or protection. Since that element is lacking, the holding is not in conflict with *Eastex*, according to the majority.

The Board concludes its analysis by distinguishing *IBM Corp*. This distinction rests on the frequency of occurrences in the workplace. Since discipline and the threat thereof are common, employees have an interest in a regimen that offers the assistance of others. By contrast the possibility that the solicited person may herself file a sexual

harassment suit is far too remote and tenuous to support the conclusion that Fabozzi's request was for mutual aid or protection.

Member Liebman in dissent raises all the arguments one would expect. Liebman calls out the majority for finding that a sexual harassment complaint is individual even when the purported victim reaches out to coworkers. First, Liebman cites to *Meyers II* and explains that Fabozzi's invocation of statutes benefitting employees has been found to be mutual aid and protection. Next, Liebman points out that *Weingarten* implicitly and explicitly protects workers who appeal for help even though the employee alone may have a stake in the outcome. Liebman rightly points out that the majority seems to conflate concertedness and mutual aid and protection at the same time the majority accuses her of same. See footnote 3, p. 164.

We point out to students that *Holling Press* brings us full circle to the beginning of the chapter and the two competing views of Section 7 collective activity, Staughton Lynd's idea and Justice O'Connor's.

3. UNPROTECTED CONDUCT

This section is simply intended to help students to understand that there are limitations in Section 7 related to the way in which normally protected activity can lose protection because of the means deployed by workers. A broader discussion of unprotected conduct by workers and unions as organizations can be found in Chapters 4 and 6.

Timekeeping Systems, Inc. (pp. 166-171)

Case: The chief operational officer of Timekeeping Systems, Inc., Markwitz, sent an email to workers detailing proposed changes in company vacation policy and asking for any comments. Despite the assertion that the new policy would give employees more days off each year, one employee, Leinweber, calculated it would not be more days off but in fact the same number of vacation days only with less flexibility as to their use. That employee sent an email explaining this to the COO, Markwitz, who failed to respond. When another employee, Dutton, sent a global response to Markwitz's initial email saying simply, "GREAT!," Leinweber sent Dutton his explanation and another one to all employees pointing out the mistake using sarcastic and denigrating language. The COO asked the employee to write a letter discussing why his email was inappropriate, how it hurt the company, and how else the matter should have been handled. When the employee was unable to do so, he was fired for failing to treat others with courtesy and respect and failing to follow instructions as delineated in the employee manual.

The Board affirmed and adopted the decision of the ALJ, who held that the employee's emails were concerted activities. The ALJ found the employee's emails met all the requirements under Section 7 of the Act. By emailing all of his fellow employees, the employee in this case was attempting to correct wrong impressions of the proposed changes and was therefore acting for the purpose of mutual aid or protection. The ALJ

found that the fact that the email was concerted—with all employees being recipients—was one of the reasons the COO felt aggrieved by the email enough to initiate action against the sender of the email. Such a communication was protected because it was not so "intolerable, violent, or of such serious character" as to remove it and the employee from the protections of the Act.

NOTES (pp. 171-174)

Note 1 explores some issues surrounding sarcasm and vulgarity as protected activities.

Note 2 explores the *Jefferson Standard* case, in which worker action disparaging the Company's product was viewed as too disloyal to be protected by the US Supreme Court. The note also discusses *Patterson-Sargent* and *Sierra Publishing*, both applying *Jefferson Standard* but finding the activity involved to be protected. This note allows the professor to talk a little about the allowable tension between labor, especially labor unions, and management under the Act. Despite some strong protection, the Act gives way to management concerns the more extreme the action by the union and the more distant the action is from labor relations/working conditions.

Note 3 discusses the increasingly significant issue of confidentiality, in particular whether release of confidential information by employees is protected.

Note 4 discusses the issue of email and blogging. The issue in *Timekeeping Systems* arose because of the use of email by an employee to air a complaint. Email presents interesting issues related to "concerted activity" and "mutual aid and protection." It would seem that use of email would make it easier for workers and unions to argue both that communications are concerted and for mutual aid and protection since the system is essentially a form of group communication. One key question, answered in the negative in the 2008 *Register Guard* case, Chapter 4, is whether employees or unions have a right of access to an employer's email system.

Hispanics United of Buffalo (pp. 174-180)

Case: Two coworkers, Marianna Cole-Rivera and Lydia Cruz-Moore, exchanged nonworkday text messages. In these messages Cruz-Moore expressed her concern regarding Cole-Rivera and others' performance and her intent to discuss their performance with a superior. After the text message conversation, Cole-Rivera posted on her Facebook page:

> Lydia Cruz, a coworker feels that we don't help our clients enough at [Respondent]. I about had it! My fellow coworkers how do u feel?

Four off-duty employees responded to the post. Cruz-Moore then brought a copy of the posts to her superior (Lourdes Iglesia). Cole-Rivera and the four employees who commented on the Facebook post were all terminated for violation of the company's "zero tolerance" policy prohibiting "bullying and harassment."

The Board agreed with the ALJ that the framework under *Meyers Industries* (1. Activity must be concerted, 2. Employer knew of the concerted nature, 3. Concerted activity was protected, 4. Discipline motivated by the activity) is the correct analysis and that the Respondent violated 8(a)(1) by terminating the five employees. Of the four elements established in *Meyers*, only whether the activity was concerted and whether the concerted activity is protected by the Act was in dispute. The Board had no trouble concluding that the activity by the five employees was concerted. Cole-Rivera alerted employees of another employee's complaint and also solicited views about the criticism. And by responding to the post the four coworkers made common cause with her. These actions fit within the definition of concerted from *Myers*. Using *Relco Locomotives*, the Board dismissed the contention that Cole-Rivera was required to discuss the object of the post with her colleagues or to tell them it was necessary because of Cruz-Moore's impending report to Iglesia. Her "mutual aid" of preparing coworkers for group action was implicit from the circumstances.

Finally, regarding whether the activity was protected, the Board rejected the argument that the Respondent was privileged to discharge the employees because their acts violated the zero tolerance policy. This argument is quickly dismissed by application of *Consolidated Diesel* which holds "legitimate managerial concerns to prevent harassment do not justify policies that discourage the free exercise of Section 7 rights by subjecting employees to …discipline on the basis of the subjective reactions of others to their protected activity." Since the employees were terminated solely on Cruz-Moore's subjective claim that she was offended, the zero tolerance policy is not a legitimate explanation for dismissal.

Member Hayes dissented arguing that the activity was "mere griping" and not for mutual aid and protection, and thus not protected under section 7. Hayes argues that the complaints were venting and never rose to the level of a discussion about what to do regarding the criticism. Hayes then distinguished cases cited by the majority.

NOTES (p. 181)

Note 1 distinguishes griping from inciting concerted action, with the former not being protected activity. It highlights this by pointing to language in *Mushroom Transportation Co.* that declares an individual complaint must appear to be engaged in to initiate, induce, or prepare for group action for it to be deemed protected concerted activity.

Note 2 should be ignored! It refers to the *HOLLING PRESS* case earlier in the textbook and should have been cut. This note points out the tension between the majority and the dissent with respect to at will employment. With the majority citing that some investigation need to have been made into the claim of harassment whereas the dissent notes the employment was at will so employment can be terminated so long as the termination was not unlawful.

Note 3 discusses a Region case, *Public Service.* In *Public Service*, the Region dismissed a ULP charge because the employee's Facebook posting was merely a gripe

about a customer complaint. The Region also found that the fact that the employer found out about the posting from the employee's Facebook friends did not constitute unlawful surveillance under section 7 because it was obvious the employer had gotten a copy of the posting from a Facebook friend, many of whom were employee's coworkers.

C. INTERFERENCE, RESTRAINT AND COERCION OF CONCERTED ACTIVITY

D.R. Horton, Inc. (*pp. 181 – 189*)

Case: Respondent, D.R. Horton, as a term and condition of employment required all new and existing employees to sign an agreement the precludes them from pursuing any class or collective litigation of claims in any forum. The ALJ found that D.R. Horton violated Section 8(a)(4) and (1) because the agreement would lead employees to reasonably believe that they were prohibited from filing unfair labor practice charges with the Board. The Board agreed with the ALJ regarding this portion. However, the ALJ dismissed the allegation that the class-action waiver violated Section 8(a)(1). The Board reversed this decision and found a violation.

The Board's reversal was based on well-established law regarding protected concerted activity. Since the agreement expressly bars employees from bringing collective claims, it is preventing them from exercising substantive rights that have long been held protected by Section 7. Also cited are *National Licorice* and *J.I. Case* standing for the proposition that employment contracts or agreements cannot be used to avoid duties on employers imposed by the NLRA. The Board also cites to the Norris-Laguardia Act, legislation that predates the Act to establish the important policy implications of protected activity, in particular Norris Laguardia's concern with limiting employee rights of access to the courts.

At the end of its decision the Board is careful to limit the scope of the holding. Noting specifically that it only applies to "employee" agreements that would be reasonably read to bar protected concerted activity. So, arbitration agreements involving individual employees are OK because they do not foreclose concerted activity.

NOTES (pp. 189 – 190)

Note 1 discusses the partial reversal by the Fifth Circuit. The Court held that the Board gave inadequate weight to the Federal Arbitration Act and that Section 8(a)(1) does not preclude an employer from requiring its employees to sign an arbitration agreement that precluded class action or collective claims. However, the Court did uphold the Board's decision in regard to D.R. Horton's agreement. They held that the wording was overly vague and could lead an employee to believe that the agreement prohibited bringing an unfair labor practice charge.

Note 2 points out that forcing an employee to sign an agreement waiving the right to file class action is a waiver of section 7 rights. It notes that while the Supreme Court and the NLRB do allow unions to waive Section 7 rights, the threshold standard is high.

Note 3 calls attention to collective grievance arbitration and what impact a contrary holding would have on these as applied to collective bargaining agreements.

DIRECTV U.S. DIRECTV Holdings, LLC (*pp. 190 – 194*)

The Board agreed with the ALJ that DirecTV had personnel rules that were unlawful because employees could reasonable construe them as prohibiting Section 7 activity. First, DirecTV's handbook has a provision that instructs employees "Do not contact the Media." Similarly, the corporate policy states that "Employees should not contact or comment to any media about the company unless pre-authorized by Public Relations." Both of these policies, the Board said, could be reasonably construed by an employee as barring them from contacting the media with a disagreement over wages, hours, and other terms and conditions of employment.

Next, DirecTV's handbook included a provision that instructed employees to contact the security department if law enforcement wants to interview or obtain information from an employee. The Board acknowledges that in certain circumstances an employer has a legitimate interest in knowing about attempts to interview employees. However, since the employee could reasonable construe Board agents as "law enforcement," and providing information to the Board in the course of an investigation is protected under Section 8(a)(4), the provision was unlawful.

Third, DirecTV had a confidentiality rule in its handbook that instructs employees to never discuss details of their job with anyone outside the company. The provision also expressly includes employee records as information that must be kept confidential. This provision, the Board reasoned, could be reasonably construed to restrict discussion of wages and other terms and conditions of employment. Additionally, since the language does not exempt protected communications with third parties such as union representatives or Board agents, employees could reasonable interpret the rule as prohibiting such communication.

Finally, DirecTV's intranet policy on company information prohibits employees from sharing company information that is not already disclosed as public record. Read in conjunction with the handbook, company information includes employee records. Thus, a reasonable reading of the policy would prohibit employees from disclosing information concerning wages, discipline and performance ratings and is therefore a violation.

NOTES (pp. 194 – 197)

Note 1 discusses the General Counsel's Office Advice Memorandum regarding social media. Walmart's policy, which is the only one discussed by the GC that was deemed lawful in its entirety, is reproduced in the note.

Note 2 examines Costco's policy regarding information that would damage the company. The Board found this policy to be a violation. Couching the prohibitions in terms of legality would certainly be better, but may still chill employees because of vagueness. Setting out the legal standards for defamation or tortious injury may also be unwieldy.

Note 3 examines a policy on courtesy that was deemed unlawful because of the chilling effect on Section 7 activity it may have. A possible better approach would be expressly to indicate what Section 7 allows, for example, discussions regarding wages, terms and conditions of employment. Of course, many employers may not want to advise their employees of these rights.

D. STRIKES

As explained in the text, this chapter is divided along the lines which labor law divides labor activity: (1) protected by § 7; (2) unprotected by § 7 but not prohibited; and (3) prohibited by § 8(b). This book divides the discussion of strikes between Chapter 2 (because they are concerted activity for mutual aid and protection) and Chapter 6 (which covers economic weapons). Here the chapter covers the basics: (1) Why does the law protect strikes? (2) What are the major limitations on the right to strike and what justifies those exceptions? The bulk of the treatment of strikes in Chapter 6 focuses on the prohibited category because the scope of § 7 protection and the unprotected categories are covered in here in Chapter 2. Remind students about the coverage of § 7 by posting its text on a board in the front of the classroom. Also read the text of § 13.

D.1 WHY PROTECT STRIKES?

This section begins with five brief vignettes of a variety of notable strikes of the last decade. One purpose of this is to introduce students to the sociology and psychology of strikes, which to many students are entirely unfamiliar. Another is to illuminate the different reasons that workers resort to direct action and the different form that such actions take. Instructors could supplement the text or substitute more in-depth accounts or local strikes. As note 3 on p. 199 notes, some of the strikes were unlawful (the teachers' strikes of 2018), some were clearly protected by the NLRA (the Hollywood writers' strike of 2007-2008) and the legality of others is debatable. In this latter category are the fast food workers' strikes in 2012 and 2013, which were generally deemed protected by the NLRB's general counsel, but critics charged they were prohibited under the "intermittent" strike doctrine, and the Day Without an Immigrant protests in 2006 (which the NLRB General Counsel concluded were not strikes protected by section 7). Teachers may wish to use all of these together in discussion for comparison and contrast or just discuss one and treat the others as background.

Section D.1 describes strikes and asks students to think about why they occur, why they sometimes succeed and sometimes fail, and why § 7 protects them to the extent it does. This material can be used as background reading that can be brought up in discussion as you work your way through Section D.2's many cases on the exceptions to § 7 protection. The core questions on which students should focus in reading the material are: (1) What prompts workers to strike? (2) Should strikes occupy a core place in the federal labor law's treatment of bargaining leverage? (3) What weight should be given

the employee's right to strike when it causes inconvenience, expense, or affront to employers and consumers? (4) Who should strike the balance between them?

D.2 EXCEPTIONS TO SECTION 7 PROTECTIONS FOR STRIKE ACTIVITY

Section D.2 focuses on the exceptions to § 7 protection. After discussing why workers strike and why the law protects some strikes, you could list the many forms of unprotected strike activity (students always appreciate lists) and then dig into each exception. You might wish to discuss some in greater depth than others to conserve time. Students find this area of law confusing, and students sympathetic to labor find both the results of the cases and the reasoning repellant. To deal with the confusion about the law, after covering these sections, if you don't provide a list of unprotected strike activity, you might ask students to generate a list of the rules finding concerted activity to be unprotected. This enables students to focus on the reasoning and also on the application of the settled rules to new kinds of labor protest. The crucial questions for students to focus on in all these cases are the following: (1) Why should the law protect various forms of employee protest? (2) Why should the law leave them unprotected? (3) What practical concerns confront unions in deciding whether to encourage employees to resort to or refrain from using various tactics, even if they are unprotected? (4) What practical concerns confront employers in deciding how to respond to employee use of unprotected tactics? (Consider PR, the local government's reaction or the local police's willingness to cooperate in enforcing the employer's property rights.)

a. Sit-Down Strikes and Slow-Downs

It helps to begin explaining the historical significance and power of sit-down strikes, so that the impact of *Fansteel* (1939) outlawing them can be appreciated. Teachers might note that sit-down strikes still occur, and that sometimes the local police are unwilling to intervene to stop them, as in the December 2008 refusal of laid-off workers to vacate the premises of the Republic Windows manufacturing plant in Chicago, Illinois. You might ask students why employees would resort to tactics other than a full strike. In the Republic Windows sit-in, the workers were protesting Republic's failure to give them the 60 days' notice required by the WARN Act. The stand-off ended when Republic paid the workers 60 days' severance pay. The workers received their compensation much faster than they would have if they had resorted to a law suit under the WARN Act.

Fansteel and *Elk Lumber* offer an opportunity to discuss how labor law does and should balance the employer's ownership of the property on which the employees work against the employees' § 7 rights. The accommodation of employer property rights and employee § 7 rights has grown in significance as recent cases (such as *Lechmere* and *Register Guard*, discussed in Chapter 4) recognize employer property rights as a significant limitation on employee § 7 rights. For example, if the employer chooses to shutter the plant temporarily and the laid off employees refuse to leave the premises, is that conduct protected under § 7 because the circumstances are factually distinguishable from the facts of *Fansteel*?

The reasoning in both *Fansteel* and *Elk Lumber* is very revealing. You can ask students to evaluate the reasoning on its own terms. You can ask them to consider how the reasoning can be applied to other cases (such as the temporary plant closure case, the question of deciding what exactly constitutes a slow down, or the question of whether participating in a Day Without Immigrants protest is protected).

b. Intermittent Strikes

This section is expanded as compared to the first edition of this book because of the resurgence of intermittent strike activity in the fast food workers, the warehouse workers, and the Walmart campaigns. Some of labor law from the 1950s-1980s envisions the strike as a long, protracted war of attrition which ends only when either the employer accedes to the union's demands or the workers abandon their strike in defeat after the employer hires permanent replacements or continues production with scabs and management employees. As unions increasingly found they could not win long strikes, they switched to short strikes with more of an expressive and organizing goal rather than as a tactic that would secure recognition or a contract. The law has not quite kept up with the new reality. You might ask students to discuss the purpose of short strikes and how the law should regard them. If you teach this section when you teach Chapter 6, you might note that short strikes have the huge advantage of making it harder for employers to permanently replace strikers.

c. Relation to Working Conditions

As labor groups, including unions, have joined efforts with immigrant and community groups in using strikes and direct action to publicize and protest bad working conditions, the question has arisen as to whether their strikes are unprotected by section 7 because the goals are too attenuated from workers' concerns as workers. As this section of the text notes, the General Counsel during the George W. Bush administration concluded that workers who participated in the Day Without an Immigrant protests of 2006 were unprotected because the protests were more political than work-related.

If you don't want to spend the time discussing this at this point, you could use this as an example of the "too attenuated" exception to section 7 protection when you discuss *Eastex* and the note cases on p. 146.

d. What Is a Strike?

This segment looks at the consequences of narrowing section 7 protection for some strike activity – it creates incentives for workers to engage in protest without striking. To some extent, this material parallels the discussion of slow downs and intermittent strikes, but to some extent it raises a different issue: should doing one's job in a way that is technically within the job description (such as the work to rule tactics of the airline mechanics) but that disrupts normal operations be deemed protected?

e. "Indefensible" Conduct

The *International Protective Services* case illustrates a vague and potentially huge exception to § 7 protection: strikes are unprotected when they are timed to inflict maximum harm on the employer without sufficient justification. This is fertile area for discussion of the assumptions underlying the Board's reasoning and the difficulty of defining when a strike is just too harmful. Although we do not cover lockouts until Chapter 6, you might ask students to think about the timing of strikes and lockouts together, and many students will be aware of lockouts because of their frequent use in professional sports. (Where the lockouts always occur during the off-season.) If the timing of a strike can make it unprotected, can the timing of a lockout make it an unfair labor practice? (This is the issue in Note 5 on p. 212.)

Note 3 asks students to consider whether the timing of a strike should make it unprotected, given that both sides have incentives to gain maximum leverage by timing strikes and lockouts to inflict maximum pressure on the other side and to incur minimum costs.

Note 1 on p. 211 illuminates the relationship between the rule in the case and the government's decision to contract out work (which means the employees are not government employees and therefore not covered by the federal government's flat prohibition on government employee strikes).

f. Disloyalty

The disloyalty exception to § 7 enunciated in *Jefferson Standard Broadcasting* is a potentially significant practical limitation on what employees can do during or in lieu of striking. In addition, as a conceptual matter, the reasoning behind the disloyalty exception resembles the reasoning behind the other limits on § 7 protection. The key doctrinal rule for students to see is that the Court found the leaflets objectionable because they disparaged the quality of the station's programming without making it clear that there was a labor dispute. However, in some later cases the Board or the courts of appeals have held that even when the connection between the statements and the labor dispute was made clear, some statements were just too disloyal or damaging to be protected.

The contours of that exception are, obviously, subject to debate and tend to depend on whether the Board majority or the reviewing court believes a broader or narrower scope for section 7 is the better labor policy. For that reason, these hypotheticals offer good opportunities for class discussion about the goals of section 7 protection for labor-related speech.

a. *Endicott:* The Board held that the statement was protected because it was explicitly tied to a labor dispute, unlike in *Jefferson Standard.* The D.C. Circuit disagreed, and held that even though the statements were tied to the labor dispute, they were particularly damaging and therefore unprotected.
b. This is an invented hypothetical. Boycotts of non-union business are an old strategy, and were also a core strategy of the civil rights movement. (From the

1920s at least, the NAACP and other civil rights groups encouraged black consumers to boycott businesses that refused to hire black workers.) Nevertheless, students are often familiar with company policies that require workers to promote their employer's products (e.g., PepsiCo famously prohibits its employees from consuming Coca Cola products on company premises).

c. This is based on *Miklin Enterprises, Inc. v. NLRB*, 861 F.3d 812 (8th Cir. 2017) (en banc), which concerned a well-known recent campaign against Jimmy John's. The Board held the protest was protected because it made clear that the employees were organizing around the lack of sick leave. The lack of sick leave meant that employees who could not afford to take unpaid time off (or whose request to take unpaid time off was denied) would come to work sick. A panel of the Eighth Circuit enforced the Board's order, but the court took the case en banc and held that the statements were unprotected.

g. Picket Line Misconduct

Picket line misconduct is largely dealt with under state law. For the reasons suggested in the notes, the contours of state law, and the availability of injunctions and criminal penalties to deal with it, is of considerable practical concern to lawyers.

CHAPTER 3
BOUNDARIES OF COLLECTIVE REPRESENTATION

A. INTRODUCTION

So many of the most challenging and frequently litigated questions under the National Labor Relations Act continue to be the most basic questions: who counts as an "employee," and therefore, is entitled to assert rights created by the Act? Who (or what) counts as an "employer," and therefore, must honor those rights? In other words, who is ***eligible*** to play the NLRA game, if she so chooses, and who is ***required*** to play, even if he doesn't want to? And is the persistence of such questions more than 80 years after the statute's enactment a sign of its continuing vitality, or its inherent weakness?

Chapter 3 invites students to explore these questions in all their complexity, from both close-up and big-picture perspectives. To this end, Section B explores four broad categories of worker whose fortunes in modern labor disputes turn on her status rather than the merits of her claim: (1) contingent workers, including independent contractors and leased or subcontractors' employees; (2) union organizers, including "salts"; (3) apprentices, including graduate student teachers, trainees, and medical house staff; and (4) transborder workers, including the growing ranks of undocumented and foreign and multi-country workers. (Technically, supervisors are also employees, but employees who are denied the protections of the Act due to their alignment with employers, so we have elected to treat them as "employers" in Section C.) Similarly, Section C explores six broad categories of entities or persons whose unique alignment with the interests of owners or managers may define him, or it, as the employer: (1) supervisors; (2) managerial and confidential employees; (3) public sector employers, who are excluded from the NLRA; (4) multiple entities that actually constitute a single employer; (5) joint employers; and (6) transborder employers. These categories were chosen because they introduce the entry-level actors that the law student is most likely to see on television, read about online or in the press, or meet in a law office. Though unusual for a labor law textbook, this structure is offered as a means of engaging students early in the course with topical, cutting-edge issues.

The entire chapter can be taught in about nine hours, or about one hour for each of the nine types of employee or employer described above. You can cut that time in half by picking four to five of these from Sections B and Section C. For example, an instructor who wishes to capture a nice mix of important traditional and cutting-edge topics could decide to teach contingent workers, apprentices, and transborder workers (including undocumented workers) from Section B and supervisors from Section C – a menu that could be served up in about four hours.

The chapter begins with a contingent worker problem: the story of Marcus Courtney and other "perma-temps" at Microsoft. As one of the world's largest companies, Microsoft is known to everybody, especially the tech-savvy law student. Yet

the company's workplace story is hardly unique; like thousands of other employers, Microsoft has attempted to lower its labor costs by loosening the legally enforceable bonds between the people who do the work and the people for whom they do that work. The story of these perma-temps, who refer to their second-class status as an "orange ghetto," can be referred to throughout the chapter.

NOTES (PP. 220-221)

1. As noted, after Microsoft was pursued by the Internal Revenue Service, Donna Vizcaino and seven other plaintiffs brought suit demanding to be reclassified as common law employees so they could become eligible for the types of benefits discussed in the "perma-temp" problem. The plaintiffs won. *See Vizcaino v. Microsoft Corp*., 97 F.3d 1187 (9th Cir. 1996), *aff'd*, 120 F.3d 1006 (9th Cir. 1997) (en banc). Despite this defeat, Microsoft and countless other companies continue to pursue the same strategy, or variations of it. The note asks: Why?

One answer, suggested by the question in the notes, is that the economic benefits of violating the law outweigh the legal costs of complying with it. This question gives the student a chance to role-play: if she was legal counsel to a similarly-situated employer, and she believed the benefits of breaking the law outweighed the costs of getting caught, would she advise her client to break the law? At one level, of course, the question invites discussion of the tension between the lawyer's duty to be a zealous advocate and her duty to ensure the law is obeyed. At another level, it also opens the door to discussing career choices: would students prefer to advocate for individual employees, unions, or employers? To this end, you could lead a discussion as to whether the lawyer should be in the business of picking her client, or vice versa.

2. *To find success, look for the union label?* The question whether it is possible to provide effective representation for workers without their forming a traditional union is a question that was not addressed much until the mid-1990s. Until then, most workers' advocates – especially labor leaders – probably would have said no. The article offered for consideration, Danielle D. van Jaarsveld, Overcoming Obstacles to Worker Representation: Insights for the Temporary Agency Workforce, 50 N.Y.L. Sch. L. Rev. 335 (2005-06), specifically addresses WashTech's efforts at Microsoft. Professor van Jaarsveld's thesis is that, despite the many obstacles they face, such groups are not only necessary to protect contingent workers, but also increasingly important to the "next-wave" labor movement, absent reform of the system governed by the NLRA. At any rate, with the rise of workers' centers, associations, and other new forms of labor organizations, they are becoming more common. A fuller discussion of such groups can be found in Chapter 6.

B. WHO IS AN "EMPLOYEE"?

This section begins with the language of Section 2(3) of the NLRA. At the outset, at least two possible themes may be raised.

The first theme is exclusion: millions of workers – from the "perma-temps" at Microsoft to the people who harvest our food, to the ride-share drivers who ferry us about town, to the people who care for our young and our old – are explicitly or arguably excluded from coverage by the Act. One criticism might be that it is unfair to leave so many of workers with minimal bargaining power unprotected by federal law. Another criticism might be the disparate impact such exclusion has on women and workers of color, who account for a large share of the excluded workers. A rejoinder might be that the door is left open for such protections to be enacted under state law. Another rejoinder might be that government regulation is inferior to market forces in addressing the effects of these developments. A discussion could ensue about the social, cultural, or economic forces that might have caused this outcome. A helpful starting place is the cited research of Professor David Weil, former Wage and Hour Administrator for the U.S. Department of Labor, who describes the modern workplace as "fissured" because it is full of rock-like cracks that can deepen, spread, and split apart. *See* David Weil, The Fissured Workplace: Why Work Became So Bad for So Many and What Can Be Done to Improve It (2014).

The second theme is that traditional tenets of statutory construction – the plain meaning rule comes especially to mind – are not always front and center when it comes to interpreting the NLRA. Students may be asked to consider whether the Board and the courts have been faithful to the plain meaning of Section 2(3) – and if not, whether it should matter after so many years of settled precedents.

1. CONTINGENT WORKERS

A. Independent Contractors

Roadway Package System Inc. (pp. 231-236)

The holding of this case is that small package delivery drivers were subject to such control by the company that they had to be considered "employees" rather than "independent contractors." It presents the instructor with an opportunity to explore the dense thicket of independent contractor jurisprudence in a readily understandable context; almost everyone has shipped or received packages from Fed Ex or other overnight services. Students may be asked whether anyone they know – a parent, sibling, friend, or perhaps the student herself – has ever worked for such a service, and if so, whether the case captures the dynamics of the workplace there.

NOTES (PP. 236-240)

1. The note describes *Roadway Package System* as the third chapter in a long-running saga, whose next chapter, now starring shipping giant FedEx as corporate successor to Roadway's ground package delivery service, is still being written. Since FedEx succeeded Roadway, the company has defended dozens of lawsuits challenging its business model, which continues to classify drivers as independent contractors even though it has lost more of these challenges than it has won.

The long-running nature of the FedEx litigation, plus the dozens of ancillary cases it has spawned, is summarized in the note. The reason why FedEx persists in defending independent contractor arrangements – that it is lucrative to do so – is given in the text. So students might be asked to give an opinion as to whether the proliferation and length of this litigation is good or bad for, or indifferent to, our system of civil justice. Hence the question posed by the note: if employers refuse to accept the official outcomes of court or administrative agency decisions, what is the point of regularly processes in the first place? Can anything be done to fix it?

2. *Room to maneuver?* The note asks whether the essence of what it means to be an independent contractor – that is, to be one's own boss – can be distilled into the notion that she determines her income by her "own efforts and ingenuity," a phrase lifted from *Roadway Package System*. The "yes" argument is that this phrase captures the entrepreneurial, risk-taking, go-it-alone spirit often associated with the term independent contractor. A hallmark of the American ethos is that anybody, by dint of hard work, has the opportunity to pull herself up by her own bootstraps and go into business for herself. The "no" argument is that no single phrase can capture the nuances of the statutory definition, which is why the multi-factor common law test is used. A discussion about whether the former is too simple, or the later is too complex, could be fruitful. Such discussion could also be related back to the perma-temps at Microsoft, and to a comparison of the "right-to-control," "economic realities," and "ABC" tests summarized in the text (pp. 228-231).

3. *Tell us what you want – what you really, really want*. They key question raised by the note is what weight, if any, should be given to drivers' stated preferences in determining their legal status. The answer may depend on who is being asked, and in what context. As discussed in Chapter 4, it takes a simple majority support of the affected employees to choose union representation for the whole lot. If we could ask the employees in a non-coercive environment, then we might get one answer, and by law it should be respected. During a union organizing drive, however, at least two other parties, each purporting to speak in favor of employee free choice, try to stand in for individual employees as their proxies. On the one hand, union organizers may argue that workers might not understand the implications of the question, or might not give an honest answer in the presence of management even if they do understand. On the other hand, company managers may argue that workers should be suspicious of the empty promises that outsiders, like unions, are peddling, and urge them to butt out. Both sides are often accused of putting undue pressure on employees to state their preferences.

4. *Be careful what you wish for*. The note describes the exploitative conditions under which cargo and container drivers labor at major ports of entry and raises the interesting question whether intentional misclassification of workers can itself constitute an unfair labor practice. Although the General Counsel under President Obama thought so, the NLRB has yet to weigh in. You can ask students for their opinions.

5. *Baby, you can drive your car*. The notes provide an opportunity for discussion of a subject on which students may consider themselves experts: whether drivers for Lyft,

Uber, and other ride-hailing services should be considered employees of the "app" companies. Worried about interfering with the ready availability of such services for themselves, many if not most students will argue "no." Press them as to why – and see if you can get somebody to argue "yes."

6. *The Canadian experience*. The note suggests that, under the Saskatchewan Trade Union Act, 1978 Rev. Sask. Stat. § 2(f)(iii), the notion of recognizing a "dependent" contractor – even though the term does not actually appear in that statute – makes some sense. It raises the possibility that the NLRA regime we are familiar with does not take into account the full spectrum of worker-management relations, including the variations in relative bargaining power that exist from industry to industry, workplace to workplace, and person to person. The question asks students to think "outside the box" about more nuanced ways to conceive of workers' status. The U.S. system is binary: a worker is either an employee or an independent contractor (i.e., the employer). The former has NLRA rights; the latter does not. Perhaps there are other ways to set up a system that recognizes the nuances, and gives some economically vulnerable workers, who happened to be labeled as independent contractors, the same protections as employees. The Microsoft perma-temp facts can be used to discuss how such a system might to set up.

Home Health Care Workers Get Organized (pp. 240-243)

The excerpt of Stu Schneider's article says two things: first, there are legal obstacles to union organizing faced by home health care workers (they're independent contractors, and if they bargained collectively, they could be subject to substantial antitrust liability); second, California, Oregon, and Washington attempted to legislate around those obstacles using the "public authority" model. Under this model, a public authority, created by legislation, assumes the role of employer of record. This is a prerequisite to doing two things: transforming into employees health care workers who otherwise would be considered independent contractors, and their being able to choose a collective bargaining representative.

NOTES (PP. 243-246)

1. *Further extensions*. The public authority model adopted by Illinois, see 20 Smith-Hard Ill. Comp. Stat. Ann. § 2405/3, is cited here to show that California, Oregon, and Washington are not the only states to embrace this model. The main practical reason why public authority employers are created in this manner is union pressure: powerful labor organizations operating in the public sector, including the Service Employees International Union (SEIU), have successfully elected sympathetic candidates to state office, then persuaded them to enact legislation making it possible to organize large numbers of low-wage laborers toiling in workplaces scattered across a city, county, or state jurisdiction. The efforts of SEIU and others are aided by the historic reluctance of public sector employers to oppose union organizing drives. The neoclassical economic argument – that the government is in a better position than the individual worker to spread the cost of employment risks, such as health benefits and unemployment insurance

– may be cited during campaigns to win such legislation, but typically is not the motive for undertaking the effort in the first place.

In 2014, the U.S. Supreme Court decided an important case that could call into question the financial viability of the public authority model embraced by the stated mentioned above. By a vote of 5 to 4, the Court ruled that personal care assistants who are paid by the State of Illinois, but who are mostly supervised by the homecare recipients they serve, are not "full-fledged" public employees who could be compelled to pay their "fair share" of union dues. The ruling will probably make it more difficult for home health care workers' unions to finance their operations, including the organizing and representation of such workers. *See Harris v. Quinn*, 134 S. Ct. (2014). The case, which is cited here (p. 244) and explored in more detail in Chapter 8 (p. 1064), could be used to discuss whether the public authority model is the proper vehicle for bringing collective bargaining to home health care workers, or to whether such workers should be entitled to engage in collective bargaining in the first place.

2. *America's next top model?* The note asks whether the "public authority" model could be extended to workers characterized as independent contractors in the private sector, such as the perma-temps at Microsoft. The answer is probably no. For now, the model appears to be limited to workers whose wages are funded by public money, because at the end of the day, the public authority model is really a species of public sector labor relations. Public authority legislation may transform independent contractors into employees, but it does not transform the source of their paychecks, which remains some agency of state government. Hence the employees created by legislation are ***public*** employees. As noted in Section C of the chapter, employees of state government are excluded from coverage by the NLRA.

3. *The home care industry: all in the family.* The figures reported by Schneider raise at least two topics for discussion. The first topic is how the public authority model grants access to so many women and people of color who otherwise would be denied access to collective bargaining due to their exclusion by Section 2(3). The other topic is whether it should matter that so many of these workers are relatives of the "clients" for whom they are caring. For example, in California, almost 40% of home health care workers are relatives paid to care for parents, spouses, and other family members. On the one hand, it does not seem to matter; after all, the wages and benefits of these workers are established outside the home, by collective bargaining negotiations between the workers' union and the designated public authority. On the other hand, it probably matters a lot to the people receiving assistance; the folks in the best position to know the impact of the level of wages and benefits on clients' health are the clients themselves.

4. *Don't know much about history?* The purpose of the note, including the citation to *United Insurance* (p. 246), is to relate the transformation by amendment of the NLRA from a statute that did not appear to exclude independent contractors to a statute that does exclude them.

Students also are asked to compare *Roadway Package System*, in which the drivers were held to be employees, with *Dial-A-Mattress Operating Corp.*, 326 N.L.R.B.

884 (1998), in which owner-operator drivers were held to be independent contractors. It is hard to draw the line between employees and independent drivers, especially in these owner-driver cases. This is as good a place as any to introduce the fact that the NLRB's decisions in such areas tend to swing back and forth, depending on whether the current Board majority is sympathetic to organized labor, or not. It is also a good place to ask whether the term "employee" under the NLRA should have a different meaning than it does under other workplace statutes and regulation.

5. *Regulation vs. the market*. The note opens the door to discussion of whether a statute crafted for the workplace of the 1930s is up to the task of regulating labor relations in the modern workplace, and if not, whether legislation or adjudication is the proper vehicle for adapting it to current economic realities. (This is but one of many places in the third edition where such discussion may be had.) Whereas Professor Hylton suggests that the existence of contingent work is proof that the new arrangements work and should be left alone, *see* Maria O'Brien Hylton, The Case Against Regulating the Market for Contingent Employment, 52 Wash. & Lee L. Rev. 849 (1995), Professor Dau-Schmitt suggests that the solution could be as simple as expanding the definition of who counts as an "employee" under existing regulations, including Section 2(3) of the NLRA, *see* Kenneth G. Dau-Schmidt, The Labor Market Transformed: Adapting Labor and Employment Law to the Rise of the Contingent Workforce, 52 Wash. & Lee L. Rev. 879 (1995). Students could be asked which approach is preferable, and why.

B. Leased Employees and Subcontractors' Employees

This subsection takes up the contingent workforce problem of determining when and how NLRA coverage attaches to leased employees and subcontractors' employees. It suggests that the problem arises from an ordinary economic incentive shared by many if not most employers: to reallocate to workers the cost of risks associated with work. Employers reallocate such risks in at least two ways: by separating "core" from "non-core" functions, as outlined by Dr. Richard Belous (p. 226), or by subcontracting out parts of the job to third parties, including non-union subsidiaries. The former arrangement is called employee "leasing"; the latter, "subcontracting," or if tasks are sent overseas, "off-shoring."

I. Leased Employees

Miller & Anderson (pp. 247-256)

This case holds that the consent of neither the user employer nor the supplier employer is required if employees of a combined unit of both solely-employed and jointly-employed workers wish to choose a bargaining representative and seek to engage in collective bargaining with both employers, so long as the traditional community of interest exists in the combined unit. In reasoning that the employer is not entitled effectively to veto the employees' selection of a representative in typical employee

leasing arrangement, the *Miller & Anderson* majority rejected the 12-year-old rule of *Oakwood Care Center* and reembraced the 16-year-old, discarded rule of *Sturgis.*

The key question in employee leasing arrangements is whether it is permissible to establish a single, integrated bargaining unit including workers of both types of employers. For many years, the answer was no. *See Greenhoot Inc*., 205 N.L.R.B. 250 (1973); accord *Lee Hospital*, 300 N.L.R.B. 947 (1990). Then, in 2000, the Board took note of the employee leasing trend, and changed its answer to yes. *See M.B. Sturgis*, 331 N.L.R.B. 1298 (2000). In 2004, the Board reversed course in *Oakwood Care Center*, 343 N.L.R.B. 659 (2004). Despite *Miller & Anderson*, it may reverse course yet again under the Trump majority.

NOTES (PP. 256-258)

1. *Some perspective*. The note suggests that *Miller & Anderson* and its predecessors, which deal with who is an "employee" in leasing arrangements, are best understood as the counterpoint to *BFI II* and its progeny, which deal with who is an "employer" in such arrangements. The note also suggests that the answers to both questions are fluid; in addition to the shifts noted, the Trump Board has signaled its intention to overrule *BFI II* if not *Miller & Anderson*. Student are asked to state which side is getting the answers to these questions right, and why.

As the third edition went to press, the Trump Board was pursuing two lines of attack on *BFI II*: attempting (unsuccessfully, as it turned out) to overturn it in *Hy-Brand* (p. 358), and undertaking rulemaking to codify *Hy-Brand*-type principles into the joint employer doctrine. After the third edition was published, an intervening decision of the U.S. Court of Appeals for the District of Columbia Circuit complicated these efforts by enforcing the Board's order in *BFI II*. *See Browning-Ferris Industries of Calif., Inc. v. NLRB*, ___ F.3d ___ (D.C. Cir. Dec. 28, 2018).

2. *Swing time*. The note asks whether there is any way to avoid the pendulum swings described in this area of the Act (or for that matter, any other area) – and if so, whether that would be desirable. You might press students on the need for stability in answering basic questions about the limits of the Act's coverage. A suggestion that one of the co-authors is familiar with: having the Board adopt a rule (either formally or informally) that would require reversal of established precedent to be made only by a full complement of five Members, as opposed to the three- or four-Members Boards that sometimes issue these decisions. What do your students think of that?

3. *Speaking of Congressional (in)action*. Taking a cue from the prior note, this note asks whether it is appropriate for Members of Congress to target for reversal Board rulings with which they disagree. The question opens the door to a discussion of how and when our elected representatives can and should bring about policy changes: through the legislative process, which has stagnated for years; through the litigation process, of which the note is an example; or both.

4. *Going global*. The note asks whether and to what extent forces outside the sphere of the NLRA – such as the economic pressures of globalization, if not international law – should affect the interpretation of a statute that makes no reference to either concept. Dissenting in Oakwood Care Center, Member Liebman, a longtime, influential Board Member, thought these forces should be taken into account. What do your students think?

5. *Going, going, gone?* The note asks whether joint employers can avoid an election petition by invoking the election-will-serve-no-purpose exception (e.g., in cases of imminent cessation of operations, sale of operations, or other fundamental change in nature of business). The cited case, Retro Environmental/Green Jobworks, rejected the application of this exception when the project giving rise to the joint employment arrangement ended. Do your students agree?

II. Subcontractors' Employees

In agriculture, food service, garment manufacturing, non-durable goods manufacturing, tourism, and many other industries, all or part of jobs traditionally performed in-house are increasingly being outsourced, sometimes overseas. Rather than gather lots of different cases and excerpts, we present the hypothetical problem of Acme Clothing (pp. 258-260). Acme is a garment manufacturer operated by Mr. Sweat, who has a contract with Ecstasy, a designer label, to sew blouses for Needless Markups, an upscale retailer. The hypo is built around the claim by a seamstress, Sarah Kim, that Acme pays less than the minimum wage, and violates other fair labor standards. Ms. Kim's claim is typical of such claims in this sometimes-difficult industry.

NOTES (P. 260)

1. *Getting organized*. The note question about Sarah Kim assumes that, if Mr. Sweat fired her for trying to organize a union, she would be the victim of the unfair labor practice of discriminatory discharge under Section 8(a)(3), as discussed in Chapter 4. The question posed, however, asks students to think about the threshold question posed by this chapter: whether, and for whom, Ms. Kim is an employee. There are legal as well as practical dimensions to the underlying problem that gave rise to Ms. Kim's union organizing efforts, which has to do with the systematic non-payment or underpayment of low-paid workers, which is also known as "wage theft."

As to Acme and Mr. Sweat, Ms. Kim may face the defense that she is an independent contractor. Students should be invited to apply the multi-factor common law, economic realities, and ABC tests to say whether this defense can work. The student also should be asked whether Mr. Sweat can be held personally liable, especially if Acme is merely a sole proprietorship. Finally, students should be asked whether this is a waste of time – after all, Mr. Sweat is likely to shut down Acme, move his equipment a few blocks away, and reopen as Zenith.

As to Ecstasy, Ms. Kim may face the defense that her employment relationship with Acme does not put her in privity with Ecstasy. If so, then of course she could not be considered an employee of that firm. Here again students should be asked about options that could be pursued. For example, if Mr. Sweat is part-owner of Ecstasy, perhaps Ecstasy and Acme can be held jointly and severally liable. And students should be asked what practical obstacles, such as Ecstasy's lack of cash or attachable assets, could stand in the way of success on such a theory.

Finally, as to Needless Markups, Ms. Kim may again face the no-privity defense. The same questions about options should be asked. An imaginative student might come up with the argument that, despite her lack of privity, a settlement might be extracted by pursuing this upscale retailer in the court of public opinion, if not a court of law. The example of Kathy Lee Gifford, the former television personality who lent her name to a line of clothing, comes to mind. After it became know in the mid-1990s that her clothing line was being manufactured under substandard conditions in Honduras and even New York City, Gifford announced an inspection program and efforts to bring wages up to minimum standards. For related background on the apparel industry in general, and Ms. Gifford's problem in particular, see Holly R. Winefsky & Julie A. Tenney, *Preserving the Garment Industry Proviso: Protecting Acceptable Working Conditions within the Apparel and Accessories Industries*, 31 Hofstra L. Rev. 587, 622 (2002).

2. *The corporate food chain*. The questions accompanying this note suggest that, for all our laws guaranteeing the rights to form and join a union, or to earn a minimum wage, sometimes those laws can be violated without effective remedies being available. Discussion may be had as to whether this is inevitable, or whether our society can and should do more to enforce the rights of people who have been the victims of "wage theft" in the workplace.

2. UNION ORGANIZERS

Squib of *Lechmere Inc. v. NLRB* (pp. 261-262)

This squib of *Lechmere* is offered for the narrow holding that professional organizers may be excluded from the protections of the Act if they are not employees of the employer being organized. A distinction is drawn between employees, who may have access, and non-employees, who may be turned away or even arrested as trespassers. In Chapter 4 (p. 461), *Lechmere* is explored more fully for the broader holding that access by unions to the employer's private property is presumed to be limited, unless certain exceptions apply.

NOTES (PP. 262-263)

1. The questions in the note are meant to cast doubts on the reasoning offered by the *Lechmere* majority. First, the plain text of the statute appears to say the opposite of what Justice Thomas says it does. Section 2(3) provides that the term employee "shall

include ***any*** employee, and shall not be limited to the employees of a particular employer" (emphasis added). Second, and rather oddly, *Lechmere* treats the Supreme Court's prior decision in *NLRB v. Babcock & Wilcox Co*., 351 U.S. 105 (1956), rather than the words of the statute, as the text to be interpreted. Professor Dannin has eloquently articulated these doubts. *See* Ellen Dannin, Taking Back the Workers' Law: How to Fight the Assault on Labor Rights 13 (2006).

In the Court's defense, it might be pointed out that one of the Wagner Act's principal draftsmen had proposed an amendment that would have make it clear that "union organizers" are covered by Section 2(3). *See* Memorandum by Philip Levy to Calvert Magruder, Apr. 17, 1935; see also *Marshall Field & Co. v. NLRB*, 200 F.2d 375 (7th Cir. 1952). The argument suggested by this event is that Congress rejected the interpretation favored by Professor Dannin. The counter-argument is that the failure to adopt a clarifying amendment is not necessarily conclusive evidence that the amendment was rejected, especially if the enacted language was thought by its supporters to be clear enough in its original form.

2. *The NLRA, the common law, and property rights*. Agreeing with Professor Dannin, Professor Cameron argues that modifying common law notions of limited access to private property in the workplace is one of the reasons why the NLRA was enacted in the first place. *See* Christopher David Ruiz Cameron, All Over But the Shouting? Some Thoughts About Amending the Wagner Act by Adjudication Rather Than Retirement, 26 Berkeley J. of Empl. & Lab. L. 275, 278 (2005). The question posed by the note, however, is whether any of this matters. There is something to be said for continuing to adhere to long-settled doctrine respecting the employee versus nonemployee distinction, even if, strictly speaking, such doctrine runs afoul of Congress' original intent. Students can be invited to take sides in this debate.

NLRB v. Town & Country Electric, Inc. (pp. 264-268)

This case holds that a "salt" is an employee under Section 2(3), and therefore, is entitled to protection from anti-union discrimination if she is refused employment by virtue of her professional organizing activities. "Salting" is the now-common organizing tactic of sending one or more paid organizers to apply for work at a company targeted for organizing. The idea is that such a person will talk up the benefits of unionization among other workers in order to "salt," or prepare, the workplace for a full-fledged organizing campaign.

NOTES (PP. 268-269)

1. *Solidarity forever?* This note contrasts the popular image of the professional organizer as a hard-charging outsider – perhaps an overeducated, underpaid, left-leaning rabble-rouser who passes out leaflets at the factory gate, as illustrated by the film *Norma Rae* – with the image of the rank-and-file worker who is paid to hire on to do the same work as the folks that she is trying to organize, as illustrated by *Town & Country*.

2. *Duty of loyalty and conflict of interest*. Citing the Restatement (Second) of Agency § 226, Comment a, the employer in *Town & Country* argued that recognizing "salts" as "employees" would compromise management's traditional prerogative to insist on the loyalty of its workforce. The note asks whether the Court dismissed this argument too hastily. The potential argument to be explored: at common law, having a duty to avoid taking positions adverse to those of the boss was one of the essential attributes of being an "employee." The potential counter-argument is that there are often inherent conflicts between owners or their managers on the one hand, and workers on the other – which is precisely why national labor policy favors allowing workers to choose collective representation. Besides, much of the NLRA is designed to overthrow common law notions about masters' exercising total control over their servants. *See, e.g.*, Wagner Act § 1, 29 U.S.C. § 151 ("The inequality of bargaining power between employees who do not possess full freedom of association or actual liberty of contract, and employers who are organized in the corporate form or other forms of ownership association, substantially burdens and affects the flow of commerce . . . .").

3. *Why the workforce can be peppered with "salts."* The question raised by this note is to the same end as the question raised in the previous note. It invites students, who may be schooled in common law principles of contract or tort, to observe how these principles may break down in the employment arena. *See* William R. Corbett, The Need for a Revitalized Common Law of the Workplace, 60 Brooklyn L. Rev. 91, 98-99 (2003) (finding a place for updated common law principles in modern labor law).

4. *Deference to administrative agencies.* The note asks what makes members of an administrative agency such as the NLRB more expert in reading the Act than the courts charged with reviewing and enforcing their orders. In so doing, the note invites discussion of the nature and status to be accorded to such expertise. Writing for the Court in *Town & Country*, Justice Breyer said one of the reasons for the result was need to defer to the expertise of an administrative agency. The agency in question, the NLRB, had found that paid union organizers were "employees" entitled to the protections of the Act. As Justice Breyer noted, deference to the application of statutes by expert agencies entrusted with their enforcement is a longstanding principle of administrative law. *See Chevron USA Inc. v. Natural Resources Defense Council Inc.*, 467 U.S. 837, 842-43 (1984); *see, e.g.*, *Sure Tan, Inc. v. NLRB*, 467 U.S. 883, 891 (1984) (holding that Board's interpretations will be upheld if "reasonably defensible").

In theory, the National Labor Relations Board is considered to have expertise in applying the NLRA because it maintains full-time staff and attorneys who exercise exclusive authority to elaborate and determine violations of the statute. The Board also has the accumulated wisdom of over 80 years' worth of trying to understand the dynamics of labor-management relations. Members of the NLRB who are appointed by the President tend to come from the full-time practice of labor law, with either private law firms, companies, unions, or the NLRB itself.

In practice, however, the federal courts, including the Supreme Court, do not hesitate to overturn Board decisions that they find contrary to the NLRA. A good example can be found in a case treated in the next subsection: *Hoffman Plastic*

Compounds Inc. v. NLRB, 535 U.S. 137 (2002) (p. 286). In a part of that decision not reprinted in the third edition, Chief Justice Rehnquist wrote: "[W]e have accordingly never deferred to the Board's remedial preferences where such preferences potentially trench upon federal statutes and policies unrelated to the NLRA," including federal mutiny law, the Bankruptcy Code, the Sherman Antitrust Act, and the Interstate Commerce Act. *Id*. at 144.

For an exploration of appellate courts' refusal to defer to NLRB decisions, see, e.g., Peter J. Leff, Failing to Give the Board Its Due: The Lack of Deference Afforded by the Appellate Courts in Gissel Bargaining Order Cases, 18 Lab. Law. 93 (2002) (analyzing remedial bargaining order cases).

5. *Reconcilable differences? Lechmere* and *Town & Country* each dealt with the rights of professional union organizers to reach an audience of workers situated on the employer's private property. The results of these cases, however, seem to be in conflict. Whereas *Lechmere* held that an organizer who does not work for the targeted employer cannot be considered an "employee," *Town & Country* held that a paid organizer who applies for a job at the targeted employer ***must*** be considered an "employee." The note asks whether these results can be reconciled. Of course, not all such tensions are soluble, and students should get used this, especially in the world of labor relations.

3. APPRENTICES: GRADUATE STUDENTS, TRAINEES, AND HOUSE STAFF

Columbia University (pp. 270-282)

This case holds that a private university's graduate students who perform teaching services as part of their studies are statutory employees who are entitled to invoke the protections of the NLRA. In so doing it, re-embraced the holding of *New York University*, 332 N.L.R.B. 1205 (2000), and rejected the holding of precedents dating to *Leland Stanford Junior University*, 214 N.L.R.B. 621 (!1974), and *Adelphi University*, 195 N.L.R.B. 639 (1972), that graduate assistants are students rather than employees.

NOTES (PP. 282-284)

1. *'Round and 'round and 'round she goes.* The note observes that the question posed by *Columbia University* represented the Board's fourth different answer in 45 years to the question whether graduate teaching assistants can qualify as employees under the Act. (The Trump Board may revisit the question yet again.) The note asks whether the "no" or "yes" camp is more persuasive, and contrasts the predictions of adherents to each position. This is but one of many examples of important legal questions for which the agency is asked to redraw the boundaries of collective representation in a manner that could include or exclude certain categories of workers. Students may be invited to discuss whether such periodic line redrawing is good or bad for labor policy.

2. The note contrasts academic "production" in the modern American university with the sort of "artisanal" production described in Chapter 1. The question posed is whether the drafters of the NLRA really meant to exclude either the artisans (i.e., the

professors) or the apprentices (i.e., graduate teaching assistants) from coverage. Of course, there is no way to know for certain; the legislative history does not address these scenarios. The question is posed so that you can explore the unstated assumptions that students – or for that matter, practitioners, Board members, and judges – may bring to discussion of the subject. One of these unstated assumptions is that the nature of work in higher education is somehow different from work in other spheres, and that as a result, collective bargaining is inappropriate. Another assumption may be that a person cannot play two different roles – i.e., student and employee – at the same time. The California and Illinois statutes are offered to show that not every legal regime buys into these assumptions; there are alternatives to the NLRA's all-or-nothing approach.

3. *You be the judge*. The question posed, which asks whether your students thought of their graduate teaching assistants as more like teachers or students, tries to take advantage of the fact that they bring some expertise to this subject simply because they themselves have lived the student experience. After all, not long ago, most of them were enrolled in college or university courses that relied heavily on graduate teaching assistants. (We hope that similar reliance on TAs is not found in law school, where the tradition is a bit different.) It is recommended that the instructor seize on this rare opportunity to give students the floor, and to talk about what they liked, or did not like, about their experiences with full-time professors, TAs, large lectures vs. small group discussion sections, etc., and how those experiences may inform their understanding or application of the Act.

4. *Are the doctors in?* The note refers to the health care context and asks whether a patient would feel better knowing that her procedure will be performed by a full-fledged employee rather than a graduate student. As in the prior note, the intention is to get your students to participate in a serious discussion of something they can readily understand from personal experience, and to have them relate it to the assigned material.

5. *Expansion of coverage to student apprentices and faculty at private schools*. The note traces the expansion of the NLRA's coverage not only to student apprentices such as graduate teaching assistants, but also to non-tenure-track faculty who teach but perform no religious function at religious institutions and to teachers employed by so-called "charter" schools.

6. *Then the Board punted*. The note asks students whether they would have reached the merits of *Northwestern University*, and why. These questions provide an opportunity to discuss the Board's discretionary jurisdiction and how declining to exercise it may shift the legal battleground elsewhere – such as the intellectual property litigation now being pursued by former student-athletes who feel that their names and likenesses were improperly exploited by their almas mater and the NCAA.

4. TRANSBORDER WORKERS

This subsection presents the opportunity to have a topical, thoughtful, and potentially lively discussion about the treatment of undocumented workers. Thanks to

the tweets of President Trump, border control efforts of the Department of Homeland Security, periodic demonstrations both supporting and opposing the establishment of rights for persons lacking authorization papers, and demands for action by Congress – not to mention the widely disseminated views of television commentators and internet bloggers – the legal status of undocumented people living in the U.S. makes the news nearly every day. Students should be encouraged to keep up with some of this news, and to relate it to the assigned material.

A. Undocumented Workers

Hoffman Plastic Compounds Inc. v. NLRB (pp. 286-290)

The case holds that, to avoid a conflict with federal immigration laws, the backpay remedy may not be awarded to an undocumented worker, even though he was fired in retaliation for his union organizing activities in clear violation of Section 8(a)(3). It dovetails with the result in *Sure-Tan Inc. v. NLRB*, 467 U.S. 883 (1984), which held that the reinstatement remedy is not available to such a worker either.

NOTES (PP. 290-291)

1. Immigrant organizing. The note presents background information intended to show that Jose Castro, the discriminatee in *Hoffman*, didn't quite fit the stereotypical image of an undocumented worker as somebody who would rather stay underground than risk speaking out, on the theory that asserting his legal rights could lead to being identified and deported.

Today, times are more complicated for the Jose Castros of the workplace than they used to be. In the 1980s and 1990s, the fear of speaking out was less common among such workers; if deported, they would simply return in a few days or weeks. Today, the fear is greater. Advocates for the undocumented report that the costs of speaking out have gone up. *Hoffman* sent the message that undocumented workers have fewer enforceable rights. The border is heavily monitored by sentries and electronic equipment. A wall is being to stop them, and much if it is already in place. If they are stopped at the border, they might become stuck in Mexico. If they manage to get around the wall, then Homeland Security will be on the lookout for them at ports of entry. They could be jailed or otherwise detained rather than deported right away. If they are traveling with family, they could be separated from them indefinitely, and their children taken away. If deported, they could be returned to home countries plagued by terrible crime run by U.S.-style gangs and job prospects as bleak as ever. Even if they manage to enter safely, fewer jobs may await them in the U.S. They will live in the shadows of the knowledge that, at any time, they could be separated from their U.S. families, including citizen children born here. All this is to say nothing of the dangers of the journey itself. Whether by land or sea, crime, disease, dehydration, and starvation may stand in their way too.

2. *"Salt" in the wound?* The note asks whether anyone should be concerned that undocumented workers have lost the remedies of back pay as well as reinstatement. This offers the chance to discuss two things: first, the effectiveness of the Act's make-whole, remedial scheme in general; second, whether it is problematic to deny the most effective of these remedies to the undocumented in particular. The typical remedies are reinstatement, back pay, the cease-and-desist order, and the posting of a notice. Now, only the last two are available to undocumented workers whose rights have been violated. One the one hand, improving remedies for everyone, including the undocumented, may be said to be the province of Congress. Besides, people who break the law, including our immigration laws, should not be rewarded for doing so. On the other hand, denying effective remedies to the undocumented diminishes the rights of all workers, documented and undocumented alike, who might assert rights under the Act. (Jose Castro wasn't the only worker at Hoffman Plastic Compounds who supported the union.)

Students may be invited to discuss an analogy. Some big city police chiefs strenuously oppose authorizing street cops to inquire about the immigration of status of victims and witnesses, for fear of scaring them away from cooperating with law enforcement efforts. The rationale is that everyone in the community is safer if people living in the shadows feel safe enough to come forward to report crime. Should the labor "police" at the NLRB take the same position? Does the safety rationale work in the workplace?

Borderline Decisions: Hoffman Plastics Compounds, the New Bracero Program, and the Supreme Court's Role in Making Federal Labor Policy (pp. 291-293)

The excerpt from Professor Cameron's article illustrates his thesis: that *Hoffman* illustrates how the Supreme Court, rather than Congress, has become the final arbiter of federal labor policy. This role-switching is due to several factors, including Congress' failure to enact major labor law reform by amending the NLRA since 1959. It remains to be seen whether Congress will reassert itself in this area. So far it has declined the invitation of the AFL-CIO to do so by enacting the Employee Free Choice Act (EFCA), which was once the federation's top legislative priority. EFCA is discussed in Chapter 4.

NOTES (PP. 293-295)

1. *Will Hoffman set precedent for other laws? Hoffman* has generated substantial commentary among scholars and discussion by the courts. Although worker advocates report that the decision has discouraged many undocumented workers from asserting their rights, so far, few courts applying employment statutes other than the NLRA have followed its reasoning in actual litigation. The note contains appropriate citations to the commentary in general and Professor Cameron's research in this area in particular.

2. *The emergence of "immployment" law*. The note discusses the wave of state and local legislation, especially from Arizona, designed to restrict the rights of undocumented immigrants. Much of this "subfederal" legislation has been held preempted by federal immigration law. Students who wish to investigate the matter

further are directed to the cited scholarship of Professor Griffith, whose intriguing work argues that such legislation is also preempted by various federal employment statutes other than the NLRA, including the Fair Labor Standards Act and Title VII of the Civil Rights of 1964. Professor Griffith identifies the confluence of federal employment and federal immigration statutes as a distinct area of law that she has dubbed "immployment" law.

3. *Is a contract a contract?* The note asks questions relating to whether an arbitrator should sustain the otherwise meritorious grievances of an undocumented worker whose rights under a collective bargaining agreement were violated. The two grievances presented are for failure to pay the higher wage rate and discharge without just cause, respectively. The questions are designed to get students to make two distinctions. The first distinction is between rights and remedies; as noted above, *Hoffman* teaches that undocumented workers still are entitled to workplace rights, but not certain remedies, such as backpay and reinstatement. The second distinction is between the province of the labor arbitrator and a court of law; traditionally, rights created by contract are the province of the arbitrator, whereas rights created by statute are the province of the court.

Most but not all arbitrators presented with the above facts advised the authors that they would sustain a meritorious grievance based solely on contract rights – such as the right to the higher pay rate or the right not to be discharged except for just cause – and award backpay irrespective of *Hoffman*. But the same arbitrators were divided as to whether they would award backpay if the right in question was a statutory right – such as the right not to be discriminated against based on sex – if it were incorporated by reference into the arbitration procedures of the contract. For further exploration of the province of the arbitrator, see Chapter 7.

4. *The Bracero Program*. The note asks whether the student agrees or disagrees with Professor Cameron that *Hoffman* essentially creates a New Bracero Program. The question is more rhetorical than practical; no single Supreme Court decision can create a licensed system for importing agricultural or any other type of labor. That would probably take a combination of legislative and executive action. But the analogy is apt. Even though the working conditions of agricultural workers are notoriously poor, they are excluded from the NLRA, which leaves them even more vulnerable to exploitation. Any legal regime that limits the power of workers – either to voice dissent or to take advantage of the market for their labor with other employers – makes them similarly more vulnerable to exploitation. *Hoffman* arguably sets up such a regime for non-agricultural workers by granting rights but withholding effective remedies. The question can be used as a jumping off point for discussing why and how labor markets dominated by undocumented or immigrant workers come to be governed by such regimes, as opposed, say to labor markets dominated by U.S. citizens, professionals, skilled workers, etc. One answer: the undocumented have no lobbyists working the hallways on Capitol Hill, but the employers who hire them do.

B. Foreign and Multi-Country Workers

Workers' Freedom of Association in the United States: The Gap Between Ideals and Practice (pp. 296-298)

The excerpt from Professor Compa's article summarizes several of the major conventions establishing international labor standards. On the assumption that labor rights are also human rights, it argues that the NLRA, by excluding millions of people – agricultural workers, domestic employees, independent contractors, and others – violates international law, especially the right to freedom of association. This right broadly includes the rights to form and join unions, the right to engage in collective bargaining (although this right can be stated separately), and the right to engage in concerted activities for mutual aid or protection, among others.

NOTES (PP. 298-300)

1. *Workers of the world unite?* As noted, in the view of two international agencies, the *Hoffman* decision caused the U.S. to violate at least two separate conventions: the Declaration of Fundamental Principles of Rights at Work (DFPRW) (1998), as determined by the ILO's Committee on Freedom of Association, and the American Convention on Human Rights (1969), as determined by the Inter-American Court of Human Rights (IACHR). The decisions of these agencies present an opportunity to explain how international law works to students whose training has been mostly in the common law system. By their very nature, some principles of human rights are considered so fundamental that they must not be violated, even if the country violating them has not become signatory to documents memorializing those principles. This is certainly true of the U.S., which has not ratified two key ILO conventions, yet was said to have violated them by virtue of having ratified the DFPRW (which incorporates them by reference). By contrast, the decision by the IACHR was said not to be binding, because the U.S. refused to be bound. To most U.S. law students, neither determination is truly "binding," in the sense that no judgment, enforceable by some world court or international police force, was issued. Yet there is a cultural and moral force to international law that should be recognized, and discussed.

2. *Transborder regulations*. The note asks which regulatory regime – U.S., foreign, international, or some combination thereof – protects workers in the various scenarios described. The answer, of course, depends on a lot of things, not the least of which is the willingness of the tribunal to exercise jurisdiction over the parties, and the willingness of the parties to submit to that jurisdiction. To date, American courts have been reluctant to enforce even treaties and individual conventions to which the U.S. has expressly agreed to be bound.

3. *The contingent workforce revisited*. The note asks whether Professor Compa is essentially arguing that, in the eyes of international labor standards, contingent work necessarily violates those standards. The answer is no, at least insofar as the existence of contingent ***work*** is concerned. Professor Compa's point is that the domestic regimes of

some countries, such as the U.S., may violate international labor standards by virtue of how they protect (or fail to protect) contingent ***workers***.

To this end, Professor Cameron has studied the freedom of association rights of employees who are undocumented – the same workers discussed in *Hoffman* – under the labor standards memorialized in at least 18 international human rights instruments, international labor conventions, regional agreements, and labor rights clauses in trade agreements, many of which are referenced by Professor Compa. As noted in the text in note 1, Professor Cameron reports that none of these instruments uses the terms "employee," or for that matter, "undocumented," to distinguish between who is protected and who is not. Instead, broader terms such as "everyone," "[e]very person," or "worker" are used, in order to characterize the protections as universal (p. 299).

C. WHO (OR WHAT) IS THE "EMPLOYER"?

This section begins with the language of Section 2(2) of the NLRA, which defines who (or what) is an "employer." It sets the stage is set for at least two possible themes.

The first theme is that the NLRA presumes a hierarchical, adversarial economic relationship between labor and management. As expressed in the excerpt by Eric Hoffer, this presumption reflects the eternal, economic divide separating the people who do the work (employees) from the people and entities for whom the work is done (employers). In Section 1 and other places, the Act recognizes this divide by giving workers rights to equalize their bargaining power by choosing collective representation.

The second theme is that the contemporary workplace has blurred the boundary between labor and management, which makes the statutory line between employee and employer harder to draw. The phenomenon of flatter hierarchies is front and center in our discussion of supervisors and managerial or confidential employees, which kicks off the section.

1. SUPERVISORS

Oakwood Healthcare Inc. (pp. 304-317)

The sometimes-tricky nature of the inquiry into who qualifies as a supervisor under the NLRA – and therefore, is excluded from its protections – is illustrated by the length and complexity of the lead case in the *Oakwood Healthcare* trio. This case held that a hospital's rotating charge nurses were not supervisors, but some of its permanent charge nurses were.

NOTES (PP. 317-320)

1. *Oakwood's definitions.* The note summarizes the definitions of the three foundational terms bearing on the question of who qualifies as a supervisor: "independent judgment," "assign," and "responsibly to direct."

These definitions went a long way in helping the Board clarify who is "supervisor," but also ensured future complex litigation, due to the many steps involved in applying the definitions.

2. *Before and after*. The note summarizes predictions by labor advocates that anywhere from 8 million to 34 million employees could be transformed into supervisors by *Oakwood Healthcare*. Although the actual numbers are unknown, they are unlikely to be close to these predictions. Students can be cautioned about the hazards of overstating claims, whether factual or legal.

3. *Truth "or" consequences?* The note asks whether the student agrees with Professor Nolan that "or" is the most important two-letter word in the NLRA. It is designed to focus on the importance of parsing language, especially in determining who is a supervisor. By codifying 13 ways of becoming a supervisor, Section 2(11) offers lots of practice at parsing.

4. *Power trip?* The note asks whether *Oakwood Healthcare* puts organized labor in the awkward position of arguing that the people it wishes to represent should not be promoted. The answer is: not really. The natural desire to be promoted, even if it means having to leave a represented bargaining unit for a job that is not unionized, is a very American idea that management and labor alike can appreciate. The question is offered as food for this thought: in a world in which everyone is a potential supervisor, either you do away with the distinction altogether (which only Congress can do), or you have to draw the line someplace. Perhaps the best place to mark the boundary is the place separating the folks who exercise real power from those who do not.

5. *International labor standards*. The note asks whether an expanded definition of who is a "supervisor" violates international labor standards. The question was also put to the ILO's Committee on Freedom of Association (CFA), with whom the AFL-CIO filed a complaint regarding *Oakwood Healthcare*. As noted in the text (p. 319), the CFA's answer was yes. As a way of summarizing what has been learned about the decision, students could be organized into groups to argue the pros and cons of the question before a mock panel of the CFA. Afterward, they could also be asked how, as a practical matter, the U.S. could comply, if it wished, with the CFA's directive to take necessary steps to limit the interpretation of "supervisor." Having Congress pass legislation (a long shot) and asking the Solicitor General to file briefs so arguing in appropriate cases (an easier step) are two things that come to mind.

6. *Supervisors' unions*. The point of the note is to remind students that the world of collective bargaining does not begin and end with the NLRA; it is possible for employees to organize themselves into unions in many contexts, even if the statute does

not offer protection for doing so. The high-end labor markets discussed in the text, such as film and television directors, are the most prominent examples of supervisors' unions.

2. MANAGERIAL AND CONFIDENTIAL EMPLOYEES

NLRB v. Yeshiva University (pp. 322-328)

This case holds that the form of shared governance in effect at one particular institution of higher education transformed the faculty into managerial employees who were not entitled to protection under the NLRA. It offers another familiar setting in which students can discuss less familiar labor law doctrine.

NOTES (PP. 328-330)

1. *Managerial employees.* The note asks how broadly or narrowly the Board should exercise its discretion under Section 14(c)(1) not to assert jurisdiction over an employer. Another way to put the same question is to ask, in a particular case, whether doubts should be resolved in favor of or against coverage. The answer may depend on whether one takes an expansive or narrow view of government's role in the economy. A similar question arose in *Northwestern University* (p. 284), where the NLRB decided not to exercise jurisdiction over a private university facing a union organizing drive among student-athletes. By declining to exercise jurisdiction, the Board avoided having to decide whether grant-in-aid student-athletes are employees within the meaning of Section 2(3).

2 *Conflict of interest.* The note compares and contrasts the doctrine defining who is a supervisor after *Oakwood Healthcare* (which is established by the plain language of the NLRA) and the doctrine defining who is a managerial employee after *Yeshiva* (which is established by interpretation). It then describes the traditional power of a university faculty to vote to hire or tenure a colleague, which would seem to fit the "effectively to recommend" option of Section 2(11). Students might be asked whether this is enough to transform faculty into supervisors at any institution where faculty wield traditional power. The answer is maybe, but not likely; even the strong tradition of faculty co-governance would not convince most courts to go this far. Students also should be advised that most faculty, if not most university administrators, would strenuously object that faculty wield such power. Most faculties would argue that administrators – acting through presidents and provosts – wield the real power, and tend to have the final say, over recruitment decisions. Most administrators would avoid making such an argument in the first place, for fear of losing it – and having to cede more decisionmaking authority to faculty senates and other governing bodies.

The note also points out that, in California, Illinois, Hawaii, and other states, public universities explicitly confer collective bargaining rights on faculty, without reference to their quasi- supervisorial or managerial responsibilities. Presumably, this

suggests that any such responsibilities are not substantial enough to raise the sorts of conflict of interest concerns that should preclude collective bargaining rights.

3. *It's not just academic*. The note asks about the implications that *Yeshiva* might have for the definition of who or what the "employer" is in workplaces outside the university setting. Reference is made to Justice Brennan's dissent, which observed: "Unlike the purely hierarchical decisionmaking structure that prevails in the typical industrial organization, the bureaucratic foundation of most 'mature' universities is characterized by dual authority systems." Certainly, the flattened hierarchies of the twenty-first century, high-performance workplace invite the argument (which Justice Brennan would no doubt reject) that many professional workers are really managers, not employees. The viability of this argument is far from clear. But students should take note of an important trend in human resources theory: from time to time, management consultants tout front line production or service workers as the company's' greatest resource, which should be tapped for ideas and action through work teams, quality of work circles, and other employee participation vehicles. The more these vehicles empower workers, the more credible the argument that the workers are now managers exempt from the Act.

4. *WashTech revisited*. The note ask whether the perma-temps at Microsoft might be reclassified as managerial or confidential employees, and on that basis, denied the protections of the NLRA. The "yes" argument is that they are professionals who are probably used to exercising substantial independent judgment in how and when they carry out their responsibilities, like so many workers in the high-tech industry. The "no" argument is that this hardly puts them in charge of major decisions about the terms and conditions of employment, as contemplated by *Yeshiva*. Besides, it should be remembered that, in an analogous situation, the argument for characterizing these same workers as independent contractors was rejected in the *Vizcaino* litigation (p. 221).

5. *Read all about it*. The note asks whether the holdings of the Republican case clarify who should be considered a managerial employee. The "yes" argument is that the decision focused not on whether the title sounded managerial but whether the employee wielded any managerial or supervisory job functions. The "no" argument is that every job in every case is different, and its job functions will require individual parsing.

3. PUBLIC SECTOR EMPLOYERS

Pennsylvania Virtual Charter School (pp. 332-340)

This case holds that a privately-chartered "cyber" school, which offered a significant part of its curriculum via the internet, was not a "political subdivision" of the Commonwealth of Pennsylvania, and therefore, not a public sector employer excluded from the Act under Section 2(2). Therefore, as employees of a private sector employer, the district's workers were entitled to assert the protections of the NLRA.

NOTES (PP. 323-325)

1. Like prior notes, the note asks how doubts about the Act's coverage should be resolved. This is a policy question that turns on legislative intent, which is often hard to divine. Absent specific guidance, a key argument for broader coverage is that too many workers are already excluded from NLRA coverage; a key argument for narrower coverage is that Congress is loathe to interfere with state and local government labor relations, which is why it carved out public sector employers in the first place. Besides, the states are free to enact their own collective bargaining statutes if desired.

2. *Public sector collective bargaining in perspective*. The information and questions in the note are designed to get students to think about the historical, political, and practical reasons why public sector workers are treated differently from private sector workers under the NLRA. There are no correct answers, which may be why Congress excluded public sector employers from the Act's coverage in the first place. After all, how people feel about collective bargaining rights for public sector employees often tracks how they feel about public employment, or the nature and size of government, in general.

Anti-government sentiment was certainly evident in recent efforts by several states, led by Wisconsin, to strip public sector workers of collective bargaining rights. The details are recounted here (pp. 340-341).

4. MULTIPLE ENTITIES OR SINGLE ENTITY? THE SINGLE EMPLOYER AND ALTER EGO DOCTRINES

1. THE SINGLE EMPLOYER DOCTRINE

Mercy Hospital of Buffalo (pp. 343-349)

This case holds that multiple entities will be found to constitute a single employer if they share (1) common ownership, (2) common management, (3) functional interrelation of operations, and (4) centralized control of labor relations. Although the Board found common ownership – the nonunion MRI operation was 50% owned by Mercy Hospital and 50% owned by Our Lady of Victory Hospital, which in turn were both owned by Catholic Health System – it did not find common management, functional interrelation of operations, or centralized control of labor relations. The two entities had separate presidents controlling day to day operations, even though they shared a common board of directors; the new MRI facility had no Catholic Health System or Mercy Hospital employees; and the few agreements (lease of land and shared linen/garbage service) between the operations were entered into at arms length. Therefore, unfair labor practice charges alleging breach of the duty to bargain were dismissed.

NOTES (PP. 349-350)

1. *The single employer doctrine.* The note offers background on the two-step application of the single employer doctrine. Finding that multiple entities constitute a "single employer" is just the first step in the analysis. The second step is determining whether the employees of the integrated entity constitute an appropriate bargaining unit, a determination that turns on the application of the traditional "community of interest" test. (Due to its exclusive jurisdiction, the Board rather than the courts must make the second step determination – subject, of course, to judicial review.) Using the perma-temps at WashTech as an example, the note then asks, in effect, whether a rebuttable presumption exists as to the appropriateness of the bargaining unit. The answer is likely no, for at least two reasons. First, presumptions aside, the community of interest test has to be met; employees who do not share a community of interest simply cannot bargain together. Second, some deference is owed to the right of employers to organize their operations as they see fit, or as market conditions may dictate.

2. *Labor relations, front and center*. The note asks students to think critically about how the single employer doctrine works in practice. For example, it may be true in some cases that, if the most important factor is centralized labor relations, then the only thing that an otherwise integrated employer has to do to preserve its nonunion entity is hire two different directors of human resources, one for each company. But a number of modern operations decentralize their labor relations anyway. Perhaps that is why each of the "single employer" prongs must be evaluated under a "totality of the circumstances" test.

3. *Mercy, mercy me*? The note challenges the Board's conclusion that Mercy Hospital and Southtowns do not constitute a single employer by asking about the practical implications of such a finding. After all, if the entities are truly separate, then they could be economic competitors, right? Not necessarily. Indeed, these businesses are complimentary: one of them (Mercy Hospital) refers patients for MRIs to Southtowns, and the other (Southtowns) accepts and administers the MRIs. The arrangement allows their common parent to capture the revenue of a full-service health care operation.

2. THE ALTER-EGO DOCTRINE

Michael's Painting, Inc. and Painting L.A. Inc. (pp. 350-355)

The holding of this case, which is based substantially on the report of the ALJ, is that an entity will be found to be the "alter ego" of the targeted employer if the following factors are present: substantially identical management, business purposes, operations, equipment, customers, supervision, and ownership. Here the only real difference between the two entitles was their business name(s). Although it was true that changes in corporate operations would have happened anyway for business reasons, the owners' antiunion motivations could not be ignored. Substantial violations of the NLRA were found, and the respondents were ordered to cease and desist from violating the Act;

recognize and bargain with the union; reinstate all picketers; and to make them whole for damages, including backpay and interest.

NOTES (PP. 355-356)

1. *Alter egos.* The note asks students to compare and contrast the single employer and alter ego doctrines as applied to the facts of this case and *Mercy Hospital*. The key differences are three: first, whereas the single employer doctrine requires the finding of an appropriate bargaining unit, the alter ego doctrine does not; second, whereas the single employer doctrine focuses on the centralization of labor relations, the alter ego doctrine does not; and third, whereas the alter ego doctrine requires a finding of antiunion animus or sham transaction, the single employer doctrine does not.

Mercy Hospital presented neither a single employer situation (for failure to meet all the requirements set forth in the opinion; appropriateness of the bargaining unit was a nonissue) nor an alter ego situation (due to lack of evidence of antiunion animus or sham transaction). *Michael's Painting* likely presented a single employer situation (the only thing that changed was its name, so everything else, including the bargaining unit, remained the same) as well as an alter ego situation (for the reasons stated by the ALJ).

2. *Of alter egos, single employers, joint employers, corporate veils, and their friends (or "allies").* At least five distinct legal tests have been developed by the NLRB to determine whether nominally separate legal entitles are actually a single entity. The note asks whether so many doctrines are needed to serve the same purpose. There is no right answer to the question, but it is worth discussing whether a single factor – such as evidence of antiunion animus – could be made to serve the same end.

3. *Arsenals and old lace*. The note asks whether the traditional arsenal of make whole remedies imposed by the Board – the cease and desist order, the bargaining order, reinstatement, backpay, and interest – is sufficient to deter employer misconduct in this area. (Arguably, it didn't deter ULPs in either *Mercy Hospital* or *Michael's Painting*.) In addition, the pros and cons of importing the tort remedy of punitive damages into labor relations could be discussed.

5. JOINT EMPLOYERS

Browning Ferris Industries of California, Inc. (BFI II) (pp. 358-372)

The case holds that the joint-employer test originally articulated in *BFI I* is restored: the Board once again may determine that two or more statutory employers are joint employers of the same group of statutory employees if they "share or codetermine those matters governing the essential terms and conditions of employment." It eliminates the requirements of cases such as *TLI* and *Laerco* that the purported joint employer must not only possess the authority to control the terms and conditions of employment, but also exercise that authority.

The case is yet another example of how landmark changes in the interpretation of the Act can shift with the political winds – and how fleeting such changes can be. As noted, as part of its efforts to roll back various Obama Board decisions, the Trump Board attempted to overturn *BFI II* in *Hy-Brand*, only to vacate that decision due to the apparent conflict of interest held by Member Emanuel, whose vote provided the margin of victory for the Trump majority in *Hy-Brand*. This development, however, does not prevent the Trump Board from seizing on a future case raising the same issue to overturn *BFI II* by simply restating the principles articulated in the now-vacated *Hy-Brand* opinion.

As noted, as the third edition went to press, the Trump Board was pursuing a second line of attack on *BFI II* by undertaking rulemaking to codify *Hy-Brand*-type principles into the joint employer doctrine. After the third edition was published, an intervening decision of the U.S. Court of Appeals for the District of Columbia Circuit enforced the Board's order in *BFI II*. *See Browning-Ferris Industries of Calif., Inc. v. NLRB*, ___ F.3d ___ (D.C. Cir. Dec. 28, 2018). According to some commentators, this development will complicate the Trump Board's attack by requiring Supreme Court review to address the reasoning of the appeals court. *See* Robert Iafolla, *NLRB "Joint Employer" Proposal May Require High Court's Approval*, Bloomberg Law News (Jan. 2, 2019) (quoting Professors William Gould, Michael Harper, Jeffrey Hirsch, and Jeffrey Lubbers), available at https://www.bloomberglaw.com/exp/eyJjdHh0IjoiTFdOVyIsImlkIjoiMDAwMDAxNjgtMDViNC1kYTA0LWEzZWItMDViNjljZTAwMDAyIiwic2lnIjoiVHVNSGFQWXUyM3dwbldqRHM4S0tueEs3bGswPSIsInRpbWUiOiIxNTQ2NTA5OTQxIiwidXVpZCI6Ii9NcjVQQ3RiQUV4WUI5bTgwSnJhZ1E9PVN5dGFPYnlXQjNnb2pFOVFJWDJzYUE9PSIsInYiOiIxIn0=?usertype=External&bwid=00000168-05b4-da04-a3eb-05b69ce00002&qid=5900357&cti=LSCH&uc=1320026152&et=CURATED_HIGHLIGHTS&emc=blwnw_hlt:2&context=email&email=00000168-0e49-d110-af68-ae4fc86f0001.

NOTES (PP. 372-373)

1. *Some perspective*. As noted, any consideration of who counts as a statutory "employer" under the joint employer doctrine requires parallel consideration of who counts as a statutory "employee" under *BFI II*'s counterpart, *Miller & Anderson* (p. 247). Students should review both cases to recall how these concepts fit together.

2. *Back to school*. The note asks whether the majority's characterization of the concerns raised by dissenting Members Miscimarra and Johnson as "law-school hypothetical . . . doomsday scenarios" is fair. This is an opportunity to have a full-blown discussion of the joint employer doctrine in all its glory.

3. *Speaking of Congressional (in)action*. The note suggests that, although Congress is the appropriate body to make major changes in the NLRA, it rarely has done so over the years. Further discussion of this topic, and its implications for federal labor policy, would be appropriate here if desired.

4. *Speaking of the dissent*. The note encourages discussion of each of the dissent's hypothetical problems in light of pending rulemaking efforts by the Trump Board.

6. TRANSBORDER EMPLOYERS

Labor Union of Pico Korea Ltd. v. Pico Products Inc. (pp. 374-378)

The case holds that the territorial scope of Section 301 of the Taft-Hartley Act, which establishes jurisdiction in the federal district courts for suits asserting violations of labor contracts, does not reach a U.S. parent of a U.S. subsidiary that in turn owns the Korean company that was signatory to the labor contract. It can be seen an example of the thorny problems – relating to labor law and international relations – that can arise when employers organize themselves across borders.

NOTES (PP. 378-379)

1. *Walk softly, and carry a little stick?* The note reviews examples of the historical reluctance of the U.S. Supreme Court to approve the extraterritorial application of American labor and employment laws, absent a specific congressional directive to do so.

2. *Plain meaning vs. inevitable embarrassment?* The note asks students to do three things. First, to think about basic Civil Procedure principles, as well as the practical effects of a decision going the other way. If the court had exercised subject matter jurisdiction under Section 301, then Pico Products would have had to defend the action – but it would not have necessarily lost on the merits. Pico Products might have argued that the plaintiffs could not pierce the corporate veil or prove a violation of the labor contract. Or the company might have raised other defenses. Second, to revisit the notion, raised elsewhere in this chapter, that the plain meaning rule and other canons of modern statutory interpretation are sometimes ignored when it comes to applying labor law. Third, to decide whether Judge Cardamone has articulated the actual basis of the inevitable "embarrassment in foreign affairs" doctrine that prevented him from reading Section 301 literally.

3. *The law of unintended consequences: imports and exports*. The note asks thorny questions about the transnational application of U.S. labor law that also have implications for the transnational practice of U.S. labor lawyers – questions that American legal practice has only begun to address.

Chapter 4
ESTABLISHING COLLECTIVE REPRESENTATION

A. INTRODUCTION

Chapter 4 presents the regulatory framework for establishing collective representation under the NLRA. The five sections that follow the introduction correspond to five distinct sets of rules that govern both the contentious environment in which employees may consider union representation, and the mechanics by which employees may choose or reject such representation: Section A offers a variation on the Enderby problem, which was introduced in Chapter 2. Section B begins with the definition of labor organization under the NLRA and Section 8(a)(2), which prohibits employer support and domination of labor organizations. This section also deals with the idea of exclusivity and the scope of Section 9. Section C discusses regulation of access to employees by labor organizations attempting to organize workers. Section D addresses regulation of speech by employers opposing organization. Section E presents the rules restricting employer coercion of employees during the organizing campaign. Section F outlines employees' legal protections against anti-union discrimination, including retaliatory discharge. Finally, Section G begins with the law regarding appropriate bargaining units and then lays out and discusses the three major routes to union recognition.

There is a lot of material here. Covering it all in-depth could take as much as eight to ten hours, or one and-a-half to two hours per section (counting Sections A and B together). Of course, not every labor law teacher will wish to devote so much time. Still, sufficient attention must be paid to the basics of the representation process; after all, Chapter 4 is threshold material that is essential to understanding later chapters. Covering it fairly can be accomplished in as few as three to six hours, provided that treatment of some basic knowledge is balanced with treatment of some cutting-edge topics. An instructor considering this approach might assign the following: Sections A, B, and C including subsections C-1 and C-2 (covering the Enderby hypo, access to co-workers, and access by non-employee organizers); Section D (dealing with regulation of employer speech during the organizing campaign); Section F (dealing with protection against discrimination); and Section G, in particular subsections G-1 (dealing with the appropriate bargaining unit), G-2 (dealing with the representation election), and G-4-b (dealing with lawful voluntary recognition, most notably the neutrality agreement and card check recognition).

The chapter begins with a variation on the Enderby story: Penny, a programmer, is fired for sending an "electronic" union authorization card from her computer in violation of a work rule prohibiting use of the company's e-mail system for personal messages. Later, as an ex-employee, Penny and two professional union organizers attempt to pass out pro-union leaflets to workers and consumers on the company's "campus." After raising a Section 8(a)(2) issue related to "work teams" created by

Enderby, the hypo raises at least three distinct legal issues relating to the employer's private property: employee access to and use of employer e-mail systems to share information relating to their Section 7 rights; retaliation against employees for exercising those rights in violation of an employer rule regulating use of its property; and access by employee versus non-employee organizers to the employer's workforce, and to the consuming public.

NOTES (PP. 383-385)

Note 1 simply previews all the law surrounding Section 8(a)(2) that students will encounter in Section B Definition of Labor Organization. The questions in the last paragraph all relate to the reason Section 8(a)(2) was included in the Act in the first place: company unions. This is the time to stress the importance of *independent unions*, ones that truly are made up of the workers in a particular workplace. Despite the movement toward including worker voice in operations over the last few decades, the incentives still exist for management control of labor organizations.

Note 2 supposes that, shortly after Penny's firing, CEO Steve Workman calls a meeting of all programmers to discuss Enderby's no-personal-e-mails policy. During the meeting, Workman warns everyone that violators will meet the same fate as Penny. It then asks whether Workman has the right to call such a meeting. The answer is certainly yes; an employer has the right to hold meetings discussing company policy and its enforcement. The note then asks whether Workman may issue such a warning. The answer is probably no. According to *Purple Communications*, reprinted *infra*, an employer may not prohibit the use of its equipment, including computers and e-mail systems, for any non-work purpose, nor may Penny be singled out for disparate treatment in the enforcement of the rule, as discussed in the chapter.

The questions that follow are designed to preview the law regulating access of employee versus non-employee organizers to the employer's private property. They are also designed to get students thinking about some of the practical problems faced by union organizers. One is that professional organizers are outsiders trying to convince insiders that a strange new organization has their best interests at heart. This is not an easy job for any outsider, much less one peddling something controversial, such as collective bargaining. Another is that the further these outsiders are kept from employees, the harder it is to convince employees to sign up. The student might be asked to recall the last time she willingly took literature of any type from a leafleter – much less stopped to discuss the merits of the message, paid money to buy the product being peddled, or signed the petition being presented. Finally, there is the matter of who wants a secret ballot election to confirm majority employee support, and who doesn't. Comparisons should be made between the brand of workplace democracy sanctioned by the NLRA, and the brand sanction by free general elections. How are they similar or different?

Note 3: *The NLRA in cyberspace*. The questions posed by the note are designed to take advantage of the fact that most students are far more familiar, and at-ease, with

the trappings of cyberspace than most labor lawyers, NLRB members, or for that matter, law professors. The student might be pressed to state whether the rationale of *Purple Communications*, the Board's most recent case on employees' right of access to an employer's e-mail system, does or doesn't make sense, and how and why they would rule on the same case.

Note 4: *Appropriate bargaining units*. The commentary in the note is designed to preview the problem of setting up an appropriate bargaining unit, especially the multi-factor "community of interest" test.

B. DEFINITION OF LABOR ORGANIZATION (p. 385)

1. EMPLOYER DOMINATION, SUPPORT, AND INTERFERENCE (p. 386)

An explicit decision was made to address Section 8(a)(2) prior to addressing Section 8(a)(1) with respect to union access to employer property for purposes of organizing. The reason for this is to familiarize law students first with the definitions of labor organizations and labor unions. In simulation classes where students are permitted to organize a union, it is helpful for them to understand up front the definition of labor organization under the Act, and then something about the formal constitution of a labor union and the scope of its power and authority under the NLRA. Even in nonsimulation classes, presenting this first paves the way for better understanding of later materials. In addition, the challenges of Section 8(a)(2) in the contemporary workplace forged out of the success of Japanese collaborative decisionmaking, which has now served as a pattern for American enterprises for some years, allow for this discussion to take place in a very current context.

Electromation, Inc. (pp. 387-398)

Although *Electromation* is a long (and some think excessively complex) case, there is a sure payoff for students. The case painstakingly works through the composite parts of Section 2(5)'s definition of labor organization and then the composite parts of Section 8(a)(2). The concurrences by Members Oviatt and Devaney (pp. 395-398) help to frame the overall debate about Section 8(a)(2)'s prohibition and management's orientation toward employee committees in the modern workplace.

Case: Electromation, Inc., a nonunionized company, decided to cut expenses by changing the attendance policy and reducing employee benefits. A large number of employees expressed their displeasure by signing a petition. In response, the company decided "to involve employees in coming up with solutions…" The company decided to set up five "Action Committees," 1) Absenteeism, 2) No Smoking Policy, 3) Communications Network, 4) Pay Progression for Premium Positions, and 5) Attendance Bonus Program. The committees were to meet to try to resolve problems and if they came up with solutions that were within the budget and generally acceptable to employees, management would implement them. The committee members were to poll employees, get their ideas, and make themselves available to them. The committees met for about a

month when management suddenly received a union demand for recognition. The company refused and told the action committee members that "due to the Union's campaign, the company's management representatives would no longer be involved in meetings or continue to work with the committees until after a union election.

The Board held that the Action Committees were labor organizations. The Board found the Action Committees were labor organizations wihin the meaning of Section 2(5) because 1) employees participated in them in a representational capacity and 2) dealt with the employer about disaffection concerning conditions of employment through them. The Board discussed at length the legislative history behind the NLRA, which originally contemplated outlawing any employer initiation, participation, or supervision of employee representation groups as robbing employees of the freedom to organize on their own. Under the current Act's Section 8(a)(2), an employer dominates a labor organization when the employer creates, determines the structure and function of, and manages the continued existence of the organization. The Board found the company's formation and administration of the Action Committees constituted domination. The company created and outlined the purposes of the committees. They also appointed management representatives to facilitate meetings and allowed employees to conduct committee activities on paid time.

Oviatt's concurrence: Member Oviatt wrote separately to stress the narrowness of the holding in this case, as there are a wide range of activities employees participate in that should remain lawful under it. Oviatt offers examples of employer-employee cooperation such as quality-of-life programs and communication management committees that are not, in his view, labor organizations under the Act.

Devaney's concurrence: Member Devaney also wrote separately for a similar reason as Oviatt, to stress that the Board has only found that these Action Committees in this particular case have violated Section 8(a)(2) and makes no decision regarding any other kind of arrangement. Looking at the legislative history behind the NLRA, Devaney believes only employer-employee communications that impair the right of employees to free choice of a bargaining representative are prohibited.

Board Order: Board orders in Section 8(a)(2) cases are tricky. The union is between a rock and a hard place. If it files no charge, the committees continue essentially at the behest of management and deter unionization because of the appearance that employees are being independently represented. On the other hand, if the union files a charge it looks like a "bad actor." Management in *Electromation* expressly blames the discontinuation of the company's involvement on the union's campaign. Note that the Board Order in *Electromation* does not require management to reverse or stop benefits so far garnered by the Action Committees. Should the Board go further and require a posting absolving the union of blame related to the cessation of employer involvement in the committees?

Crown, Cork & Seal Co. (pp. 398-403)

Case: Crown Cork & Seal Co., a nonunionized company, used seven committees to implement its "Socio-Tech System," which delegates to employees the authority to operate the plant through a committee process of discussion and consensus. All employees were divided into four production teams, each of which was headed by one management leader. These production teams "decide and do" on a number of workplace issues, including "production, quality, training, attendance, safety, maintenance and discipline short of suspension or termination." They could stop production lines, decide leaves, and authorize training on their own. The other three committees [Organizational Review Board, Advancement Certification Board, and Safety Committee] were at a higher administrative level, composed of production team members and some management. Many of the decisions made by these committees were reviewed by the Management Team, made up of 15 members of management.

The NLRB found that none of the seven committees are labor organizations because they did not "deal with" management within the meaning of Section 2(5). The Board has previously defined the element of existing for the purpose of dealing with employers under the meaning of Section 2(5) as a bilateral relationship, which usually consists of a proposal from the organization and real or apparent consideration of said proposal by management. As the Board held in *General Foods Corp.*, a case the Board found to be factually similar to the case at hand, mere delegation of managerial functions to employees through programs or committees do not involve dealing with the employer under Section 2(5). The Board in this case found the seven committees were exercising group authority that was unquestionably supervisory or managerial in nature. The fact that the managerial authority exercised could be reviewed by higher levels of management cannot be characterized as dealing between employees and the employer because it is essentially an interaction between two levels management.

NOTES (pp. 403-407)

Note 1 makes clear that Section 8(a)(2) does not have a scienter requirement. Thus, employer good faith is irrelevant to any analysis under the Section. A question often arising here is whether, since unions are well-established now and most employers set up committees to deal with legitimate workplace problems, often related to productivity, the scienter requirement should be read into Section 8(a)(2)? As the note suggests, the answer may depend on how much these committees stand in the way of effective and independent union organizing.

Note 2 discusses "advisory committees" and whether they violate Section 8(a)(2). They do not if they do not "deal with" the employer. In *Stabilus,* the Board found no Section 8(a)(2) violation where the committees could simply implement recommendations subject only to financial constraints. Does this method serve to restrict the impact of Section 8(a)(2)? Yes, though it requires the employer to give up quite a bit of power.

Note 3 discusses the issue that was central to the *Crown, Cork and Seal* case; what is meant by "dealing with" in the language of Section 2(5)? In *Crown, Cork and*

Seal the plant manager was able to persuade the ALJ, and subsequently the Board, that though committee decisions were presented to the plant manager, that the plant manager would not overturn the committee. Does this ring true to you, you might ask students? The opinion suggests the management committee existed only to police the boundaries of the delegation to the committees. Does this seem right? The opinion indicates that if the plant manager disagreed with the committee he might go to the committee and present his argument in urging them to reconsider. Does this smack of "dealing with?" Even if we were to believe the plant manager that he would in the end uphold the decision of the committee, do you think the committee will turn down the plant manager very often? Should that matter in the analysis?

Note 4 discusses the definition of employee, noting that Section 8(a)(2) does not extend to nonemployees under the Act.

Note 5 discusses the issue of remedies for domination, as noted earlier in this TM related to the Board Order in the *Electromation* case.

Note 6 presents some questions based on the Somali worker problem at the beginning of the chapter. Question 1: If HR creates a committee of workers that deals with, but only makes suggestions about labor issues of accommodation and promotion then the committee will likely violate Section 8(a)(2) as in *Electromation.* Question 2: If Enderby empowered the committee to make its own decisions without management override then Enderby might argue that the power was delegated, and they are not "dealing with" the committee which would not then be a labor organization, much like *Crown, Cork & Seal.* A question here is whether it was important in *Crown, Cork* that the entire workplace was organized on a theory of delegated power (the SocioTech System). Question 3: Disguising a labor issue as a productivity issue likely would not work since the Act applies to "terms and conditions" of employment, which a prayer break would be.

Note 7 introduces the notion of "minor domination," that action falling short of domination (i.e., not meeting the prongs of the analysis set out in *Electromation*) may nonetheless violate Section 8(a)(2) without requiring implementation of the fairly drastic remedy of disestablishment.

The bottom part of the note deals with employer influence in elections involving contending unions. Employers will violate the Act here in some circumstances where they help or endorse one union or the other. Stress here to students that employers must proceed carefully around election time or face liability under the Act.

2. EXCLUSIVE REPRESENTATION AND MAJORITY RULE (p. 407)

a. The Issue of Minority Unions

The Blue Eagle at Work (pp. 407-410)

Professor Morris outlines a tragic situation involving Vietnamese workers who were fired by an employer for attempting to bargain with him. The case Morris describes is similar to the Somali Worker problem at the beginning of Chapter 2 and also to the *Washington Aluminum* case and the facts present a good opportunity to go over all of that with students. But what about the bargaining aspect? Should the GC in the case have issued an order for the employer to meet and bargain with the union? What about the fact that the workers were in the minority? After discussing the excerpt, it is helpful to peek at the language of NLRA Section 9 in the supplement. Then, read the *Bernhard-Altmann* case following.

International Ladies' Garment Workers' Union v. NLRB (Bernhard-Altmann) (pp. 410-414)

Case: The International Ladies' Garment Workers Union campaigned at the Bernhard-Altmann Texas Corp. and got some employees to sign authorization cards. In the meantime, employees in the Topping Department, upset about wages, went out on strike. The strike was not related to the union campaign, so the union continued its drive during the strike and began to negotiate with the employer. The union represented to the company that the union had secured cards from a majority of employees, but neither the employer nor the union made an effort to verify this assertion. The employer and the union signed a memorandum of understanding, and forty days later signed a formal collective bargaining agreement. At the time of the memorandum signing, the union did not actually have cards from a majority of employees, but did by the signing of the collective bargaining agreement.

The NLRB found that recognizing a minority union even when under a good-faith belief, violated Sections 8(a)(1) and (2) of the NLRA. The Board found that god faith was especially unimportant where the employer made no effort to verify the cards. The Board ordered all bargaining activities to cease and a Board-conducted election be held. The Court of Appeals agreed and granted enforcement. The Supreme Court granted cert.

The Court affirmed the NLRB, finding that employer recognition and contracting with a union as exclusive representative when the union has only been authorized by a minority of employees is an unfair labor practice.The Court found it irrelevant that the union had managed to obtain majority support by the signing of the collective bargaining agreement, as entering into a memorandum of understanding with the authorization of only a minority of employees and any actions that followed it were still unlawful. The Court noted that the union's ability ultimately to achieve a minority may have been aided by employer recognition. Allowing a union exclusive representation when authorized by a minority would interfere with the nonauthorizing majority employee's rights. The Court also found that *scienter* was not an element of unfair labor practices, and therefore good-faith belief was not a defense.

Douglas dissent (in part): Justice Douglas agreed with the majority that a minority-backed union could not represent all employees. But he dissented in part because he saw no reason why the union could not represent and bargain for the minority

of employees that authorized it to do so. According to Douglas, nothing in the Wagner Act prevents denying a minority union the right to represent its members when the majority has not chosen a bargaining representative.

NOTES (pp. 414-417)

Prior to discussing Note 1, go back to the Morris reading preceding *Bernhard Altman*. Ask the students whether Justice Douglas's dissent in *Bernhard Altmann* negates Professor Morris's argument in the excerpt before the case? Doesn't it seem that Justice Douglas believed that the majority had outlawed union representation, even nonexclusive representation, by a minority union? Even if so, Douglas's opinion is a dissent. Does it necessarily foreclose a different, but reasonable reading of the majority decision? Does the majority in *Bernhard Altmann* in fact read the Act comprehensively to prohibit minority unions in all circumstances or is its holding expressly limited to exclusive representation? Have the class take a look again at the Court's opinion at the bottom of page 412.

Note that Professor Morris has been instrumentally involved in petitioning the NLRB to issue a rule on nonexclusive representation by minority unions. On August 14, 2007, the Steelworkers and six other unions filed a rulemaking petition supported by a letter from twenty five law professors urging the Board to take up the issue of minority union representation. See *Unions File Rulemaking Petition with NLRB On Minority-Union, Members-Only Bargaining,* Daily Lab. Rep. No. 157 (BNA) at A-1 (August 15, 2007). All "Change to Win" affiliated unions filed another petition urging same in January, 2008. See *Change to Win Joins Other Unions Seeking Rule on Minority-Union Bargaining,* Daily Lab. Rep. No. 4, at A-1 (January 8, 2008). The note details developments since 2008, including the Liebman Board's extraordinary handling of the petition. By denying the petition without ruling on the merits did the Board really preserve the issue for another day? Will the Board ever have sufficient resources to properly analyze such a novel approach (minority unions) to the statute, one that, if not contradicted by law, has not really been followed by the Board?

Note 2 explains that international labor standards encourage employer bargaining with minority unions if there is no majority in order to best allow worker freedom of association.

Note 3 follows developments in the public sector where exclusive representation has been challenged as an affront to freedom of association. It might be interesting to discuss the issue with students from this point of view, an attempt to limit union power, after discussing in the context of *Bernhard-Altmann* the idea of minority unions from a progressive perspective. The first amendment, both speech and association prongs, is now being "weaponized" for use against unions. *Janus* is the latest example on the speech side. You might ask students what they think about this development, and how it should ultimately be resolved.

Note 4: *Prehire agreements:* The note walks through the limited exceptions for employer recognition of unions as exclusive representatives, including Section 8(f) for the construction industry and, at times, the opening of a new facility for an already unionized employer based on collective bargaining obligations.

b. Exclusive Representation and Its Obligations (p. 417)

It's a good idea to open the discussion of this section by reviewing the exact language of Section 9 of the NLRA in the supplement. *J.I. Case* remains a leading case on the issue of exclusive representation, but the case is dated, and an explicit decision was made simply to excerpt the portions of the case discussion that were relevant to an understanding of the limits of exclusive representation. The excerpts include 1) the case explanation for why individual contracts are generally prohibited under Section 9 (p. 418), and 2) the explanation of the limited scope of any exceptions to the primary rule (pp. 418-419). The casebook mentions individual negotiation in professional sports and asks why individual agreements exist in sports and yet unions remain strong. Of course, the answer relates to employee leverage. The more highly skilled the worker, the more likely he or she can dictate terms because of that skill and a scarcity of ready replacements. Finally, the book excerpts the Court's admonition (p. 419) that individual agreements, even where allowed, can have a disruptive effect on the collective.

Note that exclusivity also characterizes majority union representation under the RLA.

Emporium Capwell Co. v. Western Addition (pp. 420-428)

Case: The Department Store Employees Union was the exclusive collective-bargaining agent for all of the stock and marking employees employees of the Emporium Capwell Co. The labor agreement prohibited employment discrimination on the basis of race and discrimination against union activity. The contract had a no strike/lockout clause, and grievance arbitration process for any contract violation, including the antidiscrimination clause.

A group of employees brought complaints of racial discrimination to their union representatives, who initiated the grievance and arbitration process outlined in the collective bargaining agreement. Two employees, unsatisfied with the grievance process despite union action to address race discrimination directly with the employer, refused to participate due to the inadequacy of grievance arbitration in the face of systemic discrimination, walked out and led others to walkout, then picketed the store, and made public statements condemning the company for racism. As a result of these actions, the two employees were fired.

Western Addition Community Organization (of which the two employees, Hollins and Hawkins, were members) filed a charge against the company on behalf of the two employees. The Board held that employees could not circumvent their elected representative to deal with employment discrimination issues. The Court of Appeals

reversed, holding the union may be circumvented when the union fails to remedy discrimination to the fullest extent possible by the most expedient and efficacious means. The court stressed that race discrimination enjoys "unique status," and thus seemed to be carving out a limited exception to exclusivity. The Supreme Court granted cert.

The Supreme Court reversed the circuit court, holding that section 7 of the NLRA does not protect fragmentation of the bargaining unit along racial lines or otherwise.

The Court found allowing minority employees to bargain with the employer separate from the exclusive representation of a majority union would hamper the principles of majority rule and exclusive representation. Discussing the then-recent case of *NLRB v. Allis-Chalmers Mfg. Co.*, the Court emphasized the importance of labor policy's ability to extinguish the individual employee's power to bargain with his employer and transfer that power to a representative acting in the interests of all employees. In addition, the Board has long taken measures to make sure the union represents the minority voices within the bargaining unit. The Court also discussed the adequacy of union procedures for dealing with grievances about discrimination and how minority employees would not be in a position to advance their cause having divided themselves from the bargaining unit.

Douglas dissent: Justice Douglas dissented, arguing the fired employees were engaged in a traditional form of labor protest that were concerted activities protected under Section 7 of the NLRA. In the area of racial discrimination in particular, unions are not in a position to have exclusive control over representation because the grievances concern violations of law and not just mere contract demands. Douglas believed putting the issue in the hands of the union does not follow the holding in *Alexander v. Gardner-Denver* that unions cannot interfere with an employee seeking relief under Title VII.

NOTES (pp. 428-430)

Note 1: The court in *Chelsea Labs* found an individual employee's actions to be protected and not undermining the union where the employee's inquiry about a dialogue with employees after union decertification was not viewed as "destructive of the collective bargaining process" as in *Emporium Capwell.* The Court in *East Chicago* held that a mere walkout, though a wildcat—not authorized by the union, was traditional "concerted protected activity" and did not lose its protection where the employees did not try to undermine the union by seeking to engage in collective bargaining.

Note 2: It should NOT make a difference that they didn't strike, they are still undermining the union and going around the arbitration process. Special opportunities or pay raises would violate *JI Case* unless the employees involved had special skills—but what if the employer valued diversity, and paid more to black employees to keep diversity?

Note 3 Both Schatzki and Finkin go through the arguments in favor of minority union representation. Both articles suggest that exclusivity may come at too high a price

because it serves to foment employer litigation. In minority union bargaining there are no issues about appropriate bargaining units, for example. Finkin explains that while minority union representation would be more efficient for unions in avoidance of litigation delays and employer resistance, individual unions may be weaker and power sacrificed.

Note 4 discusses the issue of direct dealing. Regarding the question at the bottom of the note, it would seem to be an §8(a)(5) violation for the employer to write directly to each union member on the eve of a decertification election, no? After all, unlike in the initial election to determine union representation, the union is the exclusive representative of the workers, at least until it loses a decertification election, right?

Note 5 again (see note 3, p. 416) raises the issue of exclusive representation in the context of public sector bargaining. The note discusses the Tennessee legislature's amendment of its public sector law to abolish exclusive representation in favor of seating the percentage that opts for representation at the table in collaborative conferencing. It's a blow to union power unless the union would not have garnered a majority. This type of representation is better than not having any representation at all, right? Plus, there would be no freedom of association issue, like the one raised in note 3, p. 416.

C. REGULATION OF ACCESS

This section treats NLRA rules modifying the absolute right of the employer at common law to control who may use or enter its property, and what such persons may say or do once there. Three areas are covered: (1) employee access to co-workers; (2) access by nonemployee organizers, and (3) access in light of the "laboratory conditions" that are supposed to protect employee free choice during the organizing campaign.

An important theme permeating this section is whether the law, not to mention the agency charged with applying it, has kept up with developments in communications technology – most notably e-mail, but also instant messaging and apps like Instagram, Twitter, and SnapChat – that have transformed society, if not the workplace, since the mid-1990s. You should take advantage of your students' proficiency and comfort with these communications technologies, which arguably make access to employees more convenient and less expensive than ever.

1. EMPLOYEE ACCESS TO COWORKERS

The seminal case of *Republic Aviation Corp. v. NLRB*, 324 U.S. 793 (1945) upheld the Board's presumption that no-solicitation rules are illegal as applied to workers soliciting coworkers during non-working time, such as breaks and periods before or after work. The case also upheld the presumption that prohibitions on wearing union buttons or other insignia in the workplace are illegal. The rationale was that, to exercise their Section 7 rights intelligently, employees must have access to information about unions and their potential effects on the terms and conditions of work, and their co-workers must be able to express themselves on these subjects.

Republic Aviation involved a traditional industrial workplace where the employer owned the factory and employed the employees who worked there. In contrast, the chapter offers cases treating the more complex employment relationships found in the modern workplace.

New York New York Hotel I (pp. 433-434)

This case holds that off-duty employees of a restaurant may pass out handbills to customers entering non-work areas of an adjacent facility that is owned or operated for multiple uses: here, the "porte cochere" area of a combined hotel and gaming establishment. The case is significant in part because it recognizes that the line between work and non-work areas – and indeed, between the private and quasi-public spheres – is blurrier than it used to be, especially in modern retail establishments.

NOTES (PP. 434-436)

1. The note reports the subsequent case history of *NYNY I*. Observe that the matter took a decade to resolve, not counting the time it took the General Counsel to investigate the charges and to issue and prosecute the complaint; *NYNY I* was decided by the Board in 2002, but *NYNY III*, the resulting decision after remand, was not decided by the Board until 2011, and not enforced by the Court of Appeals until 2012.

2. *Déjà vu all over again?* The note reports the subsequent case of *NYNY II*. There off-duty employees were again cited by police and removed from the premises for distributing handbills in the hotel's porte cochere area -- this time, inside the casino, but outside two restaurants owned by a third party. The Board majority rejected the employer's defense that the areas inside the casino, but outside the two restaurants, were work areas subject to regulation. The main reason: the porte cochere area near the restaurants was really a series of passageways through which customers and employees alike had to pass in order to come and go. To hold that such passageways constitute work areas would effectively deny employees the right to engage in protected distribution anywhere on the employer's property. Member Hurtgen dissented as to the area outside the America restaurant, which he felt was clearly a work area. Student who are familiar with such areas from weekend trips to Las Vegas could be invited to say whether agree with the majority or Member Hurtgen, and why.

3. *Law and litter(ature)*. The note asks about the legitimacy of the employer's goal of avoiding litter. Although *Stoddard-Quirk Mfg. Co.*, 138 N.L.R.B. 615 (1962), suggests that this concern can justify prohibiting the distribution of literature in working areas, it does not support a blanket prohibition on all solicitation on the employer's property during working hours. Students might be asked whether, in light of e-mail and other paperless forms of communication, the littering cases are anachronisms with little relevance to the modern workplace.

4. *Unions and waivers*. The note asks whether and under what circumstances a union may waive the employees' rights to solicit their coworkers on employer property. The two cited cases – *NLRB v. Magnavox Co.*, 415 U.S. 322 (1974), and *NLRB v. United Techs. Corp*., 706 F.2d 1254 (2d Cir. 1983) – suggest that a union has some discretion to make such waivers, but perhaps less discretion in cases in which the waiver undermines employees' free speech rights to choose or reject collective representation.

New York New York Hotel III (pp. 436-446)

This case articulates a new test for treating a situation in which a property owner seeks to exclude, from nonworking areas open to the public, the off-duty employees of a contractor who are regularly employed on the property in work integral to the owner's business. The new test is that the property owner may so exclude such employees "only where the owner is able to demonstrate that their activity significantly interferes with his use of the property or where exclusion is justified by another legitimate business reason, including, but not limited to, the need to maintain production and discipline." Because this test was not satisfied by the New York New York Hotel as to the handbilling employees of Ark (a contractor that provided food service to the hotel's guests in three sit-down restaurants and a food court), the hotel violated Section 8(a)(1) when it attempted to remove the handbillers.

NOTES (PP. 447-448)

1. *The access question*. The note presents an increasingly common question at multi-use facilities: when and where must off-duty employees of an onsite contractor have access to the premises of the property owner to distribute handbills in support of their organizing efforts? *NYNY III* was yet another attempt by the Board to answer this question by striking the proper balance between the common law rights of property owners and the Section 7 rights of employees. The majority adopted a new test that presumes the right of the contractor's employees to gain access and distribute handbills, and places the burden on the property owner to justify exclusion on narrow grounds. The dissent thought the majority had things backwards. Students should review *Hillhaven Highland House*, 336 N.L.R.B. 646 (2001), *enforced*, *First Healthcare Corp. v. NLRB*, 344 F.3d 523 (6th Cir. 2003), an earlier decision that was cited with approval as analogous authority.

2. *On-duty vs. off-duty*. The note cites established Board law governing an employer's rules restricting access by off-duty employees to its premises. A caveat: the citation to closely analogous case involving a hotel in a mixed-use complex, *J.W. Marriott at Los Angeles L.A. Live*, 359 N.L.R.B. 392 (2012), must be placed in context, because the two members who formed the majority were later declared to be impermissible recess appointments. *See NLRB v. Noel Canning*, 573 U.S. ___, 134 S. Ct. 2550 (2014).

3. *Forgive us our trespassers?* The note asks, among other things, whether an employer-owner of a mixed-use facility may invoke the First Amendment to defend charges that it violated the Act by calling the police in an effort to remove employee solicitors. The NLRB said no, , but theD.C. Circuit, speaking through Judge (now Justice) Kavanaugh, said yes. *See Venetian Casino Resort LLC*, 357 N.L.R.B. 1725 (2011), *order vacated, Venetian Casino Resort, LLC v. NLRB*, 793 F.3d 85 (D.C. Cir. 2015).

4. *What stays in Vegas?* The note asks whether the pathways in Las Vegas hotel/casinos are work or nonwork areas, and whether employees should be allowed to distribute handbills in them. The questions have no easy answers, because they depend on the context. So the students' answers have be to be nuanced, just as the majority's approach was nuanced in *NYNY III*.

5. *California dreaming?* The cited case, *Ralphs Grocery Co. v. UFCW Local 8*, 55 Cal. 4 1083 (2012), deals with a California statute that provides special protection to peaceful labor picketing, even on private sidewalks. Few if any other states have abrogated the common law of trespass to such a degree. Student can be invited to say whether they agree or disagree with California's approach.

6. *Justice delayed*. The note asks about the 16-year span that it took to get from issuance of the NLRB's original decision in *NYNY I* to enforcement of its later decision in *NYNY III*. From time to time the Courts of Appeal refuse to enforce otherwise valid Board orders simply because it has taken too long to bring matters to a close. Students can be invited to say whether either the Board or the discriminatees should be punished for delays not of their making. Some of the potential reforms that could be discussed include the greater use of injunctions under Section 10(j) of the Act and amending the statute to impose punitive damages or other deterrent-oriented remedies.

Purple Communications Inc. (pp. 449-458)

The case holds that employees' use of e-mail for statutorily protected communications during nonworking time presumptively must be permitted by an employer who have chosen to give employees access to its e-mail system. It overruled *Register Guard*, 351 N.L.R.B. 1110 (2007), which had rejected the notion that the employer's basic property right to regulate or restrict employee use of company property were unchanged by the advent of e-mail and other electronic communication technologies.

NOTES (PP. 458-461)

1. A *wake-up call for Rip Van Winkle?* The note asks whether students agree with *Purple* that *Register Guard* placed too much emphasis on employers' property rights and too little on the importance of e-mail as a means of workplace communication, thereby abdicating its responsibility "to adapt the Act to the changing patterns of industrial life." The answer depends on whether and to what extent one believes that the

NLRA modified the employer's common law right to control its private property. A lively discussion of this topic fits here.

2. *Statutory rights and statutory wrongs*. The note asks whether dissenting Member Miscimmarra is right that *Purple* gave employees "a statutory right to use employer e-mail systems for nonbusiness purposes." The answer is that it depends on one's perspective. The majority's answer might be that it is merely being faithful to NLRA principles, such as nondiscrimination. Besides, the "right" is limited; at an employer who grants no access for business purposes, or who grants no access at all, employees have no rights. The dissent's answer might be that the decisions works a fundamental change in regulation of employer property rights. For example, only a generation prior, the Board held that providing pencils, paper, telephones, and calculators to employees could violate the Act.

3. *The law unintended consequences*. The note asks whether unintended consequences are part of the price to be paid for the adoption of any new rule or standard, whether it concerns e-mail access or anything else. The answer has to be yes – human endeavors being what they are.

4. *Blog, blog, blog*. The note cites the article Rafael Gely & Leonard Bierman, Social Isolation and American Workers: Employee Blogging and Legal Reform, 20 Harv. J.L. & Tech. 287 (2007), to encourage students to think about their own use of blogs, social networking websites, and other new media. Where would this tech-savvy generation draw the boundary between proper and improper use? Students can be asked whether their freedom (or lack thereof) to take advantage of such devices for socializing with friends, posting cat videos, and engaging in other forms of personal use should be stronger, weaker, or the same as the rights of workers who might use these devices to exercise their Section 7 rights – which, after all, are rights guaranteed by public policy.

5. *Discriminatory enforcement: The Case of the Girl Scout Cookies*. The note observes that *Register Guard* was harshly criticized, but even that case recognized that an employer who otherwise had a right to exclude could not do so discriminatorily. The rub is what constitutes discrimination: is granting any exception to no-access or no-solicitation rules arbitrary, or may the employer grant access to charitable solicitors (e.g., Girl Scouts selling cookies) but deny it to others (e.g., union organizers selling collective bargaining)? Recalling the Enderby problem, the note then asks whether a company rule that granted lobby access to its building in High Tech Park to representatives of the Red Cross or the Salvation Army, but not to professional organizers from the Programmers Union, be discriminatory. The answer may depend on which circuit the case is litigated in. If the case is filed in the Tenth or District of Columbia Circuits, the answer would seem to be yes; if it's filed in the Second or Sixth Circuits, the answer would seem to be no. In cases where discriminatory access is found, the usual remedy is to permit access to union solicitors as well as other solicitors. In the long run, the employer may escape prosecution for discrimination by barring access across the board to all types of solicitors.

e-maile-maile-maile-maile-maile-maile-mail6. *Getting one's kicks – on Route 86*. The note asks whether an employer violates Section 8(a)(1) if it programs the router to block

all e-mail messages coming from union e-mail addresses. This answer too may depend on the circuit where the case is filed, and whether the purpose was to exclude union solicitations while permitting other solicitations. The case for blocking all e-mails coming from ".org" e-mail addresses might be easier to make if the employer's purpose is to stop to all non-work-related solicitations from any non-profit using the "org." address, and if unions are not the only non-profits singled out for such treatment.

2. ACCESS BY NONEMPLOYEE ORGANIZERS

Lechmere, Inc. v. NLRB (pp. 461-465)

The holding of this case is that, whereas employee organizers do have some rights to be present and to solicit their co-workers on company property, nonemployee organizers have no such rights, and may be treated as trespassers and barred from company property altogether. The effect of the decision is that the common law rules of access to private property have continuing vitality, and the Board must not disturb them, at least as to nonemployees seeking access.

NOTES (PP. 465-467)

1. The note asks what effect, if any, the failure to add the Levy amendment should have on the construction of the statute. The citation to Professor Dannin's book is designed to get students to think "outside the box" – that is, to consider the possibility of outcomes other than the one reported in *Lechmere*. The outcome was hardly pre-ordained; with the switch of a single vote, the result could have gone the other way. Even for those who concur with the Justice Thomas and the majority, the case should raise some concern that the Court may pick and choose when it will adhere to the plain meaning rule of statutory interpretation, and when it will ignore that rule. Similarly, for those who dislike the result, the reference to the Levy-Magruder Memorandum should give pause; its implication is that the plain meaning rule undermines Professor Dannin's argument, because Congress had the opportunity adopt her definition, yet passed.

The early case of *Marshall Field & Co. v. NLRB*, 200 F.2d 375 (7th Cir. 1952), is cited as further proof of what the student has already learned in this section: it's difficult to regulate access by non-employee organizers. There the Seventh Circuit rejected the NLRB's attempt to permit access by nonemployee organizers to various areas of a retail store. The Board had tried to distinguish between "selling" areas, where such solicitors could be excluded to avoid disturbing customers, and "nonselling" areas, such as aisles, public waiting rooms, and washrooms, where solicitation by nonemployees could be permitted. Granting the employer's petition for review, the court held that such a distinction could not meaningfully be drawn, and that the employer was within its rights to exclude all non-employees, including union organizers, from all areas inside the store, even the "nonselling" ones.

2. *The NLRA, the common law, and property rights*. The citation to Professor Cameron's article is more food for thought about the possibility that Professor Dannin could be right in arguing that the *Lechmere* Court got it wrong. Although the NLRA hardly has done away with common law property rights, it has certainly modified them – and the boundaries of those modifications are sometimes hard to locate.

3. *A Penny for your thoughts*. The note asks a series of questions designed to show how difficult it can be for organizers like Penny, the pro-union programmer at Enderby, to communicate with the public. Once fired, she became a non-employee. Therefore, under *Lechmere*, she could be barred as a trespasser from any and all of the

following areas: the grounds of High Tech Park; the parking lot where Enderby employees park their cars; the lobby of the 10-story building where Enderby maintains its office; and the fifth floor where Enderby is headquartered. If Penny hadn't been fired, then she would have been entitled to limited access in accordance with the rules applying to off-duty employees, discussed supra.

4. *The importance of state law*. The note asks what happens if state law does not regard the union organizer's solicitation on the employer's property as a trespass. Under *Lechmere*, state law governing the use and control of private property, including the law of trespass, must inform the Board's interpretation of the NLRA. A few states – California comes especially to mind – have reinterpreted their own trespass laws to recognize the existence of limited public forums from which union organizers and other solicitors may not be barred, except in accordance with reasonable time, place, and manner restrictions. In addition to the decisions cited in the note, the following decisions reaffirming California's approach may be consulted: *Fashion Valley Mall LLC v. NLRB* (Fashion Valley I), 451 F.3d 241 (D.C. Cir. 2006); *Fashion Valley Mall LLC v. NLRB* (Fashion Valley II), 42 Cal. 4th 850, 69 Cal. Rptr. 3d 288, 172 P.3d 742 (2007); *Fashion Valley Mall LLC v. NLRB* (Fashion Valley III), 524 F.3d 1378 (D.C. Cir. 2008), *cert. denied*, 555 U.S.819 (2008); see also, e.g., *United Brotherhood of Carpenters & Joiners Local 586 v. NLRB* (Macerich Management Co.), 540 F.3d 957 (9th Cir. 2008). For a more comprehensive treatment of the *Fashion Valley* litigation, see Douglas E. Ray, William R. Corbett & Christopher David Ruiz Cameron, Labor-Management Relations: Strikes, Lockouts and Boycotts § 11.9 (West ed. 2018-19).

5. *The lunch counter cases*. The note asks whether a retail store employer who operates a cafeteria that is open to the public can bar a union organizer from entering the cafeteria, purchasing a meal, and sitting at a table to speak with employees who are on their lunch breaks about the benefits of unionization. The answer seems to depend on which stage of the Farm Fresh litigation one examines, and highlights the controversial nature of the inquiry. Compare *Farm Fresh, Inc.*, 326 N.L.R.B. 997 (1988) (overruling *Montgomery Ward*), with *Farm Fresh, Inc.*, 332 N.L.R.B. 1424 (2000) (vacating prior ruling).

6. *Lechmere in the public sector*. The note asks whether *Lechmere* should apply to state public sector labor relations. The citation to Illinois practice is offered to show that states are free to depart from the traditional common law view, expressed in *Lechmere*, that non-employees are trespassers. Such departures have been more frequent in the public sector workplace, which is excluded from the NLRA, and governed by state law instead.

Technology Service Solutions I (pp. 468-472)

The nominal holding of this case is that a union seeking to organize a single bargaining unit composed of 236 employees scattered across eight western states is not entitled to an *Excelsior* list of the names and addresses of voting employees unless and until it has filed an election petition and made the requisite showing of interest.

(*Excelsior* is discussed in the text at pp. 468 & 474.) The true significance of the case, expressed over the strong dissent of Member Fox, lies in its borrowing of principles articulated in *Lechmere* to deal with the union's predicament – namely, that it was tough to organize employees who were hard to communicate with, because they were widely dispersed and lacked any shared workplace. Relying on *Lechmere*, the majority found that it would be premature to require the employer to turn over an *Excelsior* list, unless the union could show it had "no reasonable alternative means" for communicating with workers in the bargaining unit.

NOTES (PP. 473-474)

1. *Traditional vs. electronic workplaces.* The note summarizes the thesis of the article by Professors Malin and Perritt, who anticipated the argument that, whereas person-to-person solicitation in the traditional workplace could be disruptive, electronic solicitation in the modern workplace doesn't have to be. You can point out that, in the age of Instagram, SnapChat, Twitter, and whatever new medium is next, the trend is likely to continue.

2. *Lechmere, Schmechmere*. The note asks whether the ULP charge in *Technology Service Solutions I* effectively imposed on the employer a duty to aid the union's organizing drive, as opposed to a duty to refrain from interfering with such drive. The answer is no, unless one believes that the employer "owns" the information in the list. Posting the question could provide another opportunity to discuss property vs. privacy rights in the workplace. 3. *Whose property?* The note asks whether an employer can claim to have a property interest in its employees' names and home addresses. The answer is probably no; any property, privacy, or other right attaching to the information in an *Excelsior* list would seem to belong to the employees, not their employer. A response to this could be that an employer has a duty to speak up and protect the interests of unknowing employees before those rights are invaded by third parties. The rebuttal, however, could be that no such fuss is raised when an *Excelsior* list is produced upon the filing of an election petition and sufficient showing of interest; why should things be any different at an earlier stage in the union campaign?

4. *Throwing a "brick" at Windows?* The note states the holding of a subsequent enforcement proceeding, *Technology Service Systems II*, 334 N.L.R.B. 116 (2001), which determined the proper remedy to be the posting of a notice advising employees of the company's violations of the NLRA. For years, the time-honored method of giving such notice has been to post a piece of paper it in a common workplace area, such as the bulletin board of the break room or cafeteria. Because TSS had no such common area, the NLRB ordered that letters be sent to each affected employee. But it rejected the General Counsel's request that e-mail notice also be sent to each employee via his or her "brick," or personal computer terminal. The note asks whether this makes any sense. The answer is probably no, but students should be encouraged to draw upon their experiences; for example, they can register for courses online, so would it make sense to receive confirmation of enrollment by "snail" mail, or e-mail?

3. ACCESS AND LABORATORY CONDITIONS

The text summarizes the law of access to the *Excelsior* list in the context of the "laboratory conditions" doctrine. Reference is made to the final rule streamlining R Case procedures, which went into effect in 2014, but are viewed with skepticism by the Trump Board. The rule requires that employees' e-mail addresses, as well as personal telephone numbers, be provided as a matter of course, if available to the employer.

D. REGULATION OF SPEECH

This section discusses the tension between Section 8(a)(1) of the NLRA, which outlaws the employer's interference, restraint, or coercion of employees in their choice of a bargaining representative, and Section 8(c)(1), which is sometimes referred to as the employer's "free speech" provision, as the two provisions bear on the regulation of what the employer says to workers during an organizing campaign, and how the employer says it. The key phrase in Section 8(c)(1) is the qualifier "if such expression contains no threat of reprisal or force or promise of benefit." Thus the Act attempts to draw a fine line between impermissible coercion and protected free speech.

NLRB v. Gissel Packing Co. (pp. 476-479)

The holding of this case insofar as Section D is concerned is that an employer's repeated threats to close a plant in order to persuade employees to vote against the union amounts to coercion under Section 8(a)(1), not free speech protected by Section 8(c)(1). (The holding of the same case insofar as Section FG which discusses the bargaining order remedy as one of three routes to union representation, is concerned, is discussed in the text at pp. 546-559).

NOTES (PP. 479-482)

1. *Line drawing.* The note first asks how fine a line should be drawn between free speech and coercive speech when the underlying substantive message is the same. For example, the statement, "You can avoid a lot of trouble if you just refuse to sign that authorization card," would probably be considered less threatening than the statement, "If a union comes here, bargaining will start from scratch." Depending on the context, variations on the latter statement are more likely to be found coercive. *See, e.g.*, *Shaw's Supermarkets, Inc*., 289 N.L.R.B. 844 (1988), *enf. denied*, 884 F.2d 34 (1st Cir. 1989). The note next asks whether a line can be drawn between statements that unionization ***can*** result in lower wages and benefits and that unionization ***will*** result in lower wages and benefits. The Board's answer is yes; long-settled precedent holds that predictive statements having a basis in fact and carefully phrased statements about the parties' legal rights are permissible, but sweeping threats about what would happen if the union was voted in are not. Apropos of the former, an accurate statement of current law to the effect that economic strikers can be permanently replaced in the event of a strike is not considered coercive. See *S. Monterey County Hosp.*, 348 N.L.R.B. 327 (2006).

2. *Monkey business.* The note first asks whether it is lawful for a factory manager to tell employees that he can teach monkeys to weld, the painters could all be replaced within ten minutes, union people are stupid, and union supporters are just being used by union bosses who live it up on members' dues. The answer is no. In *Trailmobile Trailer, LLC*, 343 N.L.R.B. 95 (2004), such harassing, disparaging, and denigrating statements were found to be coercive in violation of Section 8(a)(1), and to exceed the bounds of permissible propaganda allowed by Section 8(c). The note next asks whether

it should matter if the manager adds that wages will continue to be set by management, union or no union. This is a somewhat closer question, but in *Trane Co.*, 137 N.L.R.B. 1506 (1962), the answer, in the context of other unfair labor practices committed by the employer, was that such statements are unlawful. The note finally asks what if the manager says, "You should know that in collective bargaining you can lose what you have now." In *Wild Oats Markets, Inc.*, 344 N.L.R.B. 717 (2005), the answer was that this statement was lawful, because it was an accurate statement of what could happen in negotiations. All of which illustrates how difficult it can be to draw meaningful distinctions between lawful expressions of opinion and unlawful statements of coercion, such as that union organizing is futile.

3. *Misrepresentations*. The note summarizes the NLRB's shifting positions as to whether and how factual misrepresentations made by employers or unions during representation campaigns can spoil the required laboratory conditions. It also summarizes the Board's changing precedents as to forged documents.

4. *The "captive audience" speech*. The note asks whether a captive audience speech delivered to programmers by Enderby CEO Steve Workman a few days before the election, and reprinted in the text, tainted the required laboratory conditions. The statements in the speech must be considered individually and in context. Consider the following statement: "Should the Union insist that the Company take action which will result in higher prices, we have expressly been informed by our two principal clients that they will immediately cease purchasing our programming services." The Board would likely find this speech to be coercive, but the courts of appeals would probably split over whether to enforce its order. For example, in *DTR Industries Inc. v. NLRB*, 39 F.3d 106 (6th Cir. 1994), a similar statement was found to be coercive by the Board, but not by the Sixth Circuit; the employer's prediction that it could lose half its subcontracting business had a reasonable basis in fact. In *NLRB v. Village IX Inc.*, 723 F.2d 1360 (7th Cir. 1983), a restaurant owner's speech calling the union a "cancer" and asserting it was "a statement of fact" that the business would fail if a union came in was not found to be coercive by the Seventh Circuit. In *Dal-Tex Optical Co.*, 137 N.L.R.B. 1782 (1962), a factory owner's speech stating that if a union came in, it would call a strike, causing employees to lose their wages and jobs to permanent replacements, was found to be coercive by the Board. Finally, in *Larson Tool & Stamping Co.*, 296 N.L.R.B. 895 (1989), a case involving analogous statements in preelection literature distributed by the company, claims to the effect that the union had a history of calling strikes, which could cause workers to lose their jobs, was found to be coercive by the NLRB. The note also asks whether a re-run election should be held if the Programs Union loses. The answer is typically yes, if the speech tainted the required laboratory conditions. It would not matter whether the union lost by two or 20 votes, so long as the speech reached or potentially reached substantially all of the affected voters.

5. *Racial prejudice*. The note cites Board cases in which the required laboratory conditions were found to have been tainted by "irrelevant, inflammatory appeals" to racist sentiment.

E. OTHER TYPES OF COERCION

This section deals with three major categories of coercion not uncommonly found in union organizing campaigns: (1) the grant or withdrawal of benefits; (2) interrogation and polling of employees as to their support for the union; and (3) surveillance of employees.

1. GRANT OR WITHDRAWAL OF BENEFITS

This subsection deals with the problem illustrated by *Exchange Parts*: the legal presumption attaching to the employer's grant or withdrawal of benefits in the context of a union organizing campaign.

NLRB v. Exchange Parts Co. (pp. 483-485)

The holding of this case is that an employee's grant or promise benefits before a representation election is just as coercive as withdrawing or threatening to withdraw benefits. In Justice Harlan's famous phrase, the former is like "a fist inside the velvet glove," because employees "are not likely to miss the inference that the source of benefits now conferred is also the source from which future benefits must flow and which may dry up if it is not obliged." Therefore, both actions violate the NLRA.

NOTES (PP. 485-486)

1. *Of fists inside velvet gloves.* The asks, in effect, whether there is any legal difference between blandishments designed to persuade employees to decertify an incumbent representative versus those designed to persuade them not to vote for union representation in the first place. The answer is no. In the context of any change in the status of collective representation, both the grant and withdrawal of benefits by the boss, who holds ultimate power over the job, are considered inherently coercive.

2. *Enderby revisited.* In a variation on the Enderby hypothetical, the note supposes that the company had offered to increase pay or benefits to programmers in hopes of undermining union support. It then asks whether it would pervert the purposes of the NLRA to punish the employer (and as a practical matter, the employees) for instituting the very terms and conditions of employment that a union might seek to negotiate if it ever got a chance to sit at the bargaining table. To the layperson, the answer would seem to be yes. To the seasoned labor lawyer, however, the answer must to be no. There are at least two reasons. First, the main point of *Exchange Parts* is that unilaterally granted benefits can be unilaterally withdrawn too. Once the threat of unionization passes, an employer would have little incentive to keep the new benefits in place, and could unilaterally toss them out. Only a bilaterally negotiated union contract can ensure enforcement of promised benefits. Second, the typical remedy ordered by the Board in *Exchange Parts*-type cases is to leave the unilaterally granted benefit in place, even if its implementation is later found to have been an unfair labor practice. This isn't

"punishment"; rather, it's a form of making somebody lie down in the bed he made. Other make-whole relief usually includes cease-and-desist and notice-posting orders.

3. *Is timing everything?* The note cites cases illustrating exceptions to the usual inference that unilaterally conferring benefits during a representation campaign is for the purpose of influencing the outcome of the election. In these cases, the employer offered credible reasons why it granted the benefits – mainly, that the timing was more coincidental than conspiratorial.

4. *Ask and ye shall receive?* The note cites cases demonstrating that the timing of an employer's reaching out to its workforce for the purpose of asking how the terms and conditions of employment might be improved can be risky, if it occurs during a union organizing drive. Such solicitation of grievances is considered a ULP. Even putting out a suggestion box can be suspect, if suggestions were not solicited before the organizing campaign started.

5. *Raffles and prizes*. The note asks whether Enderby could hold a "Vote No Raffle" at which prizes, such as free laptop computers, were given away to employees by random drawing. The answer is maybe. The giving of raffles or prizes to persuade employees not to vote for the union may be permitted, but not if eligibility to win "is in any way" tied to voting or to being present at the election site, or if the raffle is conducted during the 24-hour period leading up to the election. The note invites students to point out that the details bearing on these points would be needed before one could fully answer the question

6. *Employer vs. union speech*. The note cites cases reminding us that, even though this section is focused on employer misconduct, unions too are prohibited from coercing employees in their choice of bargaining representative.

2. INTERROGATION AND POLLING

This subsection highlights the basic tension between the employees' right to be free of coercion or intimidation in the exercise of their Section 7 rights and the employer's need to communicate with and understand its workforce. Thus interrogation of employees is unlawful if in light of all the circumstances it would unreasonably tend to coerce them. But polling to determine the extent of support for union representation is permitted, so long as certain conditions are satisfied. A key reason: polling can help the employer determine whether it may withdraw recognition on the ground that the union actually has lost majority support among employees, or on the ground that the employer has a good faith belief this has occurred, consistent with the principles announced in *Levitz Furniture Co*., 333 N.L.R.B. 717 (2001) (discussed in text at pp. 1132-1142).

3. SURVEILLANCE

This subsection deals with surveillance, or the monitoring of employees who are engaged protected concerted activities. In general, such surveillance is lawful, so long as it does not unreasonably tend to coerce or intimidate employees in the exercise of their Section 7 rights. But conspicuous surveillance that causes such coercion or intimidation, or that otherwise interferes with protected concerted activities, may be unlawful.

In this era of easy access to cellular telephones, tablets, tiny video cameras, and other electronic devices capable of making quick and inexpensive picture and sound recordings, recorded surveillance deserves special mention. The Board has set a "lower threshold" for finding such surveillance unlawful. *See Allie-Kiski Medical Center*, 339 N.L.R.B. 361, 365 (2003). A prominent example of this can be found in the common organizing campaign tactic of soliciting employees to participate in recorded interviews in which they may be asked to express antiunion views. Special rules govern such solicitation. *See Allegheny Ludlum Corp. v. NLRB*, 301 F.3d 167 (3d Cir. 2002).

Allegheny Ludlum Corp. v. NLRB (pp. 489-492)

This case upholds, over the employer's objection, the Board's five-factor test for deciding whether an employer may lawfully solicit employees to appear in an anti-union campaign video. The factors are laid out in the text (pp. 490-491).

NOTES (P. 492)

1. The note asks whether the five-factor test of *Allegheny Ludlum* is sufficient to protect employees from having to make an "observable choice" about the merits of unionization. The instructor should bear in mind that the reticence of some members of an older generation to appear on camera, for whatever reason, may not be shared by students from a younger generation who were reared on Facebook.com, "reality" television programs, and other public airings of what the instructor might consider private personal business. The note then asks whether the same factors should apply to union as opposed to employer solicitation of campaign-related video recordings. Although the Board has gone back and forth on this question, the answer currently seems to be yes. *See Randell Warehouse of Ariz., Inc*. (Randell II), 347 N.L.R.B. 591 (2006).

2. Recalling the Enderby hypo, the note supposes that the company plans to send each programmer a confidential e-mail message soliciting participation in making an anti-union video, and promising a handsome bonus to everyone who discreetly replies "yes" to the message. It then asks whether this would constitute interference, restraint, or coercion – that is, the "fist in the velvet glove" described by Justice Harlan. The "yes" argument is based on the unique properties of e-mail. E-mail enables the employer to identify precisely who receives the message, whether the message is opened, and what the response is (if any). In other words, e-mail solicitation could enable the employer to make an unlawful, "observable choice" of worker preferences. The kicker is that the solicitation would arguably take place in a coercive atmosphere, because Penny has just been fired for engaging in protected activity. The "no" argument is that e-mail messages can be set up to "blast" the workforce anonymously. It could be done in a fashion that

requires employees to reply on their own timetables, without a supervisor haranguing them to choose. And so far as the atmosphere is concerned, no adjudication as to the legality of Penny's firing has occurred. That is, the answer to the hypothetical depends on the context in which the e-mail was sent.

3. Following a brief review of the pertinent literature published by Professors Getman et al., Weiler, and Dickens, the note asks whether the speech of employers, employees, or unions should be deregulated during organizing drives. There is no right or wrong answer to this question. Students should be encouraged to stake out a position and back it up with up evidence from the cited research, the policies of the Act studied to date, and if applicable, any personal experience in the workplace.

F. PROTECTION AGAINST DISCRIMINATION

NLRB v. Transportation Management (pp. 493-497)

Case: A bus driver, Santillo, tried to get his fellow employees interested in joining the Teamsters' Union. His supervisor took the driver's actions as a personal offense and fired the driver, telling the driver he was being fired for leaving his keys in the bus and taking unauthorized coffee breaks. The bus driver filed a complaint with the Board, and the ALJ found the employer illegally fired him for union activity. The Board affirmed, saying the employer failed its burden under the *Wright Line* test, which provides that once the GC proves that the employee's protected Section 7 activity was a substantial or motivating factor in the discharge, the burden shifts back to the employer, as in an affirmative defense, to prove he would have taken the same action regardless. The Court of Appeals rejected the Board's decision, believing the Board's General Counsel retained the burden. The Supreme Court granted cert. and reversed, holding the burden imposed by the Board on the employer under *Wright Line* was reasonable as it is like proving an affirmative defense.

The Court found that the Board's analysis in *Wright Line* did not change or add elements that the General Counsel has the burden to prove under the NLRA. The Court did not see this as burden shifting, but rather as the establishment of an affirmative defense the employer would reasonably have the burden of proving beyond a preponderance of the evidence. The Court thus found the Board's application of *Wright Line*, while not required by the Act, was a permissible construction of the Act. As applied to the instant case, the Court found that while the employer could have fired the driver for taking breaks, it was a "transgression" that happened all the time and the employer had never before fired an employee for doing so. It was also the employer's practice to first warn the employee of disciplinary consequences before taking action, which did not happen in this case.

NOTES (PP. 497-500)

Note 1. Both evidentiary frameworks used to prove Section 8(a)(3) violations come from other areas of law where proving discrimination is also critical, such as equal protection

violations under the Constitution and race and gender discrimination under Title VII. Both the pretext and mixed motive frameworks do the same thing—they help to prove causation. With respect to proving causation, neither framework is superior. Both are discussed in the casebook because it is important that students in law school be exposed to both since students will encounter them in practice and judicial opinions about the frameworks, even at the level of the US Supreme Court, have been less than clear. A good explanation of these frameworks generally and their link to causation is Martin J. Katz, *The Fundamental Incoherence of Title VII: Making Sense of Causation in Disparate Treatment Law*, 94 Geo. L. J. 489 (2006). In the *Holo-Krome Co.* case cited in the text, Circuit Judge Jon O. Newman explains the difference between pretext and dual/mixed motivation in finding that the NLRB erred with respect to its classification and exclusion of evidence in a Section 8(a)(3) case.

Note 2. One possible explanation for the NLRB preferring the mixed motive framework is that the framework more explicitly follows the NLRA-- the "for cause" termination protection in the statute favoring employers tracking with the affirmative employer defense in the mixed motive framework that despite unlawful motivation the employee would have been terminated regardless. The Supreme Court explicitly addressed the similarity between the "for cause" exception in Section 10(c) and the defense allowed in the mixed motive framework. See note 5 below. Unfortunately, the Supreme Court perhaps raises more questions than it answers.

Note 3. *Requirement of Intent:* The third paragraph of the note is perhaps the most critical. Although *scienter* is generally required in Section 8(a)(3) cases, it is not the case for employer actions, typically taken against unions as a whole/group, that are viewed as *inherently destructive.* This doctrine, perhaps best viewed as a "reckless disregard" standard, is rarely found, but is an important weapon in the union arsenal under the NLRA. The doctrine should simply be previewed with students at this point in the class. The concept will be revisited in the upcoming *Darlington* case and then will receive fuller treatment in Chapter 6.

Note 4. *The Prima Facie Case:* The note simply lists the different types of evidence the General Counsel will rely on to make her case. Despite the cautionary note sounded by the Supreme Court in footnote 6 of *Transportation Management* (cited in the text of casebook note 5), the most important element in discrimination cases is the suspect timing of the discharge/demotion.

Note 5. *Section 10(c):* The Supreme Court makes one thing clear in footnote 6 of the *Transportation Management* decision: the "for cause" provision was only intended to prevent the NLRB from presuming intent by the employer to violate Section 8(a)(3) merely because they terminated a union advocate. In mixed motive cases, the "for cause" exception is not an issue because the General Counsel has sufficient evidence to show that unlawful discrimination was a "motivating factor" in the employer's decision. Nonetheless, if the Board wishes to allow for an employer affirmative defense in strong cases, such an element is consistent with the "for cause" language in the statute.

Note 6. This hypothetical was, of course, impacted heavily by the Board's decisions in *Register Guard* and in *Purple Communications.* Before *Register Guard,* the employee and employer would have contested motive. The employee would have shown clearly that the employer acted immediately after her pro-union message was sent out by email. The problem even tells us that the employer acted on the basis of that particular email. Before *Register Guard,* the case would have come down to whether the employer uniformly enforced his non-email for personal uses policy. The case would be accompanied by the GC's argument that Penny's message was more akin to announcement of a company softball game than a truly personal message. Discriminatory enforcement of the rule would go a long way toward showing motive against unionism. In that case, the GC would be able to prove that a motivating factor in the dismissal was Penny's pro-union message, and the full burden would shift to the employer to show Penny would have been dismissed anyway. *Purple Communications* basically reverses *Register Guard.* As a result, Penny may prevail even regardless of discriminatory enforcement by the employer.

Town & Country Electric v. NLRB (pp. 50-503):

Case: Town & Country Electric needed to hire a number of Minnesota-licensed electricians in order to fulfill a construction contract. Through the services of a temporary worker agency, company officials scheduled interviews, screening for those who were willing to work a nonunion job. Because officials were delayed arriving to the interviews, only one applicant who scheduled an interview was waiting for them, along with a dozen members of the local union who did not have interviews. Union officials had learned of the jobs through the ads and encouraged their members to apply and then to organize the jobsite if hired. The officials interviewed one of the union members and then the one scheduled applicant. Neither applicant was hired. The officials found out all the remaining applicants were from the local union. The official in charge of the interviews then claimed to have an important meeting and refused to interview anyone else, except one additional union member that said he had called that morning and set up an interview. That union member was hired through the temporary worker agency for Town & Country, and he indeed subsequently attempted to organize the other employees once on the jobsite. These attempts were met with resistance, and company officials refused to hire him directly onto Town & Country's payroll as would have been required to keep him on the job.

The ALJ concluded Town & Country violated the NLRA because the company failed to establish it would not have interviewed the remaining applicants regardless of their union membership. The Board affirmed. The Court of Appeals affirmed and held that Town & Country violated sections 8(a)(1) and (3). The court applied the mixed motive framework in analyzing the ALJ and NLRB decisions. The court first found sufficient evidence to support the ALJ's finding that the employer's decision not to retain the union member was motivated by his union activity. The court then analyzed the employer's defenses, which included that the employee was not productive and that the employee was creating disharmony in the nonunion workplace. The court found that though the employee may

not have been a model worker, the employer failed to carry it's burden of showing it would have fired him regardless of his protected union activity.

NOTES (pp. 503-505)

Note 1. The Board is less than explicit about the framework it uses in *Town & Country*, but given the preference for the mixed motive framework, it is a good bet the Board is applying it. As mentioned, a textual analysis seems to support this view. *Edward Budd Mfg.*, cited in the note, precedes any of the confusion about alternative frameworks. It is interesting to look at the case and have the class discuss how it would fare under a mixed motive framework.

Note 2. *Town & Country* deals with the issue of *salts*, union paid organizers who apply for jobs with a purpose of organizing a nonunion workplace. The note discusses legal developments related to employer responses to *salts.*

Note 3. *Effectiveness of NLRA Remedies:* Board remedies are limited under the Act primarily to reinstatement and backpay as well as cease & desist/injunctive relief and notice postings. A good question for the class relates to the role of a management attorney advising clients about the NLRA. Isn't it enough that an employer action might be unlawful under the NLRA? Or, is it the lawyer's role to advise the client about remedies under the Act and let the client make its own decision? The ethical implications involved are explored more fully in Stephen Pepper, *Counseling at the Limits of the Law: An Exercise in the Jurisprudence and Ethics of Lawyering*, 104 Yale L.J. 1545 (1995).

Note 4. *NLRA Protection Against Retaliation:* Section 8(a)(4) provides very important protection for workers who proceed against their employers under the Act. It is worth reviewing the actual statutory language with the class, in class, otherwise it tends to lose its hold on student memory.

Textile Workers v. Darlington Mfg. Co. (pp. 506-511):

Case: Darlington Manufacturing Co. was one of a number of textile mills owned and operated by Deering Milliken. Deering Milliken was controlled by Roger Milliken, President of Darlington, and other members of the Milliken family. Deering Milliken operated seventeen textile manufacturers, including Darlington. When the Textile Workers Union won a narrow election victory at Darlington, the board of directors decided to close and liquidate the assets of the Darlington mill.

The Board held that because the mill was closed due to antiunion animus, it was a violation of section 8(a)(3) of the Act. The Board also found Deering Milliken to be a single, integrated employer and therefore DM could be help liable for Darlington's unfair labor practices. The Court of Appeals disagreed, stating that a business had the right to close all or part of its operations even if for antiunion reasons. The Supreme Court granted cert. The Court held an employer has the absolute right to terminate his entire business for any reason, but that right does not cover closing a part of his business due to

antiunion animus. The Court found that such an unfair labor practice did not hinge on whether the employer was a single, integrated employer, but established instead a three-part test for determining liability: 1) do the persons in control have an interest in another business sufficiently related to be able to achieve benefits in that business from discouraging unionization, 2) was the business closed with the purpose of producing such a result, and 3) do the closed business and the other business have such a relationship that it is realistically foreseeable that the other employees would fear the business being closed down if they continued organizational activities.

An employer's right to go out of business would provide the employer with no future benefits and leaves no remedy to employees due to the complete termination of the employer-employee relationship, so even if done under a discriminatory motivation, invoking that right would not be a violation of the Act. However, because such a partial closure can have an effect on the operation of the remaining part of the business and the remaining employees, it could be an unfair labor practice. Because the Board did not consider the impact of the mill closure on the rest of the Deering Milliken business outside of the Darlington employees, the Court remanded for determination if the mill closure had an adverse impact upon unionization in other mills and if there was a showing of employer motivation aimed at achieving such an impact.

NOTES (pp. 511-514)

Note 1. This note discusses what happened on remand in the *Darlington* case. A good question for the class is whether more sophisticated, less outwardly hostile employers can evade the *Darlington* requirements. Even if they cannot, they certainly can avoid providing the kind of evidence Roger Milliken generated. More recently, the General Counsel has had to rely on evidence of union activity at the employer's other facilities, geographic proximity of other operations to the closed facility, the ease of employee interchange or contact across facilities, and discussion about the closed operation by supervisors to employees. See *Bruce Duncan Co.,* 233 NLRB 1243 (1977).

Note 2. It's hard to understand the Court's approach here since it is so out of line with other 8(a)(3) precedent in that the Court's focus seems to be more toward the other employees of the company at other locations than the employees who have been most impacted by the employer's actions. Guessing at the Court's reasoning is pure speculation but there are a few possible explanations. First, the case is a foray into an area of employer privilege—what it cares to do with respect to maintaining or ending business operations. Of course, the Court finds an employer may go completely out of business for any reason, a sort of compromise, but the sense still persists that the Court was uncomfortable impinging too much on traditional business prerogatives regarding the direction of the business. Second, the Court probably felt that requiring the employer to reopen his closed branch/subsidiary was going too far, but a focus on the employees at the closed operation could only have led to such a remedial possibility. The changed focus leads the Court and Board to a remedy of preferred employment at other operations rather than the more "make whole" relief of making the employer reopen the now closed part of its business.

Note 3. The 1955 *Adkins* case cited in the textbook indicates that the employer profiled in the problem would not be found to violate Section 8(a)(3). Since the employer is not explicitly antiunion, apparently we believe his only reason for exiting his Oregon business is that he cannot pay the union rate, which the business agent has "guaranteed" he will end up paying. Also, the profiled employer seems much more sympathetic than Roger Miliken, no? Should that matter in the analysis? No, not really. If the *Darlington* elements are met, as they are in the problem, an employer should probably be held in violation despite the *Adkins* ruling. The overall policies of the Act suggest that if the employees want collective bargaining, they are entitled to it. As will be explained in Chapter 5 on bargaining, the employer cannot be forced to agree to a particular term or provision. Presumably, the hardship on him will be demonstrated and carry the day in bargaining.

Note 4. It's interesting to note that the battle between the NLRB General Counsel and Boeing focused around the mixed motive framework in *Transportation Management* and not the runaway shop analysis of *Darlington.* This may mean a shift away from the *Darlington* framework or it may mean that *Darlington* applies exclusively where the company is responding to "unionization," rather than any kind of economic rationale. In Boeing, it's a close call. If the company says it's moving because of "strikes" rather than because of the "union" per se, it's arguably still an anti-union motivation. The *Darlington* remedy is preferential hiring for union employees from the closed location/line at other company locations/lines. In Boeing, that would have meant preferential hiring for Washington workers in South Carolina where, if willing to make the move, they would have been employed in a nonunion shop. The GC may have argued *Transportation Management* to avoid that kind of remedy, and try instead to get Boeing to keep manufacturing in Washington or agree that the next line would be opened in Washington (which it did, getting Boeing to agree to build the new 737 line in Washington).

G. ROUTES TO UNION RECOGNITION (p. 514)

1. APPROPRIATE BARGAINING UNITS (p. 514)

Students often just look at the statutory language on its surface and try to understand the meaning of the words. Taking that approach to appropriate bargaining units is risky since the whole issue is rife with strategic considerations both for mounting a successful organizing effort as well as for employer defense. The casebook expressly in reference to the Enderby problem at Chapter beginning frames the strategic issues involved in bargaining unit determination and strategy (pp. 514-515). The introduction also mentions a bit of the history behind the statutory language as well as references to the statutory commands of Sections 9(b)(1), 9(b)(2), and 9(b)(3) providing for an election determination by professional employees about a combined nonprofessional/professional unit, an explicit command to the NLRB not to consider the history of craft employee unit determinations in a particular workplace unless craft employees demand it by election, and a requirement that guard employees may not share a bargaining unit with nonguard employees. The proliferation of bargaining units in healthcare since the 1972 NLRB

amendments authorizing such units led to the NLRB rulemaking prompting the American Hospital Association lawsuit discussed in the first case.

American Hospital Ass'n v. NLRB (pp. 516-518)

Case: The NLRB promulgated a substantive rule defining that only eight employee collective bargaining units shall be appropriate in any acute care hospital, with exceptions for 1) extraordinary circumstances, 2) cases in which nonconforming units already exist, and 3) cases where labor organizations want to combine two or more of the eight units. Although the Board had engaged in rulemaking prior, this was the Board's first attempt to make rules following the Administrative Procedure Act's informal rulemaking procedures.

The Court found that the Board had power under Section 6 to make rules (and that the rulemaking power was not somehow waived by non-use). The Court stated that Section 9(b) authorized the Board to decide whether a unit designated by employees for the purposes of collective bargaining is appropriate "in each case," and that the words "in each case" did not act to limit the Board from promulgating a general rule about what is considered an appropriate unit, but rather the words provide the Board the power to resolve disputes regarding appropriateness should any happen to arise. In addition, even with the rule, the Board would have to decide if the rule applied "in each case."

NOTE (p. 518)

More information about the health care unit rule and the *American Hospital* case can be found at Grunewald, *The NLRB's First Rulemaking: An Exercise in Pragmatism*, 41 Duke L.J. 274 (1991). The Board has not used rulemaking, preferring to announce policies and "rules" in adjudication. The reasons are complex, but probably in the main have to do with politics. The Board has been a lightning rod for management criticism and adjudicatory results are less visible and less assailable. Rulemaking requires public notice and broad participation, good things usually, but not necessarily for embattled and overtaxed agencies. For more on this, see Note, *NLRB Rulemaking: Political Reality Versus Procedural Fairness,* 89 Yale L.J. 982 (1980).

Questions About Bargaining Units and the Enderby Chapter Problem (pp. 518-519): Probably the question about whether the NLRB would be violating the Act by combining both Tulsa and Eugene into a single unit is best answered after the *Friendly Ice Cream* case that follows. The short answer is no because 1. The NLRB has great discretion in these matters, 2. The Board is not obligated to find the most appropriate unit, and 3. The Board's single store/plant presumption is only a presumption and can be overcome by the circumstances of an individual case.

Friendly Ice Cream Corp. v. NLRB (pp. 519-524)

Case: The Union sought to represent one of many hundreds of "Friendly" chain restaurants. Friendly argued the scope of the unit sought (a single restaurant) was

inappropriate because "Friendly's" organizational structure was highly centralized, divided into divisions then districts then restaurants with a similar management structure. The NLRB determined a single store unit was appropriate despite the employer's request for a unit of all Friendly's nationwide or in the alternative divisions or geographic areas. The Union was elected and certified, but Friendly refused to engage in collective bargaining,. The Union filed charges and the Board found the employer in violation of the law for failure to bargain. The employer defended by arguing that the unit was inappropriate. **Footnote 3 in the case (p. 520) reminds students that the only way to challenge an election determination is by committing the "technical" 8(a)(5) and pressing the election issues as defenses.**

The Board found the unit appropriate and Friendly's petitioned the First Circuit for review of the Board's decision.

The Court of Appeals held that the Board's determination that a single store unit was appropriate was within its discretion and supported by substantial evidence on the record. According to the Court, the Board is only required to select an appropriate unit, and in doing so, is to consider employee freedom of choice paramount to employer preference and efficiency. The court first applied the "community of interest" test utilized by the Board in bargaining unit determinations. That test requires consideration of a number of factors in determining whether the employees in a given unit share a community of interest, including: (a) geographic proximity of stores; (b) level of employee interchange between various stores; (c) degree of autonomy exercised by store managers; (d) extent of union organization; (e) history of collective bargaining; (f) desires of employees; (g) employer's organizational framework; and (h) similarity in skills, benefits, wages, and hours of work. However, the court emphasized that bargaining unit determinations are required by statute to be made on a "case by case" basis and that courts must heavily defer to the Board. The court applied the NLRB's presumption in favor of single store units and found it to be determinative. The First Circuit addressed Friendly's primary arguments: 1) that the Store Manager has limited authority, 2) that interstore transfers are substantial, and 3) that the Board erred in making a geographic area determination. The court found 1) that while Store Manager has limited authority overall, the Store Manager has significant authority over employees on a daily basis including the ability to discipline, discharge, evaluate, and determine hours and wages, 2) that while the company had a number of interstore transfers, the actual store involved did not, and 3) that the Board's choice of a 15 mile versus a 20 mile radius for considering interchange was within the Board's discretion.

Footnote 4 on p. 522 gives a short history of the single store presumption.

NOTES (524-526)

Note 1. Again, emphasize that while Friendly's arguments were reasonable, the Board must only find "an appropriate," not the "most appropriate" unit.

Note 2. Some industries, like public utilities, are highly integrated and therefore fall under a systemwide presumption of the Board.

Note 3. Despite the Board's finding in *Alyeska,* a close case, consider with your class whether the difference in terms and conditions of employment between the VMT technicians (do not travel and are not supplied food & board by company) and the pumping station technicians (travel and are provided food & board) is stark enough to suggest they should be in separate units despite the fact that all the employees are based at the same location.

4. Note the differences from the NLRA in RLA and state public sector approaches.

Specialty Healthcare (p. 525)

Obama Board introduces a two-step test for appropriate bargaining units, consistent with tradition but harder on those seeking to create a larger or different unit.

1st step: Board applies community of interests test to sought-after unit. If that test is met, then:

2nd step: Board asks whether any additional employees share an "overwhelming Community of interests" with the original group. If so, they are added.

PCC Structurals, Inc. (pp. 526-537))

Case: PCC Structurals manufactures various metal castings for use in jet engines, airframes, gas engines and other metal products. Its operations in Portland consist of three "profit and loss" centers located within five miles of each other. The manufacturing process is the same at all facilities. First, creation of a wax mold casting and pouring in liquid metal to create the casting. Second, inspection and reworking of the casting. The petitioned-for unit were welders who worked in the second stage repairing defects in metal castings. But the unit also one included one rework specialist working in the first stage process. To determine whether the unit was appropriate, the RD applied *Specialty Healthcare* criteria. Thus, the RD first determined whether there was a traditional community of interest. Despite the fact that one welder (the rework specialist) was in a different department and there was no common supervision across the class of welders, the RD found the unit appropriate because all the workers in the proposed unit were welders with many interests in common (the specific facts are set out toward the bottom of p. 527 and top of p. 528). Moving to the scond stage of the *Specialty Healthcare* inquiry, the RD rejected the Employer's contention that all of the production and maintenance workers should be in a single unit because, although the welders have much in common with all p & m employees, the welders are 1) paid at the higher end of the scale, 2) use distinctive equipment, 3) have distinct training and qualifications, and have limited contact or interchange with other employees. Hus, Employer did not carry its "overwhelming community of interest" burden in showing the smallest appropriate unit would be all of the p & m employees.

Law: A full Board majority consisting of Chairman Miscimarra and Members Kaplan and Emanuel overruled *Specialty Healthcare & Rehabilitation Center of Mobile*, 357 NLRB 934 (2011), and reinstated the traditional community-of-interest standard for determining an appropriate bargaining unit in union representation cases. Under *Specialty Healthcare*, if a union petitioned for an election among a particular group of employees, those employees shared a community of interest under traditional standards, and the employer took the position that the smallest appropriate unit had to include additional employees excluded from the proposed unit, the Board would find the petitioned-for unit appropriate unless the employer proved that the excluded employees shared an "overwhelming" community of interest with the petitioned-for group. The Board has now abandoned the "overwhelming" community-of-interest standard and returned to the traditional community-of-interest test that the Board has applied throughout most of its history. Under that test, the Board will assess whether employees in the proposed bargaining unit share interests that are sufficiently separate and distinct from those of the remainder of the workforce to constitute an appropriate unit for bargaining, considering whether the employees are organized into a separate department; have distinct skills and training; have distinct job functions and perform distinct work; are functionally integrated with the Employer's other employees; have frequent contact with other employees; interchange with other employees; have distinct terms and conditions of employment; and are separately supervised.

Additionally, the Board reinstated the standard established in *Park Manor Care Center*, 305 NLRB 872 (1991), for determining appropriate bargaining units in non-acute healthcare facilities.

The case was before the Board on the Employer's Request for Review of a Regional Director's Decision and Direction of Election. The Regional Director found that a petitioned-for unit of approximately 100 welders was appropriate for collective bargaining under *Specialty Healthcare*'s "overwhelming community of interest" standard. Expressing no opinion as to whether the petitioned-for unit was appropriate, the Board remanded the case to the Regional Director for further appropriate action consistent with its Order.

Dissenting Members Pearce and McFerran criticized the majority's decision not to invite amicus briefs as a break from the Board's tradition of inviting briefing in cases where the majority is considering the reversal of significant precedent as well as the majority's failure to grant parties their opportunity to brief the issue following the Board's grant of review. The dissent noted that all eight circuit courts of appeals presented with employer challenges to *Specialty Healthcare* have approved *Specialty Healthcare's* standard. The dissent argued that the majority's standard improperly shifts the focus of the appropriate-unit analysis from the rights of the petitioned-for employees to self-organize to the interests of the non-petitioned for employees. It also argued that even though the majority decision purported to return to the traditional community-of-interest test, key aspects of its analysis depart from long-standing Board precedent. The dissenting Members additionally found the petitioned-for unit of

welders appropriate for bargaining.

NOTES (pp. 537-538)

Note 1. Remand of the case nevertheless resulted in the original union petitioned-for unit of welders to be found appropriate under the traditional community of interests test.

Note 2. This note explains the 9(b)(3) exception involving guard units and explains its contemporary relevance. Guard unions have historically been weak. The reason for guards to join other workers is simply to increase collective strength and benefit from stronger union representation.

Note 3. *Multiemployer bargaining:* There is much less in this casebook about multiemployer bargaining than in other casebooks. This is simply a strategic choice to help limit the length of the casebook. For more in-depth information about multiemployer units, including a short history of multiemployer bargaining, see Higgins et al., *The Developing Labor Law: The Board, the Courts, and the National Labor Relations Act* 712-730 (BNA: 5th ed. 2006).

2. REPRESENTATION ELECTIONS (pp. 538-546)

This section is set up for easy access by students and lecture by professor. Many of the concepts in the section, such as election bar rules, require further explanation to students by professor, but learning them through caselaw is highly inefficient. The casebook text is intended to be relatively self-explanatory. Many casebooks include the *Leedom v. Kyne* case in full. A decision was made here to allow professor lecture about the *Leedom* case whose central benefit is to emphasize to students the difficulty of obtaining judicial review of representation questions.

3. BARGAINING ORDERS (p. 546)

NLRB v. Gissel Packing Co. (pp. 547-556):

Case: The case deals with authorization cards—the extent to which they may be relied upon exclusively by a union demanding recognition and the appropriate employer response to such demands. Up for review was the NLRB's practice of allowing employers, when confronted with a union demand for recognition based on authorization cards, to decline the union request and insist on an election. The NLRB argues before the Supreme Court: 1) unions have never been limited to certification elections in seeking representation, 2) authorization cards are reliable, and 3) a bargaining order is the appropriate remedy for employer refusal to bargain in certain cases.

The Supreme Court approved the practice of the Board with regard to card check recognition and found that a bargaining order may be issued as a remedy. The Court also

saw nothing in the Wagner Act or the 1947 amendments to indicate that an employer only has a duty to bargain with unions certified after a Board election.

With respect to reliability of cards, the Court rejected employer arguments that the cards undermined employee free choice because the cards are solicited without employee chance to hear employer views and that the cards are misrepresented or obtained fraudulently. The Supreme Court found that, although using cards is an admittedly inferior process to elections, it is reliable enough a process as to be able to create a duty to bargain. Cards can accurately reflect employee wishes, and there are adequate rules in place by the Board to control card solicitation.

Finally, the Court concluded that a bargaining order can be an adequate remedy when the election process includes employer unfair labor practices, leaving for another day the question of the propriety of bargaining orders when employer unlawful activity is not present. According to the Court, in addition to issuing bargaining orders in the face of "outrageous" and "pervasive" employer unfair labor practices, the Board may also issue bargaining orders if the Board, after taking into account the effects of employer unfair labor practices in terms of their past effect on elections and the likelihood of their recurrence "finds that the possibility of erasing the effects of past practices and of ensuring a fair election (or a fair rerun), though present, is slight and that employee sentiment once expressed through cards would, on balance, be better protected by a bargaining order, then such a bargaining order should issue." (text, p. 399)

NOTES (556-557)

Notes 1-3. The *Gissel* Court was less than clear about the lines to be drawn between the three categories of employer conduct outlined and the Board response via bargaining order. These notes discuss developments since the case in further fleshing out these distinctions and answering other questions raised by the case. Note that while there are no per se rules with respect to bargaining orders, the Board generally reviews whether a union has at one time achieved majority status that was directly eroded by employer unfair labor practices.

Notes 4-5. *Nonmajority Bargaining Orders:* Nonmajority bargaining orders have seemed to be a dead letter, but the question after the election of President Barack Obama, and his naming of Wilma Liebman as Chair of the Board, was whether the possibility of nonmajority bargaining orders would resurface. Note that then-Member Liebman wrote a harsh dissent in *Gourmet Foods* (see quoted material, p. 540). No further action was taken by the Liebman Board.

Linden Lumber v. NLRB (pp. 559-563)

Case: The union obtained authorization cards from a majority of the employees of Linden Lumber and demanded recognition as collective bargaining representative. The employer said it doubted the union's claim of majority status and suggested the union file an election petition. The union filed a petition but withdrew it when employer refused to

abide by an election because it alleged improper influence and support for the union campaign by company supervisors. The union then struck for recognition and shortly thereafter filed another election petition.
There is no charge of employer unfair labor practices except for its refusal to bargain. The NLRB found for the employer finding that it is not an unfair labor practice for an employer to refuse to accept evidence of majority status except by election. The Court of Appeals agreed with the NLRB,but placed the burden on the employer to file the petition for an election rather than the union. The Supreme Court granted certiorari.

The Supreme Court upheld the Board's decision to give the burden to the union to petition for an election upon an employer's refusal to voluntarily recognize a majority obtained via authorization cards that are not accompanied by any unfair labor practices. The Court reasoned the Board's decision was not arbitrary or capricious or an abuse of discretion in light of absence of Congressional intent for placing the burden on employers to file petitions in such cases and the administrative procedural questions involved. Critically, the Court explained that the reason that Congress amended the Act in 1947 to allow for employer election requests was not to put the burden on employers to seek elections in cases of doubt but only to allow the employer to file if it wanted in any particular case. Congress felt it was discriminatory that only unions had that avenue.

NOTES (pp. 563-566)

Note 1. No, although there is language in *Linden Lumber* indicating "in cases of doubt," the overall decision seems to allow an employer to refuse to trust union submitted authorization cards. However, if the employer uses its own means to determine majority status after a union demand for recognition, the employer is bound by the result.

Note 2. The fact that the Court reserved judgment with respect to employer/union agreements to have majority status determined by means other than Board election may suggest that the Court would treat those situations differently as suggested in the notes. Board Chair Wilma Liebman has publicly criticized the Bush Board's assault on voluntary recognition, including its decision to review Board doctrine at issue in *Shaw's Supermarkets. See* Liebman, *Decline and Disenchantment: Reflections on the Aging of the National Labor Relations Board,* 28 Berkeley J. Lab. & Emp. Law 569 (2007). The *Lamons Gasket* case, coming up in the next section of the casebook, clearly represents the Liebman Board's effort to provide a foundation for voluntary recognition.

Note 3. No, the employer may not continue to refuse. Yes, it matters. The employer is only bound to the majority he discovers post-demand.

Note 4. The 7th Circuit found that no recognition of the union had taken place just because the employer reviewed cards and noted that all employees had signed. After *Linden Lumber* it seems the only safe way to oblige a reticent employer by cards is to set up some sort of 3rd party verification process for signatures. Under the reasoning of *Linden Lumber,* just because the employer sees the card and notes a majority does not mean the employer deems the cards trustworthy. The 7th Circuit also found that no

bargaining had taken place because there had been no "give and take" negotiating. As union counsel, you should suggest that the union propose to the employer some sort of card check (or volunteer it) verification procedure and to have the union make a better attempt to engage in give and take bargaining. Both hard things to do, with no guarantees that another court would see things the same way.

Note 5. *Mandating Card Check Recognition:* As mostly private sector labor lawyers and professors we often forget that parts of the public sector have been much more innovative in approach to unionization. For example, five states now mandate card check as part of their public sector labor laws. New York and Illinois laws are described in detail in the casebook (pp. 564-565). These processes which nonetheless allow for hearings in case of fraud or scope of unit disputes seem much more efficient than the NLRA.

4. VOLUNTARY RECOGNITION AND OTHER METHODS OUTSIDE THE NLRA'S PROCESSES (p. 566)

a. RECOGNITIONAL/ORGANIZATIONAL PICKETING (p. 566)

The statutory language can be tricky, making it worthwhile to review the outline provided in the casebook at the beginning of the section (see pp. 567-569).

Int'l Hod Carriers, Local 840 (Blinne Construction) (pp. 569-577)

Case: Blinne Construction transferred one of its three employees at a particular jobsite and told the union that it did so in order to destroy a union majority. In protest, the union picketed the jobsite for over a month. The picketing had 3 objectives: 1) recognition of the union, 2) payment of Davis-Bacon scale (higher) wages, 3) protest against employer unfair labor practices in refusing to recognize the union and in transferring an employee to destroy a union majority. The union picketed for more than thirty days without filing for election, but filed unfair labor practices against the employer before the end of the thirty day allowed picketing period under the statute. When two of the four unfair labor practice charges were dismissed by the NLRB, the union filed an election petition. The NLRB later entered into a settlement agreement with the employer on the remaining charges.

The Trial Examiner found that while Blinne had committed an obvious unfair labor practice and the equities of the case rested with the union, he also found the union did violate Section 8(b)(7)(C). The Board agreed, holding that the union had violated Section 8(b)(7)(C) and the employer's unfair labor practices were not a defense. After a lengthy examination of several interconnected sections of the Act, the Board found that Congress intended the expedited election procedures of Section 8(b)(7)(C) to protect employers and employees from the adverse effects of prolonged "blackmail" picketing, but was not otherwise meant to benefit or handicap picketing for the purpose of union recognition or organization. The Board found that employer unfair labor practices were not a defense to the union picketing longer than thirty days as it appears Congress was unwilling to adopt

a proposal to write exactly such an exemption into the Act. The union should have filed unfair labor practice charges against the employer and still have filed for an election within 30 days. Board processes would ensure no election would take place prior to the resolution of substantial employer unfair labor practice charges. The union here was still able to commence action against the employer in a timely and proper fashion and still ensure all its rights would be appropriately safeguarded.

NOTES (pp. 577-579)

Note 1. First, the union argued it had majority status and Section 8b7C was not intended to apply to unions with majority support. The Board pointed out, however, the statute only exempts "certified" unions. Second, the union maintained that employer unfair labor practices were a defense to an 8b7C, and, presumably, if the union filed meritorious unfair labor practice charges against the employer it would not have to file an election petition. The Board rejected the argument primarily because the Senate had rejected just such a defense to 8b7C when the legislation was in Congress.

Note 2. The Board points out that if a union files both unfair labor practices and an election petition, the Board would ensure that no election would take place before the unfair labor practices were resolved. Presumably, the same would be true if an employer filed for an election.

Notes 3-5. Notes 3 and 4 merely flesh out the implications of *Blinne* and section 8b7C a bit more. Regarding the Enderby problem, note 5 asks students to think about which facts suggest the object of the picketing. The timing at which picketing starts, the location of the pickets, and the text on the picket signs are all relevant. This may be mixed or dual motive picketing (because the union is seeking recognition but also the timing of the pickets suggests it may be to protest the unfair labor practice in firing Penny). The note also asks students to think strategically about when an employer may find it useful to keep its own legal costs down by doing nothing (will two pickets on a road do anything at all? Might it be best to wait and see whether the pickets have any effect before expending money to try to stop it?). Alternatively, the employer might want to drive up the union's legal costs and show a tough face by filing a charge. The question also points out that when the legality of conduct is uncertain, there is the possibility of chilling protected speech. The union lawyer might advise the union to refrain from arguably protected speech (protesting a ULP) because of the risk that the Region may conclude that the speech is not protected but is instead prohibited under 8(b)(7).

Note 6. The picketing was not an unfair labor practice. The Board found that three affected deliveries in *Barker Bros.* were not a sufficient impact to lift the protection of the publicity proviso. Despite the strict literal language of the proviso, the Board found a quantitative test inadequate in favor of a case by case determination of the overall impact of nondeliveries on a business.

The New Otani Hotel & Garden (pp. 579-584)

Case: The employer filed an election petition with the NLRB asserting that the union has made an implied present demand for recognition based on the fact that the union had been attempting to organize employees of the employer hotel for four years through the use of repeated picketing, distribution of leaflets urging boycotts, and by requesting the employer to sign a neutrality/card-check agreement. The employer also points out that the union's picket signs evidence a recognition demand. Those signs say: "New Otani Hotel is non-union and does not have a contract with HERE Local 11. Please boycott." The employer also refers to union press releases and other documents indicating recognitional motive.

The Board held that the union's activities do not demonstrate a present demand for recognition and dismissed the employer's petition. An employer is not entitled to an election under Section 9 of the NLRA if there is no present claim for recognition. The Board has consistently held that activities like informational picketing to pressure the employer into changing its working conditions is not a claim for recognition. In addition, the Board found that repeated requests for neutrality/card-check agreements were not a present demand for recognition because such an agreement is not a present claim by the Union that it represents a majority of the employees in an appropriate collective bargaining unit. It is merely a tool through which the union can contemplate reaching such a goal without interference from the employer.

NOTES (p. 584)

Note 1. This note invites students to think about timing of elections. As to the 8(b)(7) issue, filing an 8(b)(7) charge will delay an election. In New Otani, the employer obviously wants to hurry up and have an election, probably because it feels that the union will lose if the election is held soon but that the union may gain strength if it has a longer time in which to campaign. The rest of the note focuses on whether a union's organizing efforts involving appealing to the public as a way of ratcheting up political pressure on the employer to secure a neutrality and/or card check agreement triggers the ability of the employer to demand an NLRB-supervised election. Students should be asked to think about why the employer evidently wants an election and the union does not. The questions about the disclaimer raise the issue about whether a union that gets less extensive or competent legal advice when running a PR campaign like this runs the risk of being forced into an election simply because it didn't realize the necessity of including a disclaimer.

Note 2. Whatever the intent of the Bush Board in agreeing to review the *Marriott Hartford Downtown Hotel* case, while the Obama Board with Wilma Liebman as Chair was unlikely to take the same approach, it did not move on the issue.

B. LAWFUL VOLUNTARY RECOGNITION (pp. 584-585)

Brudney, Neutrality Agreements and Card Check Recognition: Prospects for Changing Paradigms (pp. 585-588)

This article discusses neutrality agreements and card check provisions, focusing on their increasing popularity as an organizing tool. The article presents data about the use of these methods, including empirical research about the effectiveness of their use singly and in combination. The reading is critical to setting up the *Dana Corp* and *Lamons Gasket* cases that follow.

NOTES (pp. 589-590)

Notes 1-4. Another reason not mentioned in the reading but suggested by the dissent in *Dana Corp.* is simply the efficiency and relative cost versus an election campaign. Economic motive in the face of a sure pro-union majority is a likely primary reason for employers to follow this route. The issue of states passing secret ballot election laws, discussed in note 4, is likely to continue. These would seem to be completely preempted by the NLRA, but the judge in the Arizona challenge refused to find preemption in a facial challenge, arguing the issue is premature. However, even state laws requiring secret elections on the books would seem to be in conflict with the NLRA, no?

Dana Corp. (pp. 590-592)

Please note that *Dana Corp.* was drastically cut back for the casebook given that it is superseded by the *Lamons Gasket* case following. However, a full brief of *Dana Corp.* is included here in the Teacher's Manual for professor convenience.

Case: Metaldyne Corp. and Dana Corp. independently entered into separate neutrality and card check agreements with the union [UAW]. Each employer later recognized the union on a showing of majority support. Shortly after, employees filed decertification petitions (Metaldyne: 50% support; Dana: 35% support). Regional Directors dismissed the petitions based on the recognition bar doctrine. The NLRB granted review to reexamine its recognition bar doctrine.

The Board stated that the balance between employee free choice and stability of bargaining relations had not been properly struck by its longstanding recognition bar-doctrine and modified the doctrine.

The Board held the following about the recognition bar:

No recognition bar will be imposed after card recognition unless:

1. employees in the unit,
    a. receive notice of the recognition, and
    b. are noticed of their right, within 45 days of notice, to file a decertification petition or support the petition of a rival union, and
2. 45 days pass from the notice date without the filing of a valid petition.

Decertification or rival union petitions may use employee signatures gathered both before & after recognition.

The Board also held the following about the contract bar doctrine in these cases:

> A collective bargaining agreement executed on or after the day of voluntary recognition will not bar a decertification or rival union petition unless a) notice of recognition has been given, and b) 45 days have passed without a valid petition being filed.

The Board expresses a preference for secret ballot elections over voluntary recognition through the use of authorization cards. The Board maintained the following in support:

1. Elections have the protections of secrecy & Board supervision.
2. Authorization card campaigns have been accompanied by misrepresentations or lack of info about representational options, and, even if not, employees may get more info about the pros & cons of unionization in a contested Board election.
3. Like a political election, Board elections show employee preference at a single moment. Unions with 50-70% majority card showing won only 48% of elections and unions with 70% or more won only 74% of elections.
4. If an employer exerts undue pressure during an election campaign, the Board will invalidate the election, but no such protection exists for card campaigns.

The Board addressed two US Supreme Court opinions, Brooks & Franks Bros., suggesting the bars are particularly for elections, not card checks and that courts supporting the bars existing before Dana Corp. did not state that such bars were required as policy or statutory matters under the Act.

The Board stated that if the new conditions are satisfied, then the union's majority status will be presumed for a reasonable time and any contract entered after recognition will bar an election for 3 years once the window period of 45 days passes without the filing of a valid petition. The duty to bargain is not affected by the decision and applies immediately after recognition.

Importantly, the Board now requires the employer and/or the union to notify the NLRB Regional Director in writing of the grant of voluntary recognition. After such notice, the NLRB will send an official notice to be posted in "conspicuous places" in the workplace about the new requirements.

Members Liebman & Walsh dissent in part but concur in result:

With respect to balancing interests, the dissenters maintain the proper balance was struck in *Keller Plastics* and nothing has changed to cause a modification. The modification upsets both interests in now allowing the will of the majority to be upset by a 30% minority (required amount for decert petition) and in destabilizing nascent collective bargaining relationships.

Moreover, majority gives insufficient weight to, and undercuts, the role of voluntary recognition as a legitimate mechanism for exercising free choice and promoting collective bargaining.
The recognition bar operates for only a reasonable period of time, after which a decert petition might be filed and Section 8(a)(2) already protects against employer recognition of minority unions.

Initial collective bargaining must be protected and dissenters argue that Supreme Court opinions in *Brooks* and *Franks* support that view.

An employer after *Linden Lumber* can already insist on an election if it wants. One important reason they choose voluntary recognition is to avoid the time, expense and disruption of an election. The new window period imports undue uncertainty and cost to the equation for the employer. The union suffers too because the employer has less incentive to bargain knowing the process can be undermined within 45 days and the union now has less of an opportunity to show new members that bargaining is productive at an early stage. The new window gives the minority of employees who may have opposed the union an incentive to undermine and argue against union efforts.

The new contract bar rules will allow contracts to be challenged even years after based on the technicalities of following the new procedural requirements.

Dissenters disagree with majority claims that change is necessary:

1. Voluntary recognition has been a favored element of national labor policy.
2. Card checks are long accepted and sanctioned by the Board, and there is no empirical support for majority claims that cards are unreliable. Note 19, p. 444 challenges statistics cited by majority.
3. Antiunion petitions rely also on signatures gathered in public, not in secret.
4. The law already protects against union coercion in soliciting cards and against minority union recognition.
5. The majority suggests that NLRA provisions are not adequate to deal with union coercion but fails to acknowledge the same is true re: employers in the election process.
6. Majority concerns about the lack of an antiunion campaign to give employees full information is overstated and unwarranted because nothing in the Act or its policies requires an employer to mount such a campaign or oppose a union effort.

Lamons Gasket Co. (pp. 593-608)

Case: The Board opens up by reviewing the history of the recognition bar, including the effect of the Bush Board's *Dana Corp.* decision in 2007. The Board granted review to consider the experience under *Dana Corp.* Having found that *Dana Corp's* premises were flawed, the Board overrules *Dana Corp.* and returns to the well-established precedent pre-existing that case. However, the Board also "for the first time, [defines] the benchmarks for determining a 'reasonable period of time.'"

Facts: On July 13, 2003, the Employer and the Union entered into an agreement stating the conditions under which the employer would recognize the union at several facilities, including the one located in Houston, Texas. The employer agreed to voluntarily recognize the union upon presentation of proof of majority support for the union in the form of signed authorization cards. In 2009, after such a showing, the employer recognized the union. Then, as required by *Dana Corp.*, the employer notified the Region, and the Region sent a notice to post notifying employees of the right to seek a decertification election within 45 days.

- Employer posted notice on Nov. 23.
- Employee filed a decertification petition on Dec. 9.
- Employer and union began bargaining on Jan 20.
- RD issued a decision and direction of election because petition raised a QCR on July 21.
- Employer & Union reached a CBA on Aug. 8.
- Decert election held on Aug. 26, ballots impounded pending appeal.

Discussion: Dana Corp. was decided on the premise that card majority's are coerced, but evidence of the last 4 years under *Dana Corp.* shows that suspicion unfounded. The decision imposed a notice requirement impinging upon employee free choice for no reason. Thus, we overrule *Dana Corp.*

A. Congress has Expressly recognized Voluntary Recognition as a Lawful Element of the Representation System Created by the NLRA (pp. 577-579):

   The Board here cites precedent that voluntary recognition has been recognized as lawful and even predates the NLRA, that voluntary recognition requires evidence of majority support, and that Section 9(c)(1)(A)(i) expressly declares an election necessary only when an "employer declines to recognize" a union representative.

B. Experience has demonstrated *Dana* procedures are unnecessary (pp. 579-580):

   The Board cites to experience under *Dana* to show no need for extra procedures:

- As of May, 2011, the Board received 1,333 requests for *Dana* notices.
- 102 decertification election petitions were filed.
- 62 decert elections were held.
- 17 times the employees voted against the union.
- Employees decertified a union in only 1.2% of cases in which *Dana* notices were posted.

Employer argues 17 is significant, but Board maintains that small number is more likely "buyer's remorse" than evidence of coercion. The Board cites Brooks v. NLRB in support of its conclusion.

C. *Dana* Compromises the Board and Undermines Neutrality

The Board maintains that the procedures required by *Dana* evince the NLRB's thumb on the scale favoring management. The case requires that employees only be advised of their right to decertify and casts suspicion on union majority. The Board points out that no similar procedures exist upon a card majority supporting withdrawal of recognition.

D. Statutory Policies Underlying the System of Bars Applies to Voluntary Recognition

The Board recounts the various bars to challenges to union representative status, including the certification bar (1 year), the unfair labor practice failure to bargain bar (reasonable period of time), voluntary recognition bar(reasonable time), successorship bar, in maintaining that a newly created bargaining relationship should be given a chance to succeed.

The Board goes on to link employee choice of a union with collective bargaining, maintaining that it's collective bargaining that employees who support a union are after. The Board emphasizes that voluntary recognition, being entirely between the parties, is actually more likely to yield successful bargaining and makes the case for protection of initial negotiation.

The Board maintains that a majority through voluntary recognition is harder to achieve than an election majority because it must be a majority of the entire unit while an election majority is only a majority of those voting. The Board also states that employees who believe the union only represents a minority have recourse through Section 8(a)(2) and Sections 8(a)(1) and 8(b)(1)(A). The Board concludes that the *Dana* notice period delays bargaining by at least 63 days.

E. A Return to Formerly Settled Law is Warranted

The Board reformulates the recognition bar, based on its decision in *Lee Lumber (2001)(multifactor test to determine reasonable period),* to be not less than 6 months and not more than one year.

Dissenting Member Hayes argues that the majority makes a purely ideological choice not entitled to judicial deference. Hayes notes *Dana* only affected the bar to election and not voluntary recognition itself. Hayes argues that the number of successful decertification elections is significant, constituting one in four of every post-*Dana* notice decert election held. Hayes argues that we know the following four things after *Dana:*

1. *Dana* served its purpose of assuring employee free choice by options provided;

2. In cases where majority status was affirmed, the union achieved certification status and a one year bar;
3. There is no evidence that *Dana* has had a negative impact on voluntary recognition;
4. There is no evidence that *Dana* had a negative impact on collective bargaining.

NOTES (pp. 608-609)

Note 1. Professor Laura Cooper's article questions whether arbitrators should be handling these issues at all. Her major point is that arbitrators are concerned with enforcing the parties' bargain but that does not leave much room for protecting the statutory rights of the employees. Professor Martin Malin's *Alden* award covers a wide range of issues but a key point that comes out of it is that where the parties adopt a neutrality and card check agreement, they clearly intend to make it easier, or less burdensome depending on one's point of view, for the union to organize and be recognized than under the NLRA but that recognition does not get one very far. In *Alden*, the employer kept urging that its conduct was lawful under the NLRA (and most of it was – there was one *Exchange Parts* violation) but that its conduct was lawful under the NLRA did not get the employer very far because the agreement was intended to place greater restrictions on the employer than the NLRA. On the other hand, the union argument was that this is neutrality and card check which is more favorable to them than the NLRA. Although true, it did not help the union that much because the question remained whether the employer breach the neutrality agreement. For example, one of the alleged breaches concerned the employer's lawyer interviewing a number of bargaining unit employees in preparing for the grievance proceeding. The employer meticulously complied with *Johnny's Poultry* notice, but the union said that didn't matter because the neutrality agreement went further than the NLRA. Professor Malin held that the parties did not intend to impede the employer's ability to prepare a defense to a grievance and therefore, as long as the employer complied with *Johnny's Poultry*, it was not in violation of the contract. On the other hand, Malin held that the employer violated the contract which required "reasonable access" when it excluded union organizers from non-working areas of the interior of the facility, i.e. the break room, even though it had a right to exclude them under the NLRA. Professor Malin also held that certain employer statements violated the neutrality provisions of the contract even though they were lawful under the NLRA.

Dana Corp. II (pp. 609-621)

The Dana II case is a very current case on neutrality agreements, and poses a question that naturally arises after *Bernhard Altmann (pp 410-414)*, which is how can an employer enter into an agreement with a union before it is determined that a majority of workers support the union? Go back to the earlier Section 8(a)(2) discussion at the beginning of the chapter. The 8(a)(2) issue may be easier to discuss now. Is the neutrality agreement a contract with a minority union, or is it simply a set of principles premised upon the union reaching majority status? Should the fact of a neutrality agreement affect

how we view voluntary recognition and the policies discussed by the Board in *Lamons Gasket*?

Case: The employer entered into a Letter of Agreement with the UAW providing 1) ground rules for organizing, 2) procedures for voluntary recognition upon proof of majority, and, perhaps most controversially 3) substantive issues collective bargaining would address if and when the union was recognized.

Decision: The ALJ found no violation because the employer had clearly neither recognized the union nor entered into a collective bargaining agreement. The ALJ distinguished the *Majestic Weaving* case where the employer had actually negotiated a complete collective bargaining agreement but conditioning its execution on the union achieving majority status.

The Board (Liebman & Pearce with Hayes dissenting) affirmed the ALJ. In Part A, the majority discusses the reason 8(a)(2) was passed, to deal with the issue of company unionism, and explains that lesser forms of support for unions by employers have not been viewed as unlawful, including entering into "members-only" agreements and even expressing the desire to enter into a collective bargaining with a particular union upon its gaining majority status. The Board also explains that the Board has upheld neutrality agreements and has not viewed them as 8(a)(2) problems or violations of Section 302 as they are not "things of value" given by employers to unions.

In Part B, the Board majority tackles the 8(a)(2) minority union recognition issue head on. The Board discusses the cases of primary concern, precedents in *Bernhard Altmann* and *Majestic Weaving.* The Board emphasized that in both of those cases the employer had effectively already entered into a complete agreement with the union before majority status had been achieved. In addition, in *Majestic Weaving* a supervisory employee had assisted in the distribution of authorization cards. In Part C, the Board takes on the GC and Charging Parties' argument that there should be a "per se" rule that basically any negotiation with a union before it achieves majority status should be unlawful since it can be used to help the union achieve majority status. The Board rejects such a broad reading of the case precedent and maintains that going so far would create an unnecessary obstacle to collective bargaining. The Board then distinguishes *Majestic Weaving:*

- *MW* involved an initial, oral grant of recognition by employer.
- Initial recognition in *MW* was followed by the negotiation of a *complete* CBA lacking only the ministerial act of execution.
- Solicitation of authorization cards came after negotiation of a complete agreement and also was aided by supervisory involvement.

The Board explained that in *Dana* the Letter of Agreement only created a framework for future bargaining, far short of the complete agreement in *MW.* The Board maintained that the LOA could not reasonably be understood as a grant of recognition and distinguished cases cited by the GC that involved issues surrounding whether union proof of majority

was valid. Lastly, the Board points to the fact that the employees ultimately rejected UAW representation as proof that there was no confusion about premature recognition.

The Board answers Member Hayes dissenting, again emphasizing the difference between *MW* and *Dana.* Hayes emphasizes that the LOA was a tacit recognition of the union, but the Board majority distinguishes the case again, maintains that the election result refutes Hayes' point, and states that on the contrary, the LOA allows employees to make more informed choices about representation.

Member Hayes, dissenting, argues that the Board effectively overrules its decisions in *MW* and a related case, *Julius Resnick,* and points to language from *MW* indicating that what is unlawful is "negotiating a contract" with a union prior to its reaching majority status. Hayes argues that the LOA is more than a procedural framework, but an actual agreement on substance dictating terms that must be included in any CBA. Hayes agrees that the LOA would provide employees more information about choice but argues the agreement is unlawful nonetheless.

CHAPTER 5
COLLECTIVE BARGAINING

Once a union has been recognized as exclusive bargaining representative the law assumes that the parties will negotiate a collective bargaining agreement, their private law governing their workplace. Although all labor relations acts impose on the parties a duty to bargain, the legal structure under which that bargaining takes place can have a significant impact on how negotiations proceed and even whether agreement will be reached. A newly recognized union faces great pressure to secure agreement on a first contract. The contract institutionalizes the union and enables it to root itself in the workplace. If the union is unable to secure a first contract, there is a high probability that the workers will view it as ineffective and ultimately decertify it.

The chapter's primary focus is on the duty to bargain under the National Labor Relations Act, but the chapter illustrates the importance of the statutory framework by contrasting the Railway Labor Act and public sector labor relations statutes. The entire chapter can be covered in six class hours. Professors pressed for time can skip sections E, F and H or cover them by lecture.

A. INTRODUCTION and
B. MODELS OF THE COLLECTIVE BARGAINING PROCESS

Parts A and B can be covered in one class session. Part A, the Introduction, sets up the discussion of the contrasting models of the collective bargaining process in Part B. The NLRA, RLA and public sector models can be seen along a continuum. The NLRA model has the least government involvement in the bargaining process. The parties are left largely to their own devices with the government offering mediation assistance only upon a joint request from the parties and otherwise becoming involved only through the unfair labor practice procedures of the NLRB. The assumption is that the parties, motivated by fear of each other's economic weapons, will reach agreement and the agreement will reflect their relative economic strength. But the process does not always work that way. As the Congress Hotel example illustrates, the parties can end up in an economic war.

The RLA reflects a policy determination that rail and air transportation are so important to the economy that the parties cannot be left to their own devices. The National Mediation Board plays a very active role in choreographing the negotiations and the parties are frozen in the status quo until such time as the NMB releases them. Even then, they are subject to cooling off periods and to the establishment of a Presidential Emergency Board, factfinding recommendations and another cooling off period before they may resort to economic warfare. But, ultimately, the parties are left to resolve their dispute through economic force – strike, unilateral changes in terms and conditions of employment and lockout.

Most public sector statutes prohibit resort to economic warfare and even the minority of jurisdictions that recognize a right to strike in the public sector prohibit strikes by law enforcement personnel and firefighters. Many jurisdictions provide for bargaining impasses to be resolved by arbitration, a practice particularly common for police and firefighters.

Teachers may want to project on a screen the contrasting language of the NLRA and RLA. Section 8(d) of the NLRA speaks only of the duty to meet at reasonable times and confer in good faith with no obligation to make concessions or agree to proposals. The RLA imposes an obligation to "exert every reasonable effort to make and maintain agreements." Ask students whether the differences in language are differences in substance or just in form.

Ask students how the Congress Hotel negotiations might have proceeded under the RLA and how the United Airlines negotiations might have proceeded under the NLRA. The last paragraph on page 625 should get the students started with respect to the Congress negotiations. A more provocative discussion is likely to ensue imagining the United negotiations under the NLRA. Of course, under the RLA, agreements never expire; they simply become amendable. But, assume that United had NLRA-style contracts which expired. Upon expiration, the union would no longer be under a contractual obligation not to strike. United would no longer be under a contractual obligation to pay the existing wages and benefits. United could declare impasse and unilaterally reduce wages and benefits, thereby daring the union to strike, as the Congress Plaza Hotel did. The union could strike. Expand the scenario to suggest that the pilots' and flight attendants' contracts had also expired and United was also seeking to reduce wages and benefits with those unions. Unilateral action by United reducing wages and benefits for all three groups could result in a strike by all three unions which likely would ground the airline and perhaps push it into bankruptcy or even liquidation given its precarious financial position following the September 11th terrorist attacks. The assumption underlying the NLRA is that the stakes will be so high that the parties will force themselves to reach agreements.

1. THE NATIONAL LABOR RELATIONS ACT

Insurance Agents (page 628) and *Katz* (page 636) can usefully be treated together. In *Insurance Agents*, the Court rejects the NLRB's position that a work slowdown violates the duty to bargain in good faith imposed on unions by section 8(b)(3). The Board's position is inconsistent with the laissez faire vision of the NLRA. The work slowdown is an economic weapon and the threat to use and actual use of economic weapons will motivate the parties to reach agreement. The Board may not regulate the use of the work slowdown, but the employer may retaliate against employees engaging in a slowdown because a slowdown is not protected by section 7.

Students may be challenged to reconcile *Katz* with *Insurance Agents*. The teacher might play devil's advocate and suggest that the Court has employed a double standard. It has allowed unions the weapon of a work slowdown but denied employers the weapon of

a unilateral change in a term or condition of employment until impasse is reached. The conventional response is that the unilateral change prior to impasse is not just an economic weapon; it is a weapon that can completely preempt bargaining. On page 639, the Court distinguishes *Insurance Agents*, observing, "The union in that case had not in any way whatsoever foreclosed discussion of any issue, by unilateral action or otherwise. . . . We held that Congress had not . . . empowered the Board to pass judgment on the legitimacy of any particular economic weapon used in support of genuine negotiation. But the Board is authorized to order the cessation of behavior which is in effect a refusal to negotiate . . ." The Court's discussion of the sick leave policy (page 638) illustrates its conclusion that a unilateral change prior to impasse is inconsistent with good faith bargaining.

Notes (pp. 635-36 and pp.640-44)

The facts of *Associated Home Builders* (Note 2, page 636) may be used to challenge this distinction further. There, carpenters averaged laying 7 ½ squares of wood shingles per week. The union, in response to the employer's dismissing slower carpenters, adopted a resolution that no union member install more than 6 squares per week. Students may be challenged to determine whether this is a work slowdown, lawful under *Insurance Agents*, or a unilateral change in a working condition, illegal under *Katz*?

The second matter on which the employer acted unilaterally in *Katz*, automatic wage increases, illustrates another consequence of the Court's distinction between economic weapons that further the collective bargaining process and those that preempt it. With respect to automatic wage increases, the employer implemented a system that was more generous than any it proposed to the union. The Court observes that "even after an impasse is reached [an employer] has no license to grant wage increases greater than any he has ever offered the union . . ." Thus, even after impasse is reached, some weapons remain off limits to employers because they still preempt bargaining. *McClatchy Newspapers* (Note 6, page 644) tests the limits of this approach.

The third matter on which the employer acted unilaterally in *Katz*, merit increases, illustrates another issue – what is the status quo. The Court concludes that the merit increases were not a continuation of the status quo and, consequently, the employer's unilateral implementation of them preempted bargaining in violation of ' 8(a)(5). Note 2, pages 640-42 considers the converse – whether an employer's failure to give a periodic increase amounts to a unilateral change in the status quo. These cases typically involve step increases or longevity increases. Note that at issue in *Finley Hosp.* was the parties' intent – did they intend the increase provided for in their one-year collective bargaining agreement to be a one-time event or did they intend it to establish a status quo of continued automatic increases? Are there other ways in which the parties; intent might be significant? For example, what if one of the issues in negotiations is an employer demand to freeze steps or to eliminate certain longevity steps? What if the parties' negotiations take step increases into account by, for example, the employer offering percentage wage increases inclusive of step increases? This issue is sometimes referred to as a choice between a dynamic status quo (which includes step or longevity increases)

and a static status quo (which freezes wages at their levels as of the date the collective bargaining agreement expired).

The instructure might raise with students the impact of the choice of a dynamic or static status quo on the negotiations. If wages are frozen at their levels in effect when the contract expired, the longer the negotiations go on, the greater the pressure on the employees whose wages are frozen. This may be particularly the case in a high inflationary environment or where the employees see co-worrkers who are not in the bargaining unit receive wage increases while their wages are frozen. On the other hand. if employees receive step or longevity increases even though a new contract has not been agreed to, the pressure on them will be diminished.

Under *Katz*, discretionary wage increases generally may not be implemented unilaterally without first bargaining to impasse. The discussion of *DuPont* and *Raytheon* (pages 641-42) illustrates the potential limits to the significance of employer discretion over a subject. In each case, the employer exercised discretion annually to make changes to the health care plan for its entire workforce. Is that annual exercise of discretion itself a part of the status quo such that the employer may extend those changes to the bargaining unit even though negotiations for a successor collective bargaining agreement are on-going or must the employer wait until agreement or impasse is reached?

Total Security Mgmt. (page 642) presents what might be considered an extreme application of the view that whenever a decision involves the exercise of employer discretion, the empoyer may not act unilaterally without first bargaining to impasse. Note that this issue arises only when negotiating a first contract. When negotiations for a successor contract are on-going the discipline provision of the expired contract will continue to apply. But while negotiations for a first contract are underway, must the employer bargain over its decision to discipline a particular employee for misconduct. The Board distinguishes between the finding that discipline is warranted which need not be bargainged and the level of discipline over which the employer exericses discretion and therefore must bargain. The instructor may want to ask the class whether the employer exercises discretion, through its investigation, over whether any misconduct warranting discipline occurred. If so, why not require bargaining over this issue as well? Furthermore, the instructor may point out that the employer may impose discipline at the level it determines to be appropriate after initially bargaining it and need not wait for an overall impasse in negotiations. The Board also recognized an exigent circumstances execption. The instructor may ask whether the Board was enforcing the duty to bargain or effectively imposing its own interim discipline procedure on the parties.

Notes 3 and 4 (pages 642-44) explore the question of what constitutes an impasse such that an employer may make unilateral changes. The teacher may point out that the determination of whether the parties were at impasse will be made by an administrative law judge long after the fact. Thus, an employer contemplating unilaterally implementing changes in terms and conditions of employment faces considerable uncertainty about the legality of such action. A skilled union negotiator can gain considerable bargaining power by manipulating this uncertainty, leaving the employer in a quandary as to whether

an ALJ will ultimately hold that the parties are at impasse when the employer unilaterally implements. *Mike-sell's Potatoe Chip Co.* (page 643) illustrates the peril an employer faces. This can be especially useful where the employer is seeking concessions in wages or benefits.

2. RAILWAY LABOR ACT

Whereas the NLRB's power to regulate the use of economic weapons, and thus its power to regulate the negotiation, is significantly circumscribed, the NMB's power to control the negotiations is almost endless. *American Train Dispatchers v. Ft. Smith Ry.* (page 645)nicely illustrates the point. The court says it will only interfere with the NMB's conduct of its mediation efforts upon a showing of "patent official bad faith." The NMB's "primary resource" is "the ability to force continuing negotiations almost interminably."

Notes (p. 648)

Note 1 (page 648 calls on students to speculate why the NMB mediator insisted on the parties meeting in Washington, DC. The teacher may ask the students whether it should matter if the mediator believed that a change of scenery might lead to progress in negotiations or if the mediator was trying to harass the railroad into changing its position.

3. THE PUBLIC SECTOR

Virtually all states with public sector labor relations acts impose impasse procedures and prohibit unilateral changes until the impasse procedures have been exhausted. In states that mandate interest arbitration, this generally means that there can never be any unilateral changes in terms and conditions of employment. Rather, an employer must await the outcome of the arbitration.

Even in right-to-strike jurisdictions, strikes and unilateral changes generally are prohibited prior to exhaustion of statutorily mandated mediation and, in some jurisdictions, factfinding. *Philadelphia Housing Authority* (page 649) raises a more provocative question: after impasse procedures have been exhausted and the parties have bargained to impasse, may the employer unilaterally change terms and conditions of employment? The court says it may not unless the union has struck. The court reasons that a unilateral change dares the union to strike and, given the policy against interruption of public services, we do not want employers daring unions to strike. The dissent argues that this result leaves employers at the mercy of unions, particularly when seeking concessions in tough fiscal times.

As Note 3 (pages 652-53) illustrates, twenty years later the decision remained very controversial. The instructor may wish to discuss the allegations in the City of Philadelphia's complaint to revisit the dispute between the majority and the dissent in the

principal case. A recent article examined the impact of the *Philadelphia Housting Authority* case on neogitations in the public sector in Pennsylvania. It found a dramatic reduction in strikes after the decision but it also found examples of extremely prolonged negotiations. The article suggests that the experience since the decision vindicates the view of the majority that denying employers the ability to unilaterally implement after reaching impasse prevents strikes but also vindicates the view of the dissent that it has reduced the incentive to reach agreement, paqrticularly in a concessionary environment. *See* Martin H. Malin, *The Motive Power in Public Sector Collective Bargaining*, 36 Hofstra Lab. & Emp. L.J. ___ (forthcoming 2019).

C. DETERMINING GOOD FAITH: THE PROBLEM OF SURFACE BARGAINING

Potential surface bargaining issues arise when there is a significant disparity in bargaining power between the parties. For example, in *NLRB v. Adkins Transfer Co.*, cited in Note 3, page 512, the Teamsters organized the employer's two mechanics. The union already represented the employer's drivers. Evidence indicated that the union would insist on the company signing a pattern contract for its mechanics, with terms identical to contracts the union had with other employers, and if the employer resisted, the union would strike, even if that would force the employer out of business.

More often, the disparity in bargaining power favors the employer. This is particularly so when a newly recognized union is negotiating for a first contract. Such a union has not had a chance to institutionalize itself. Particularly, if the employer waged a vote no campaign, the union comes into power with majority support but often far from unanimous support. A sizeable portion of the bargaining unit may still be opposed to union representation and may not be counted on to exert economic pressure on the employer in support of the union's bargaining position.

NLRB v. American National Insurance Co. (page 654) is one such case. Students should observe that the parties were bargaining for a first contract and that the union ultimately agreed to most of what the employer demanded – recognizing that discipline, demotion, discharge and scheduling were functions of management and not subject to grievance arbitration. Just as the NLRB has only very limited authority to judge the economic weapons deployed by the parties, the Court holds that the NLRB may not judge the substantive proposals made by the parties and may not infer bad faith from the employer's insistence on the management functions clause. The Court in effect tells the union that if it does not like the employer's proposals, its remedy lies in the assertion of economic pressure, not with the NLRB. If the union's economic weapons are not strong enough to persuade the employer to change its proposal, then the union is stuck with the deal that its relatively weak bargaining position obtains. The statute is indifferent to whether the deal is a good one for union or management.

In its analysis, however, the Court observes that similar management functions clauses had been ordered implemented by the War Labor Board. This raises the

possibility that bad faith may be inferred from bargaining proposals that are more extreme than the management functions clause at issue in *American National*.

Hardesty Co. (page 659) provides an excellent pedagogical vehicle for exploring this further. Note that the case presented a mixture of inferences from bargaining proposals and interpretation of statements made by employer agents. Yet a point that divides Member Hurtgen's concurring opinion from the majority is whether bad faith could be inferred from bargaining proposals alone. A second point dividing the two views is whether a union negotiating a first contract should receive special protection.

2. Surface Bargaining and the RLA and 3. Surface Bargaining in the Public Sector

Not surprisingly, the structure of the statutory scheme largely determines whether surface bargaining will be a problem. Under the RLA, suspected surface bargaining, such as may have been present in the *Ft. Smith Ry.* case, is handled by the NMB mediator who can employ various tactics to pressure the stronger party into reconsidering its position at the bargaining table. In the public sector, where the statute employs interest arbitration for resolving impasses, surface bargaining may be absorbed by the statutory process. Some have argued that traditional interest arbitration encourages surface bargaining as each side holds something back in anticipation that the arbitrator will award a middle ground between the two parties' final offers. In final offer interest arbitration, a party that engages in surface bargaining and adheres to patently unreasonable positions runs a substantial risk that its position will not be selected by the interest arbitrator. On the other hand, where the statute only provides for factfinding, there is considerable concern that the employer will surface bargain and as the *Oakland Community College* case (cited on page 665) illustrates, the employer's bargaining proposals may come under closer scrutiny.

D. INTERPRETING "GOOD FAITH" AS OBJECTIVE RULES OF CONDUCT

Given the difficulties of policing subjective good faith in light of section 8(d)'s admonition that the duty to bargain does not require reaching agreement or making concessions, some have suggested that the most productive use of sections 8(a)(5) and 8(b)(3) is to regulate objective bad faith, i.e. to prescribe objective rules of conduct during bargaining. One such objective rule comes from *NLRB v. Katz*, discussed earlier. A party breaches the duty to bargain in good faith by implementing a unilateral change with respect to wages, hours or terms and conditions of employment before bargaining to impasse.

1. THE DUTY TO SUPPLY INFORMATION UNDER THE NLRA

The duty to supply information provides an excellent illustration of how an effort to police subjective good faith evolved into an objective rule of conduct. The teacher may ask students why, in *Truitt* the Court found the employer's refusal to open its books to the union after claiming that it could not afford the union's wage demands violated § 8(a)(5).

The answer is found in the excerpt from the case on page 666. Having pled poverty at the bargaining table, if the employer refuses to back its plea by giving the union access to its books, an inference arises that the employer was lying when it pled poverty, i.e., that it acted in bad faith.

Ask students whether the *Truitt* approach applies in *Detroit Edison* (page 667). The answer is, "Of course not." No one questioned Detroit Edison's subjective good faith in withholding the test questions and refusing to disclose test scores by employee name without employee consent. The Court's analysis, however, did not end there. Rather, the Court engaged in an objective balancing process, balancing the factors supporting required disclosure against the factors supporting maintaining confidentiality and concluded that the latter factors outweighed the former.

The teacher may then ask students to re-analyze *Truitt*, using an objective balancing test. Students should recognize that a union always has a need for the employer's financial information during bargaining. However, the confidential proprietary nature of such information will generally outweigh its relevance to the union's performance of its duties. But, when the employer injects its financial health as an issue in bargaining, the employer's financial information takes on a heightened relevance which objectively outweighs the confidential proprietary nature of the data. Indeed, the employer's raising its financial health as an issue in bargaining diminishes the weight to be accorded to the employer's interest in maintaining such proprietary data a secret.

The teacher may extend the discussion further by focusing on the *SDBC Holdings* case (page 676). The Board and the Court of Appeals differed over whether the employer had claimed an inability to pay during bargaining, with the Board majority finding an implied claim of inability to pay and the court rejecting that. As Note 1 (page 678) raises, wasn't it clear that the employer was placing its financial condition at issue in the negotiations? Does the focus on whether the employer did so in such a way as to constitute a claim of inability to pay elevate form over substance? If students think that it does, the instructor might ask them whether there are other areas where the law under the NLRA elevates form over substance, such as the distinction between lawful statements of position and prediction and unlawful threats. Are there good reasons in the case of union access to the employer's financial records to elevate form over substance? Note 3 on page 678 may be used to extend the discussion even further. Where the employer's plea is not inability to pay but inability to compete, does the balancing analysis change and, if so, how? The fine lines that have been drawn and the difficulty in drawing them are illustrated further in the *Wyron* case discussed in note 3. The Dau-Schmidt article (discussed in note 4, page 679) suggests that the analysis should be the same but the Board has tended not to mandate access to the employer's financial information where there has been a claim of inability to compete rather than inability to pay. Notes 3 - 6 on pages 674-76 provide additional vehicles for applying the objective balancing test. Note that most cases involving employer requests for information from a union concern access to union-operated hiring hall records and copies of the union's contracts and dealings with other employers, particularly where the contract contains a "most favored nations"

clause which requires that where the union agrees to more favorable terms with a competitor of the employer, the employer is to receive the more favorable terms.

2. INFORMATION DISCLOSURE UNDER THE RLA AND IN THE PUBLIC SECTOR

If the teacher engages in the detailed analysis of the duty to provide information under the NLRA presented above, there likely will be time only to reference the issues under the RLA and in the public sector briefly. The *IFFA v. TWA* opinion, cited on page 680, questioned the holding in *Pacific Fruit*, quoted on pages 679-80, but ultimately found that the absence of further information disclosures by TWA did not cause or prolong IFFA's disastrous strike. The opinion makes for interesting reading because it provides a great deal of detail on the negotiations that led to the strike. We revisit the IFFA strike against TWA in chapter 6, page 783.

3. OTHER PER SE VIOLATIONS UNDER THE NLRA

The question of what constitutes bypassing the union and dealing directly with employees in violation of § 8(a)(5) makes for fascinating class discussion from both policy and strategic perspectives. The majority and dissenting opinions in *Mercy Health Partners* (page 681) and Notes 2, 3 and 6 (page 683-85) provide useful vehicles for this discussion. Challenge students to identify conflicting policy concerns in the debate. Ask them why we regulate an employer's direct communications with its employees concerning statutory subjects. Do employees have an interest in hearing what their employer has to say? How might "too much" employer direct communication with employees undermine the system of exclusive representation. Ask students if they see any parallels in the underlying policy concerns at work here and those at work in the controversy over the application of ' 8(a)(2) to employee involvement committees and similar plans.

Turning to the question of strategy, students may be asked how they would counsel an employer in a situation like the one. faced. Students can be asked to draft statements and strategies for the employer in Notes 4 and 5, pages 683-84. In *Alan Ritchey, Inc*, cited in Note 4, a 2 – 1 Board majority found no employer violation in polling the employees about their desires for representation in upcoming negotiations, but the majority emphasized the peculiar situation that the employer faced. It had to negotiate with some representative of the union because its principal, customer, the U.S. Postal Service had set a deadline by which it had to be notified of the wage rates and if it wasn't notified by the deadline the wage rates from the prior year would roll over as far as the employer's contract with the Postal Service was concerned. Furthermore, the union had such a loose structure that the majority believed it was impossible for the employer to get any definitive information from the union as to whom the authorized representative would be. A 2 – 1 decision from an NLRB whose membership is subject to ideological fluctuations is a slim foundation on which to base advice to a client.

E. THE EFFECT OF A STRIKE ON THE DUTY TO BARGAIN

Part E can be handled with a very brief lecture or, if time permits, it may be used to preview regulation of economic weapons covered in detail in chapter 6. The earlier discussion of *Insurance Agents* and *Katz* already previewed chapter 6 and may be worth recalling here. For reasons of policy, a union is free to employ the work slowdown, albeit subject to employer retaliation, but an employer may only implement unilateral changes after it has bargained to impasse.

In a strike, should we require the employer to bargain the decision to hire permanent replacements? The answer is clearly no. Hiring permanent replacements is the strongest weapon that an employer has in its arsenal to respond to a strike. The union should not be able to control the employer's ability to use it by requiring bargaining to impasse prior to its use. But what about permanently subcontracting the strikers' jobs? In *Land Air* (page 686), the D. C. Circuit said permanent subcontracting was different from permanent replacement and required bargaining. Permanent replacement, the court reasoned, does not sever the employment relationship. Replaced strikers remain employees and have a right to return to their jobs if they are available. In contrast, permanent subcontracting severs the employment relationship. Should this matter? If an employer is to gain bargaining leverage from a threat to permanently subcontract, shouldn't it be allowed to carry out that threat without bargaining?

F. THE DUTY TO BARGAIN DURING THE TERM OF A CONTRACT

Milwaukee Spring's relocation of bargaining unit work to its non-union facility in McHenry, Illinois, is a pedagogically rich case worthy of classroom attention. It illustrates three different approaches to questions of midterm bargaining but it also illustrates the effect of shifting Board composition. Milwaukee Spring relocated the work during the term of its contract with the UAW and after bargaining the decision with the UAW to impasse. Milwaukee Spring's motivation for the relocation was to avoid paying union wage scale – the non-union workers at the McHenry facility were paid less and had less generous benefits.

To a majority of the Board appointed by President Carter, Milwaukee Spring's motive was critical. Because the work relocation was designed to evade the wage and benefit provisions of the collective bargaining agreement, it contravened sections 8(a)(5) and 8(d). The employer appealed the Board's decision to the Seventh Circuit but while the appeal was pending, Reagan appointees gained majority control of the Board and petitioned the court to remand the case to them for reconsideration. On remand, the Board held that because the employer bargained the decision to impasse, it was free to implement it. Now, the UAW, which had intervened in the Board proceeding, appealed and the teacher should note the forum shopping.

To the D.C. Circuit, the bargaining was irrelevant. The critical fact was the zipper clause in the contract. The clause amounted to a waiver of the right to bargain during the term of the contract. Thus, if the contract allowed the work relocation, the action was lawful regardless of whether it had been bargained. If the contract did not allow the work

relocation, then its implementation, without an agreement to do so from the union, violated sections 8(a)(5) and 8(d), regardless of whether the decision was bargained. Indeed, under such circumstances, the union was not obligated to bargain – it could have just relied on the existing contract. Judge Edwards concludes that the contract's management rights clause allowed the work relocation and thus the action did not violate sections 8(a)(5) and 8(d). Note 4 on page 693 is useful to contrast a broad zipper clause with a broad management rights clause. Generally, the latter will not justify a conclusion that the union waived the right to bargain during the term of the contract.

G. SUBJECTS OF BARGAINING

1. THE NLRA

The text begins by introducing the student to the classification of bargaining topics into mandatory, permissive and prohibited subjects. The teacher may present this briefly as background or may probe this area more deeply in class. To do the latter, the teacher may ask students whether the distinction makes sense. Ask students how a party may negotiate for a permissive subject if the party is not allowed to insist on its position to the point of impasse. Point out the game negotiators play, insisting to impasse over a mandatory subject while letting it be known that there could be more room on the mandatory subject if there were some give on the permissive subject.

The teacher may also ask students whether the all-or-nothing approach to mandatory/permissive subjects makes sense. For example, if an employer is going to negotiate a permissive subject, does it make sense to allow the employer to withhold relevant information from the union? Does it make sense to allow an employer not only to refuse to negotiate a permissive subject but also to bypass the exclusive bargaining representative and deal directly with the employees?

Fibreboard (page 696) and *First National Maintenance* (page 700) can be presented very effectively by diagramming the facts of each case and then diagramming the rationales. This may be done on the board or on a slide projected on a screen. Factually, the cases are as different as night and day. In *Fibreboard*, when the employer contracted out the maintenance work, virtually nothing changed. The employer's business remained the same and operated in an identical manner as before the subcontracting. The only things that changed were the identity of the people doing the maintenance work and what they were paid.

In *First National Maintenance*, although the Court characterizes the decision at issue as one to go partially out of business, factually it is more accurately characterized as a decision to cease doing business with a customer. Note that Greenpark and First National Maintenance had a cost-plus contract, and the dispute between them was over the "plus," rather than the "cost" component of First National's fee. The benefit of any assistance the union might have given First National to reduce its labor costs would have

automatically been passed on to Greenpark. This would not have addressed First National's concern with the size of the management fee, the "plus" component of its charge.

Although the cases are reconciled easily on their facts, it is very difficult, if not impossible, to reconcile their rationales, at least the rationale of the majority in *Fibreboard* as opposed to Justice Stewart's concurrence. The Court begins by observing that the decision to subcontract was literally a term and condition of employment, as was the employment termination that resulted from its implementation. Mandating bargaining "promote[s] the fundamental purpose of the Act by bringing a problem of vital concern to labor and management within the framework established by Congress as most conducive to industrial peace." It does not matter if bargaining is unlikely to lead to a solution, the union must be "afforded an opportunity to meet management's legitimate complaints that its maintenance was unduly costly." Implicit in the Court's analysis is that the employer need only bargain to impasse and may then unilaterally implement the decision. The union is not likely to have much ability to obstruct management decision-making if it is not going to offer solutions to the problem identified by management.

The teacher might challenge the reasoning as naïve. A skillful union negotiator can keep management guessing as to whether impasse has been reached and thereby make unilateral implementation of the decision legally risky. Recall the discussion of *Mike-sell's Potatoe Chip Co.* (page 643). The employer's desire for certainty can be a source of bargaining power for the union which can tie up the decision for a good deal of time.

Whereas the Court in *Fibreboard* begins its analysis with a heavy presumption in favor of bargaining, the Court in *First National Maintenance* begins with a heavy presumption against bargaining. The Court seems to call the *Fibreboard* Court for its naivety. "Management must be free from the constraints of the bargaining process to the extent essential for the running of a profitable business. It also must have some degree of certainty beforehand as to when it may proceed to reach decisions without fear of later evaluations labeling its conduct an unfair labor practice." Thus, the Court tells us that bargaining is required only when "the benefit, for labor-management relations and the collective bargaining process, outweighs the burden placed on the conduct of the business."

What of the *Fibreboard* Court's analysis that the union be afforded an opportunity to confer on a subject of vial concern to labor and management. The *First National Maintenance* Court tells us that where the union can help, "management will have an incentive to confer voluntarily . . ." In this regard, the teacher may suggest, that the Court is being as naïve as its predecessor in *Fibreboard*.

After establishing that the rationales are as irreconcilable as the facts are distinguishable, the teacher may ask the students whether Justice Stewart's concurring opinion in *Fibreboard* may provide a way out. Justice Stewart distinguishes the subcontracting in *Fibreboard* from decisions that "lie at the core of entrepreneurial

control," or that "concern the commitment of investment capital and the basic scope of the enterprise," or that "are fundamental to the basic direction of a corporate enterprise" (page 699). If students begin to feel comfortable that Justice Stewart has indeed provided a useful means of discerning mandatory from permissive subjects, the teacher may challenge them with the facts of *Bob's Big Boy* (page 707). Was this a decision to get out of the shrimp processing business and thus one that concerned the basic direction of the enterprise or was it a decision to contract out the shrimp processing operation. A key concern is how broad or narrow a view is taken of the role of the union. If the only relevant role of the union is to offer wage, benefit and work rule concessions, then where the decision involves more than labor costs, as was the case in *Bob's Big Boy*, the decision is not a mandatory subject of bargaining. But, the union may have more to offer than just give backs. In *Bob's Big Boy*, a major employer concern was the inconsistent quality of the available raw shrimp which resulted in problems with portion control. The workers who process the shrimp may have valuable insight into solving this problem. Should we mandate that the employer find out by requiring it to bargain the decision or should we send the employer to the bargaining table only where the union can save jobs with give backs?

The discussion may be pursued further by asking the class what, if anything, the Board's decision in *Dubuque Packing* adds. The Board seems to recognize that *Fibreboard* and *First National Maintenance* are factually reconcilable but philosophically incompatible. Students should be able to see that the decision really does not help draw the line between decisions of vital importance to labor and management that must be bargained and decisions that go to the basic direction of the business that need not be bargained. The Board itself seems to concede that its decision deals mostly with "definition and allocation of the parties' respective burdens" (page 713).

Finally, students can be asked about the hypothetical on page 695 involving the call center that will dismantle its physical operation and require employees to work from home. This would appear to be a fundamental change in the scope of the enterprise but many people's intuitive reaction will be that an employer should not be able to impose this on employees without bargaining. The hypothetical can be used to further challenge students to discern the difference. It may also be used to transition the discussion to practical implications. Even if the decision to require all employees to work from home is not a mandatory subject, its effects on the employees is mandatorily negotiable. Students can be asked what this means as a practical matter for union and employer. Recall the duty to provide information upon request and ask students what kinds of information the union likely will seek and how the *Detroit Edison* balancing test would apply. Further discuss whether it is even possible to confine negotiations to the effects of the decision or whether negotiations inevitably will devolve into decision bargaining.

Teachers pressed for time can skip *Pittsburgh Plate Glass*, but the decision is worth exploring if time permits for two purposes. First, explore the concept that a matter dealing with persons outside the bargaining unit may still be a mandatory subject of collective bargaining if it vitally affects bargaining unit members. Application of this

analysis was rejected by the Court and, as Note 3 (page 716) illustrates, is usually unsuccessful before the Board.

Second, *Pittsburgh Plate Glass* allows for exploration of the very timely topic of retiree health benefits. Teachers may ask students why, if retiree benefits is not a mandatory subject of bargaining, may employers opt to negotiate them with the union, as the auto manufacturers have done multiple times. Note 4 (page 716) discusses the legal effects of such negotiations and provides a preview for a more detailed discussion of retiree benefits in chapter 7 (pages 950-60).

2. RAILWAY LABOR ACT and 3. THE PUBLIC SECTOR

As noted in the text, the general view is that the scope of mandatory bargaining under the RLA is broader than under the NLRA. Students may be asked to evaluate this in light of the very different nature of the collective bargaining process under the RLA as compared to the NLRA. They may conclude that a broader scope of bargaining under the RLA is counter-intuitive as the process is much more laborious and subject to much greater governmental control.

In the public sector, the concerns shift from protecting employer managerial control to protecting the citizens' democratic control over issues of policy. Consequently, many issues which are clearly mandatorily bargainable under the NLRA are not bargainable in the public sector because they involve policy decisions which courts and labor boards conclude must remain subject to resolution through democratic processes. The paragon example is class size – at one level it is an issue of teacher workload but at another level it is an issue of educational policy. It is not surprising that the jurisdictions are divided over whether class size is a mandatory subject of bargaining.

H. BARGAINING REMEDIES

The subject of remedies for bad faith bargaining brings the discussion of regulation of the collective bargaining process full circle. The laissez faire approach of the NLRA leaves the government out of regulating the substantive deal. Rather, the bargain is to be the product of the relative strength of each party. If the union's strike weapon is strong, it will drive a hard deal; if it is weak, it will be forced to acquiesce to employer demands. Consequently, in *H. K. Porter* (page 718), the Court forbids the NLRB from imposing any terms on the parties as a remedy for bad faith bargaining.

In the public sector, strikes are generally illegal and if the statute does not provide for interest arbitration, the union has no real weapon to brandish in bargaining. Union leaders often mock bargaining under such circumstances, calling it "collective begging." These differences lead the Washington Supreme Court in *Metropolitan Seattle* (page 722) to reject *H. K. Porter* as relevant authority and to uphold the authority of the Public Employment Relations Commission to order interest arbitration as a remedy for repeated bad faith bargaining.

The contrast between *H. K. Porter* and *Metropolitan Seattle* provides an opportunity to challenge students to evaluate the continuing relevance of the laissez faire philosophy under the NLRA. The discussion of remedies may be tied back to the discussion of surface bargaining. Students may be asked to recall the particular vulnerability of unions to surface bargaining during negotiation of a first contract. This can lead to a discussion of the provision of the Employee Free Choice Act for arbitration of first contract bargaining impasses.

CHAPTER 6
ECONOMIC WEAPONS

The material on economic weapons offers many opportunities to get at fundamental questions of labor law, such as why do workers strike and why does the law protect it but only ambivalently? The material also offers opportunities to teach important legal skills, including the close reading of complex statutory language (such as section 8(b)(4) on secondary boycotts). Thus, the chapter offers opportunities for interesting policy-oriented discussions about how the law ought to treat the power of worker protest and the economic power of employers to replace strikers and also opportunities to engage in close reading of convoluted statutory language and the mastery of the complex legal rules governing secondary boycotts.

Chapter 6 can be covered thoroughly in about eight class hours for those who want to cover all four substantive sections: (1) introduction and constitutional treatment of strikes, picketing, and protest; (2) statutory protection for employee tactics; (3) legal regulation of employer weapons; and (4) statutory protections for employers against employees (focusing largely on the law of secondary boycotts). Those pressed for time could teach just the section on statutory protection for employee protest and the section on employer weapons in about 3 hours.

The materials in Chapter 6 dovetail with materials in Chapter 2 on section 7 protection for concerted activity. Indeed, the material on the protections for strikes that now is in Chapter 2 (at pp. 196-218) could be taught with Chapter 6. Some professors may wish to teach the chapters out of order, either covering those parts of Chapter 2 when covering other economic weapons with Chapter 6, or covering all of the law of primary strikes and boycotts with the materials on concerted activity in Chapter 2. We would advise, however, not to attempt to cover secondary boycotts early in the semester.

We begin with the constitutional treatment of labor activity because students often have little familiarity with the First Amendment. Moreover, all the statutory regulation rests on the important premise that labor speech and association do not receive the same degree of protection under the First Amendment that other speech and protest do. The First Amendment cases are also a nice vehicle for getting students to think about the policy questions underlying much of labor law having to do with why the constitution singles out speech and assembly for protection, and why speech and assembly can seem sufficiently threatening that legislatures frequently wish to restrict them. In addition, as a practical matter, recent labor activity has increasingly involved coalitions among labor unions, community and church groups, worker centers, immigrant rights groups, and civil

rights organizations. Therefore, the old divide between lax protection for labor speech and vigorous protection of political speech has begun to break down, and the First Amendment looms larger as a source of concern for lawyers dealing with labor activism.

A. INTRODUCTION and
B. CONSTITUTIONAL PROTECTIONS FOR STRIKES AND PROTEST

[This can be done in a one-hour class, or in part of a longer class, or Section B can skipped entirely. Those who do not want to devote an entire class to the First Amendment cases could assign portions of Section B in the context of Part E on secondary boycotts and the consumer appeal proviso.]

Context: most forms of labor protest, including most of the tactics available to workers to secure better working conditions, involve some form of appeal to other workers, to consumers, to employers, and to the public at large. This could include picketing, dissemination of information via handbills, communication over the internet, including on Facebook, Twitter, and other social media sites, speeches in public assemblies, advertisements, rallies, lobbying government, and organizing boycotts. Because Congress concluded that these tactics are both necessary for unions to form and collective bargaining to function and potentially harmful to business and the public at large, the NLRA extensively regulates labor tactics. Some are protected by the statute, some are permitted but not protected, and some are prohibited.

The Verizon strike that begins the chapter raises the fundamental issues covered in Parts A through D of the chapter:

(a) Why do workers strike?

(b) Should strikes and labor protest be treated as a fundamental right akin to political protest?

(c) What role does labor law envision for strikes, lockout, consumer boycotts, and other forms of protest in the context of bargaining disputes?

(d) Labor law is ambivalent about the right to strike (and, to some extent, about lockouts). On the one hand, strikes are broadly protected by sections 7 and 13. On the other hand, employers are free to permanently replace striking workers, which is seen by some as the equivalent of firing strikers and thus as a repeal of the statutory protection for strikes. What is the right balance between the right to strike and the right of employers to operate their business?

(e) Given the importance assigned to economic weapons in labor law, and also the considerable power that strikes and lockouts can wield and the harm they can

cause for all involved, how should law regulate the efforts of unions to maintain solidarity during a strike or lockout?

(f) Should strikes and lockouts be treated as exact equivalents under labor law, or should one be given greater protection than the other?

I. Background -- History of the Evolving First Amendment

Teachers might wish to begin with an overview of the history of the evolution of the constitutional and statutory regulation of labor speech before delving into details. First Amendment doctrine is complicated, and the situation is even more confusing for students because labor picketing receives significantly less protection under the First Amendment than other speech and is not subject to the usual strict scrutiny or intermediate scrutiny analyses. Professors who wish to cover the First Amendment, therefore, may wish to provide some summary of at least the basics of contemporary First Amendment doctrine so that discussion can focus on the reasons for the different treatment of labor speech rather than on the confusing nuances of doctrine. The first part of the following outline can be lectured through or can be used as the basis of a PowerPoint presentation or a handout reviewing the history and the basic current First Amendment doctrine regarding picketing and boycotts. The material most conducive to discussion begins at Part II below.

A. The ebb and flow of statutory and constitutional regulation of labor protest

1. Pre-Wagner Act – No first amendment protection

a. The First Amendment, like other protections of the Bill of Rights, was not held to apply to the states until 1925.

b. Even after the First Amendment was held to apply to the states, many forms of conduct that are today regarded as constitutionally protected speech were not then regarded as conduct protected by the First Amendment (e.g., commercial speech, expressive conduct).

c. State and federal courts often enjoined or criminally punished a wide range of labor-related speech, including picketing and boycotts.

d. Moreover, when states tried to protect labor speech, the Supreme Court held that a statute protecting peaceful picketing was unconstitutional on the grounds that it deprived employers of due process and equal protection. *Truax v. Corrigan* (1921).

2. Early Wagner Act Period – broad first amendment protection (from 1940 to mid-1940s). Just at the time that section 7 of the NLRA began to be interpreted to protect labor protest, the Supreme Court also began to see the first amendment to protect

labor speech against state regulation. *Thornhill v. Alabama* (1940) represents the high-water mark of constitutional protection for labor speech.

3. Taft-Hartley and Landrum-Griffin broadly restrict picketing and protest – both judicial and legislative attitudes about the harms and benefits of labor protest changed during the strike wave that followed the end of World War II and when a new Republican majority took over Congress in 1947. The enactment of Section 8(b)(7), which prohibits many forms of picketing for purposes of organizing a union or seeking recognition of the union by the employer, and Section 8(b)(4), which prohibits secondary boycotts, put the labor law on a collision course with the first amendment, as interpreted in *Thornhill*. In *Teamsters v. Vogt* (1957), the Court resolved the conflict by abandoning the idea that peaceful labor picketing is speech entitled to heightened first amendment protection and upheld a state-law ban on labor picketing.

4. The Court upheld both state restrictions on picketing in *Vogt* and the § 8(b)(7) and 8(b)(4) restrictions on picketing and protest that Congress added in 1947 and 1959. The Court has never been very clear why labor protest is different from other forms of speech that it protects more zealously, nor about the standard it uses to evaluate the permissibility of labor law restrictions on speech and expressive conduct. Students can be asked to provide reasoning that the Court has neglected to provide.

B. Labor protest compared to civil rights protest under the First Amendment.

1. When the Court first confronted the permissibility of civil rights protest in 1937, it held that the NAACP's "Don't Shop Where You Can't Work" campaign in the District of Columbia was a labor protest that could not be enjoined under the Norris-LaGuardia Act. *New Negro Alliance v. Sanitary Grocery*, cited on p. 738. Thereafter, the Court treated civil rights picketing as equivalent to labor picketing for First Amendment purposes, and in 1950 in *Hughes v. Superior Court*, the Court upheld a state court injunction against picketing at a California grocery store urging the store to hire black clerks. By 1950, the Court had backed away from the broad First Amendment protection for labor protest that it had granted in *Thornhill*, and upheld many state court injunctions against any form of labor protest or boycott except a traditional primary strike with peaceful pickets.

2. However, the composition of the Court changed, as did the Court's view of the First Amendment significance of civil rights direct action, including picketing, after the lunch counter sit ins began in Greensboro, North Carolina in 1960. When the first civil rights direct action cases reached the Court (*Edwards v. South Carolina*, in 1963, cited on p. 738), the Court extended First Amendment protection to civil rights picketing. The difference between constitutional protection for labor speech and constitutional protection for other forms of speech became more acute after the civil rights and anti-war protests of the 1960s led to expansion of First Amendment protection for picketing and protest generally, including protest related to working conditions.

3. Two of the cases in the reading show how civil rights protest about race discrimination in employment and commerce sparked the Supreme Court to grant broad protection for pickets and boycotts: *Chicago v. Mosely* (picketing alleging race discrimination in employment) and *NAACP v. Claiborne Hardware* (consumer boycott challenging race discrimination in employment and commerce)

4. Until about the last ten or fifteen years, labor lawyers generally assumed that the First Amendment protections of *Mosely* and *Claiborne Hardware* did not apply in labor cases and that First Amendment challenges to state, local or federal laws prohibiting labor picketing or boycotts were doomed to fail. One might call this the "labor exception to the First Amendment." But as recent labor protest has involved civil rights groups, church groups, immigrants' rights groups and others besides labor unions, the question of whether a particular protest is either protected by the first amendment or prohibited by the NLRA has become much more complex.

C. The contemporary treatment of protest under the First Amendment (The following brief summary of pertinent first amendment principles may be helpful because many students have not studied the first amendment before taking labor law.)

1. The key to understanding the relaxed treatment of labor protest under the first amendment is the view, articulated in *Vogt,* that labor picketing isn't pure speech. But outside the labor field, the speech/conduct protected under the first amendment includes symbolic activities such as burning draft cards or crosses, wearing arm bands, and picketing. If labor picketing were treated as political speech, contemporary labor law would be unconstitutional under modern first amendment analysis.

2. The Supreme Court has identified three categories of speech restrictions with different first amendment analyses for each

a. Content based restrictions. A content-based restriction can be found in either of two ways. One is a viewpoint restriction: a viewpoint restriction arises where the application of the law depends on the ideology of the message. If a city had an ordinance allowing pro-war (or pro-union) speech in city parks but prohibiting anti-war (or anti-union) speech, that would be a viewpoint restriction. The other form of content-based restriction is a subject matter restriction: a subject matter restriction arises where the application of the law depends on the topic of the speech. If a city had an ordinance allowing labor-related speech, but not speech on the topic of peace and war, that would be a subject matter restriction. Both viewpoint and subject matter restrictions must meet strict scrutiny (i.e., be narrowly tailored to serve a compelling governmental purpose). *Reed v. Town of* Gilbert, struck down a city ordinance restricting the use of temporary outdoor signs. (see note 3, p. 747). As *Mosely* points out, a law that treats one kind of picketing as worse than others is unconstitutional. But in the labor area, as the permissibility of section 8(b)(4) and 8(b)(7) make clear, the Court has upheld viewpoint based and content based restrictions on speech.

b. Content neutral regulations of speech needs to meet intermediate scrutiny (i.e., be substantially related to an important government purpose). If a law applies to all speech (such as all parades or protests), regardless of its viewpoint and topic, it only has to meet intermediate scrutiny. Commercial speech receives only intermediate scrutiny, so laws prohibiting false and deceptive advertising are permissible.

c. There are categories of unprotected speech where the government has more latitude to regulate. The government can prohibit incitement of illegal activity, obscenity, and fighting words. However, the Court held in *RAV v. City of St. Paul* (the cross-burning case) that content-based categories within the class of unprotected speech must still meet strict scrutiny.

d. Many laws regulating speech are subject to challenge on vagueness and overbreadth grounds. Consider *Schenck*, in which the Court struck down a floating buffer zone restricting picketing around family planning clinics because the zone restricted too much speech. Injunctions are permissible only where necessary to protect the right to enter the clinic. The usual first amendment vagueness and overbreadth doctrines have not been applied in labor speech.

e. Reasonable time, place, and manner restrictions on speech are acceptable.

3. At the time *Vogt* was decided, the Supreme Court had yet to decide cases holding that expressive or symbolic conduct is protected by the first amendment (e.g., burning draft cards, wearing arm bands, and picketing).

III. Exploring Contemporary Problems in the First Amendment Treatment of Labor Protest

A. Picketing

1. In *Vogt*, in what respects is labor picketing not speech?

a. Students will point out that it involves walking around. This is symbolic conduct, which could be treated as First Amendment speech. However, you might point out that parades and picketing (at family planning clinics and at military funerals) have been held to be speech.

b. Frankfurter in *Vogt* points out that it is a signal. Why should the fact that it is a signal affect whether it is protected by First Amendment?

i. It's coercive – union members do what they're told. Is that another way of saying the speech is especially persuasive to some listeners, just like speech of very authoritative people like the Pope? Does it make a difference whether the union can discipline members who cross picket lines, and thus it's not just persuasion?

ii. You may alert students to the fact that "coercion" becomes a statutory term of art in section 8(b)(4), and the line between what is "coercive" (and therefore prohibited by section 8(b)(4)) and what is not coercive (and therefore likely protected by § 7) is covered in detail in Part E.

c. Compare the impact of the picketing in *Vogt* with the picketing in *Thornhill* or in *Mosley*. Does this help explain why the Court thinks labor picketing is different? Should the social power of the speaker dictate the difference in constitutional protection?

d. Ask students if they think the Court should revisit its treatment of labor picketing today. Is labor picketing as powerful today as it was when the Teamsters did it in the 1950s? Should that matter?

2. The Court in *Vogt* essentially adopts the rule that the government may prohibit picketing if there is some governmental interest that outweighs the value of speech in a balancing test. What are the government's interests?

a. Ensuring the free flow of commerce

b. Preventing coercion of workers, both union and nonunion

3. The relaxed First Amendment standard for labor picketing and protest as compared to non-labor picketing/protest requires lawyers to define two things: what is *labor* picketing? And what labor activities are *picketing*?

4. If you covered section 8(b)(7) in Chapter 4, you might ask students to review it and to decide whether it is constitutional. It regulates speech based on the identity of the speaker (only labor organizations are prohibited), on the basis of its content (only picketing with a recognitional or organizational object, and even then only a subset of those), and even on the basis of its viewpoint (pickets assertin that the union should *not* be recognized would not be covered).

a. What is *labor* picketing?

i. As will be seen in Part E, and as students learned in the treatment of section 8(b)(7) in Chapter 4, only labor organizations are covered by the prohibition on picketing and secondary boycotts.

ii. You might explain to students that this could be an issue of considerable practical importance today, as many labor organizations work in partnership with civil rights, immigrants' rights, and religious groups in conducting protest. The fact that the federal labor law does not (and constitutionally cannot) reach the protest of other groups creates various strategic challenges and opportunities.

iii. You might ask students to advise a union contemplating picketing whom to ask to picket (people not employed by the employer, so they don't risk being fired, and also perhaps non-labor organizations).

b. What is *picketing*, or what kinds of conduct are comparably coercive to picketing?

i. The notes after *Vogt* provide a variety of hypothetical problems to discuss what kinds of behavior (the rat, leaflets, etc.) are comparably coercive to picketing and boycotts. Note that those who teach the First Amendment section will have the opportunity to review the discussion when covering § 8(b)(4) in Part E.

ii. You might also ask students how the law would have differed if workers had adopted some other form of activity or speech as the way to signal their objections to working conditions. If the distribution of handbills had been labor's weapon of choice, perhaps the symbolic and coercive effect of handbills would have been significant, whereas picketing would have been considered relatively benign and simply persuasive.

5. The location of picketing matters a great deal for the scope of First Amendment protection: only picketing and protest on public property is constitutionally protected. Part B.2.c (pp. 731-732) covers the development of the law and the Supreme Court's change of view from *Marsh v. Alabama* (company towns are treated as public property) through *Logan Valley Plaza* (shopping mall treated as public property) to *Hudgens v. NLRB* (shopping mall treated as private property) about whether shopping malls and huge enclaves of private property on which the public is invited freely to congregate are to be treated as "private" or "public" property for First Amendment purposes.

Professors might wish to know that California (and, perhaps, some other states) grant free speech rights in places on public property that are public forums (e.g., some areas in shopping malls).

Boycotts

You might begin by talking about why boycotts work. There are contemporary examples that students might know – such as the student-led efforts to ban sweatshop produced gear from college bookstores. The Taco Bell boycott (described in note 4(b) on p. 758) also became successful when students pressured universities to ban Taco Bell from college campuses. It has grown from a campaign focused on forcing Taco Bell to pay more for tomatoes to the Fair Food Program (www.fairfoodprogram.org).

Then ask whether the circumstances in which people conduct a boycott should make a difference: consumer boycotts versus an employee's refusal to do certain parts of his/her job

Consider why even consumer boycotts can be quite coercive -- the NAACP boycott in *Claiborne Hardware* was reasonably effective, in part because of the strength of the cause but in part because of the social power of the Black Hats and the Deacons who observed where consumers shopped.

Discuss the factual circumstances that might affect whether a boycott is constitutionally protected expression (as in *Claiborne*) or is instead coercive (which is the test under federal labor law as illustrated by *Allied International*) or unlawful restraint of

trade (the test under antitrust law that applied in the case of *FTC v. Superior Court Trial Lawyers Assn*, p. 757 n. 3 after *Allied International*). Ask students to distinguish *Claiborne* and *Allied International*. Both were unanimous decisions and both were decided in the same year (1982). Is one more coercive than the other? Does one inflict more harm than another? Is it that the longshoremen were refusing to do part of their job but that the Claiborne Hardware boycott was about consumer behavior? Why should workers receive less protection than consumers? Ask them also to distinguish *FTC v. Superior Court Trial Lawyers Association.*

The background of *Claiborne* is really interesting, as indicated from the Supreme Court's statement of the case: The complaint was filed in the Chancery Court of Hinds County in 1969 by 17 white merchants. The merchants named two corporations and 146 individuals as defendants: the NAACP, a New York membership corporation; Mississippi Action for Progress (MAP), a Mississippi corporation that implemented the federal "Head Start" program; Aaron Henry, the President of the Mississippi State Conference of the NAACP; Charles Evers, the Field Secretary of the NAACP in Mississippi; and 144 other individuals who had participated in the boycott. Trial began before a chancellor in equity on June 11, 1973. The court heard the testimony of 144 witnesses during an 8-month trial. In August 1976, the chancellor issued an opinion and decree finding that "an overwhelming preponderance of the evidence" established the joint and several liability of 130 of the defendants on three separate conspiracy theories. First, the court held that the defendants were liable for the tort of malicious interference with the plaintiffs' businesses, which did not necessarily require the presence of a conspiracy. Second, the chancellor found a violation of a state statutory prohibition against secondary boycotts, on the theory that the defendants' primary dispute was with the governing authorities of Port Gibson and Claiborne County and not with the white merchants at whom the boycott was directed. Third, the court found a violation of Mississippi's antitrust statute, on the ground that the boycott had diverted black patronage from the white merchants to black merchants and to other merchants located out of Claiborne County and thus had unreasonably limited competition between black and white merchants that had traditionally existed. The chancellor specifically rejected the defendants' claim that their conduct was protected by the First Amendment.

The suit worked its way up through Mississippi courts, with the Mississippi Supreme Court eventually overturning the holding on state antitrust law and the state secondary boycott law, but upholding the judgment based on state common law. There was litigation in federal courts on whether the defendants would have to post a bond for 125% of the judgment (which was for over a million dollars) in order to appeal and on whether the state court judgment would be stayed pending appeal. The case finally reached the Supreme Court in the 1981-82 Term.

It is interesting that the NAACP and its supporters had a First Amendment right to engage in conduct that would have been a conspiracy in restraint of trade as tactic to improve working conditions (and all of commercial life) for African-Americans, but that lawyers committed an antitrust violation by trying to do the same thing in *FTC v. Superior Court Trial Lawyers Association.*

Note that the labor prohibition on secondary boycotts applies only to labor organizations. (That is why the Coalition of Immokalee Workers, which created the Fair Food Program after the success of the Taco Bell boycott campaign, refuses to be or be affiliated with a labor organization.) When employers confront boycotts that involve other groups, they consider other legal weapons. The new favorite is RICO, as illustrated in note 5 after *Claiborne Hardware*. The theory in the RICO cases is that calling for a consumer boycott, engaging in leafleting campaigns outside of supermarkets, and lobbying for closer legislative or regulatory oversight of employers is a conspiracy to extort union recognition from the employer. Leaving aside the various technical arguments about whether RICO covers this behavior, at this point students should focus on whether the First Amendment would protect the campaign against the employers and whether the closer analogy is *Claiborne Hardware* or *Allied International*.

C. STATUTORY PROTECTIONS FOR EMPLOYEE PROTEST

Parts C and D can be covered in about 2-3 class hours. One class can be spent on the limits of statutory protections for strikes and on permanent replacements and the problems of solidarity, and a second can be spent on lockouts. Those pressed for time may wish to omit subsection e. Special Statutory Limitations on Strikes and subsection f. Work Stoppages in the Public Sector, and could cover *Mackay Radio* but skip *TWA v. IFFA.* Section C.2.a (Striker Replacements) and Part D (Employer Weapons) make a nice package because they focus attention on the power of the permanent replacement weapon and the potential of permanent replacements during lockouts to eliminate a union.

1. STRIKES

Students should be reminded to review section D of Chapter 2, which covered the scope of sections 7 and 13 protection for strikes. Chapter 6 assumes knowledge of that material and focuses on exceptions to statutory protections for strikes.

It might help to begin with an overview of the statutory regulation of labor activity, which divides actions into three categories. Federal labor laws *protect* some forms of picketing and labor protest under section 7 and *prohibit* others under sections

8(b)(7) and 8(b)(4). In addition, there is a third category – *unprotected* – which cannot be punished as a ULP but can be the basis for employer discipline.

1. Generally protected: peaceful, "primary" picketing. (Picketing is usually "primary" when the picketing workers are employees of the picketed employer.)

2. Generally unregulated: sit-down, slow-down, harassing tactics

3. Generally prohibited

    a. violence or trespass (prohibited by state law)

    b. recognitional or organizational picketing: with the object of requiring target employer to recognize the picketing union or the employees of the target employer to join the union. Section 8(b)(7).

    c. secondary activity: picketing or other coercive activity directed at an employer with whom the picketing union does not have a dispute over the terms of employment of its employees. Section 8(b)(4).

Students may also be confused about the effect of federal preemption of state law, and since preemption is covered in a later chapter, it might help to give them a summary: Except with respect to labor conduct that does NOT fall in areas of "traditional state concern" (violence, property rights), federal labor law preempts most state and local laws that seek to regulate labor relations. (You might point out that under today's labor preemption law, the state laws at issue in both *Thornhill* and *Vogt* would be preempted.) State laws that regulate conduct that federal law leaves unregulated category are preempted. State laws that prohibit conduct that federal law prohibits are also preempted. And, obviously, federal law preempts state laws that prohibit what federal laws protect. States can regulate only in a limited sphere in labor relations; one area is to prohibit property damage, trespass, and violence.

You might review the materials from Chapter 2 and integrate it with the materials in Chapter 6 by providing the following summary:

I. The statutory protections

A. Section 7: Concerted activity for mutual aid and protection (see Unit II)

B. Section 13: "Nothing in this Act, except as specifically provided herein, shall be construed so as either to interfere with or impede or diminish in any way the right to strike, or to affect the limitations or qualifications on that right."

C. Section 10(c): "No order of the Board shall require the reinstatement of any individual as an employee who has been suspended or discharged, or the payment to him of any back pay, if such individual was suspended or discharged for cause."

D. Norris-LaGuardia Act: federal courts have no jurisdiction to enjoin labor disputes except in narrow circumstances and only then by following certain procedures, including providing notice to union and evidentiary hearing

E. State "little" Norris-LaGuardia Acts. *E.g.* California's Moscone Act and Cal. Lab. Code § 1138.1 (*Ralphs Grocery*)

II. Unprotected

A. Activity inconsistent with exclusivity (*Emporium Capwell*)

B. Violence, trespass, and property damage (state law)

C. "Indefensible" conduct

1. Sit-down strikes (*Fansteel*)

2. Slow-downs, "harassing tactics," and intermittent strikes (*Elk Lumber; Insurance Agents*)

3. Timing: Failure to take reasonable precautions to protect employer's operations (*International Protective Services*)

C. Disloyalty (*Jefferson Standard*)

D. Strikes over nonmandatory subjects of bargaining are unprotected and violate the union's duty to bargain under § 8(b)(3)

E. Strikes in violation of no-strike clause

1. A standard no-strike clause waives right to strike over economic issues and over "non-serious" ULPs that can be redressed through CBA's grievance procedure.

2. A general no-strike clause does not waive right to strike over "serious" ULPs. (*Mastro Plastics*)

F. Sympathy strikes

1. Types of sympathy strikes

2. Why should the law protect, or not, sympathy strikes, including the right to observe a picket line?

3. What showing should the employer have to make in order to discipline an employee who refuses to cross?

2. Under what circumstances would a refusal to perform struck work, as in *Electronic Data Systems*, be deemed a partial strike and therefore unprotected? (Consider footnote 3 in the case.)

V. Strikes in the public sector

A. Many states either prohibit public sector employee strikes (e.g., New York) or make them unprotected.

B. Some states allow and protect them by some employees in some contexts (e.g., California)

1. Public safety employees (police, firefighters) cannot strike

2. Other employees can strike but not if it would cause a substantial and imminent threat to public health or public safety

C. Where strikes are illegal or unprotected, it becomes necessary to define a strike

D. Where strikes are illegal, remedies vary widely and can include discipline of employees, injunctions, fines levied against union, decertification of union, damages payable by the union

E. Alternatives to strikes: mediation, fact-finding, arbitration

Then you can delve into the details:

Section C.1.c (No-Strike Clauses) and C.1.d (Sympathy Strikes)

The legal status of sympathy strikes is quite confusing to students, because it depends in part on the existence of a no strike clause in the contract of the sympathy strikers, and in part on a very vague and malleable standard (as illustrated in *Electronic Data Systems*) for deciding whether the employees were justified in refusing to cross a picket line.

The textual material preceding *Electronic Data Systems* attempts to describe the rules governing sympathy strikes and the *Electronic Data Systems* case offers the opportunity to discuss how the rules are applied in practice and to appraise the reasoning that would support or militate against § 7 protection.

Section C.1.e and C.1.f: Special Statutory Limitations on Strikes and Public Sector Strikes

These two sections can easily be taught as a pair, or skipped. As explained in the text, there are special rules governing strikes in health care and under the Railway Labor Act. The National Emergency Provisions provide a convoluted process for dealing with threatened work stoppages (by either strike or lockout) that the President may invoke when he feels it will affect an entire industry and "imperil the national health or safety." All of these special procedures are very important in certain cases, but they are also somewhat technical. Students often confuse the required notice for strikes in health care with a required notice before striking, not realizing that all section 8(d) requires is notice by a party seeking to terminate or modify a collective bargaining agreement, not notice of an intent to strike.

Those who wish to teach the material will find that it raises the same fundamental issues as all the rest of the material on strikes and section 7: how to accommodate the desire of employers and some segments of the public to enjoy uninterrupted production with the right of employees to use strikes to secure better working conditions.

The material on work stoppages in the public sector raises similar practical problems as the material on slow downs: how is a court or the labor board to determine whether an apparent decline in employee work effort constitutes an illegal strike or slow down (in the case of the public sector) or an unprotected slow down (in the case of the private sector). Those who want to teach the material in a condensed fashion might discuss the public sector hypotheticals at the same time as the slowdown hypotheticals. And of course it's important to point out that the fact that strikes are illegal does not mean they don't happen, as illustrated by the teachers' strikes in April of 2018.

Section C.2 -- Legal Regulation of Tactics in the Battle for Solidarity

C.2.a.: Management Tactics: Replacing Strikers

Both as a conceptual matter and as a practical matter, the most important limitation on the § 7 right to strike is the rule (which recently was elevated to a management "right" protected against infringement by either state law or Presidential executive order) allowing companies to permanently replace striking workers. There are many teaching opportunities in this material.

First, to teach *Mackay* itself, it helps to have students see why the rule allowing permanent replacements was in fact dicta. The employees struck. The employer brought in 11 replacements. At the end of the strike, only five replacements wanted to stay. In deciding which strikers would not be reinstated, the employer chose those who were most active in the union and in instigating the strike. At this point, ask the students what the issue was, and they should spot that the issue was whether the employer could discriminate against the union activists in deciding who to reinstate. That would be a clear violation of section 8(3) [now 8(a)(3)].

Then you might ask: If you were to reason from first principles, would permanently replacing strikers be an unfair labor practice?

Under section 8(a)(1) you would balance the interference with section 7 rights against the legitimate needs of the employer to operate the business. How would you decide whether the employer "needed" to permanently replace strikers?

Under ' 8(a)(3) you would look for an economic motive to make the replacements permanent as opposed to a motive to weaken the union. How would you distinguish the two?

You can ask students to evaluate the rationale for the rule. Why did the lawyer for the NLRB make the concession? What rationale does the Court offer for the rule? (hint: none.)

Does the absence of a rationale matter? It might, because it didn't give either the Supreme Court (in *Erie Resistor, Great Dane, or TWA*), or lower courts much guidance on how broad the right to hire permanent replacements is. For example, after the disastrous Hormel strike in Austin, Minnesota in 1985-86, the state of Minnesota banned the use of permanent replacements. The Eighth Circuit found the law to be preempted. President Clinton issued an executive order banning the use of permanent replacements by government contractors, and the D.C. Circuit held that Executive Order was effectively preempted. In both cases, the courts found that *Mackay* established an affirmative employer right. If the Court in *Mackay* had elaborated on its reasons, it might be perceived that the lower court decisions protecting the employer right rest on adherence to precedent more than on policy preference of the judges.

Mackay Radio offers a fascinating study about the nature of law. Note 1 after the case invites students to think about why the Supreme Court decided the case as it did, given the section 7 and 13 protections for the right to strike. It was one of the Supreme Court's earliest decisions on the NLRA, handed down only one year after the Court had first upheld the constitutionality of the Act. The Board had not formally considered the permissibility of permanent replacements; the Board's lawyer simply conceded in oral argument that the use of permanent replacements was not illegal. The chapter on *Mackay Radio* in *Labor Law Stories* (Cooper & Fisk, eds., Foundation Press 2005) contains a thorough account of how the case was decided as it was, and why it was not controversial for the first several decades that the law was on the books. Note 3 after the case invites students to think about why management often did not choose to use permanent replacements for strikers. And the April 2018 teachers' strikes illustrate that the ability to hire permanent replacements depends on the availability of a sufficient number of trained workers who are willing to cross picket lines – that wasn't feasible for skilled jobs for much of the middle-twentieth century. The textual note on permanent replacements then explains how the use of permanent replacements became more widespread 50 years after *Mackay* was decided and thus transformed the nature of the strike weapon decades after the statute was enacted.

Those who want to focus on the policy aspects of law governing permanent replacements can ask students to articulate the arguments for and against allowing the use of replacements and to justify those arguments in light of the statutory language and policy.

You might frame the argument as whether Congress should amend the NLRA to overrule *Mackay Radio,* or you might frame it as to whether organized labor should make legislative change a high priority (assuming it could overcome a likely Senate filibuster), or how one would advise a Senator to vote on such legislation.

You might ask students to articulate a principle that can be used to determine when employer weapons are unacceptable.

One argument against *Mackay* is that it gives too much power to employers and only when they need it least. An employer will be most successful in finding permanent replacements when there is a labor surplus and when employees are less skilled. Aren't those the employees who will have the least bargaining power anyway?

A second argument is that employers don't need permanent replacements because strikes are naturally limited in duration by the employees' economic stamina.

On the other hand, temporary replacements are more expensive for the employer if the employer has to invest in training them and cannot recoup the training costs over the long haul.

Students will often argue that the employer simply should have a right to run its business, and it is an unwarranted intrusion on its freedom to restrict who it can hire.

To teach the practical significance of the use of permanent replacements, the notes cover the series of cases, including *Erie Resistor, Great Dane,* and *TWA v. IFFA.* To begin with, you should ask students to articulate the difference between being fired and being permanently replaced. This is explained in the text in the discussion of *Laidlaw*. If the employer tells employees they cannot have their jobs back before replacements have been hired, it's a ULP. Strikers have a right to reinstatement when vacancies become available.unless they have acquired substantially equivalent employment elsewhere or the employer can demonstrate a legitimate and substantial reason for refusing to reinstate strikers. The latter is very hard to prove. Strikers must be reinstated with full seniority, but, as you see in *TWA v. IFFA*, competitive seniority will not allow the reinstated striker to bump a more junior replacement employee from a job.

Only economic strikers may be permanently replaced; ULP strikers may not. You might ask students to consider the rationale for the distinction between ULP and economic strikers. The distinction between ULP and economic strikers requires the Board to determine the reason for a strike both when the strike begins and, if it subsequently converts from an economic to a ULP strike. It's a counterfactual inquiry based on all the evidence: would the employees have struck or continued the strike, if there had been no ULP. As explained in the notes, the conversion doctrine gives rise to strategic behavior by unions because the ULP that is most likely to occur during a strike is a failure to bargain, often by the employer implementing its final offer without bargaining to impasse. Sophisticated union negotiators will thus do their utmost to prevent the negotiations from reaching an impasse, which creates incentives to be devious in bargaining strategies and which, ironically, may sometimes result in prolonging the strike.

You might ask students to think about why an employer might be reluctant to hire permanent replacements (makes strikers angry which tends to galvanize support for a strike that might have fizzled out), makes it harder to settle the strike because a fundamental union demand to settle any strike will be to reinstate strikers, which then puts the employer in a difficult position vis-a-vis the replacements, and where replacements and strikers have to work side-by-side after the strike, personnel relations are likely to be strained.

The note and squib cases on pp. 780-789 consider other management tactics related to striker replacements. After *Mackay Radio*, the Board and the courts had to decide whether particular management tactics for dealing with strikers were ULPs under the usual section 8(a)(1) and 8(a)(3) analyses. Under section 8(a)(1) the question is whether a legitimate (i.e., not hostile to union) employer interest outweighs the impact on section 7 rights. Under section 8(a)(3) the question is the employer's intent.

One might read *Erie Resistor* as an example of an 8(a)(1) analysis: the impact on strikers of granting superseniority was so large that the employer's desire to run its business during the strike could not outweigh it. It's not a conventional ' 8(a)(1) analysis because there was little scrutiny of whether the employer in fact needed to offer superseniority in order to keep its business running. Hence, it is treated as a *sui generis* case where an employer tactic was so inherently destructive of section 7 rights that it could not be justified. As illustrated by *Great Dane* and *TWA v. IFFA*, no subsequent case has found an employer strike breaking tactic to be inherently destructive of section 7 rights; they all are judged under the usual 8(a)(1) and 8(a)(3) analyses.

In teaching *Erie Resistor*, it's illuminating to ask the students to take each of the five bases on which the Court distinguished *Mackay* and ask whether it is a distinction with a difference:

superseniority affects the tenure of all strikers, not just those replaced. Why is that difference legally meaningful?

superseniority operates to the detriment of strikers as compared to nonstrikers. Isn't that true of permanent replacements?

superseniority offers individual benefits to induce abandonment of the strike. Doesn't permanent replacement do that?

deals a crippling blow to the strike effort. Hiring permanent replacements en masse does that, especially when there is a shortage of jobs in the area.

superseniority renders future bargaining difficult because it creates long-term cleavage among employees in the unit. Doesn't hiring permanent replacements do the same thing, because the union will have to represent both those who honored the strike and those who crossed the line to take the jobs of others who honored the strike? And the ones who were lucky enough to get their jobs back will be working alongside the people who took the jobs of their fellow strikers and former coworkers?

As illustrated by *TWA v. IFFA*, most employer weapons are judged by whether they serve a legitimate employer interest or are motivated by an intent to discourage the exercise of section 7 rights. In teaching this case, it is important for students to understand why the seniority system helps cross-overs and hurts hold-outs. Then you can ask the students to generalize about what standards should be used to prove whether a

policy harms section 7 rights (and how much harm is necessary to be legally significant), how the employer should prove that it had a legitimate reason for adopting the preference it did for those who broke the strike, and how the Board's general counsel should prove anti-union intent.

Section C.2.b. Union Tactics

The power to hire permanent replacements and then, under *TWA v. IFFA*, to perpetuate the advantage gained by crossing a picket line creates enormous pressure on unions to figure out how to protect the strike as a weapon by protecting those who honor a strike. If the union's power comes from its ability to act as a collective to control the supply of labor, what can a union do to see that it continues to act as a collective? One way to get students thinking about this is to remind them that unions are voluntary membership organizations and, as such, they have limited ways to control their members. What can they do? They can expel strikebreakers from membership, they can shun them, they can try to impose a fine on them. But they still must represent them in a manner consistent with the Duty of Fair Representation so long as the employees remain in the bargaining unit.

The full range of issues about union relations with its members is covered in chapters 7 and 8. At this point, it's sufficient simply to highlight for students some of the key rules. First, point to section 8(b)(1) and ask them to think about what kinds of actions a union could take against a member who crosses a picket line that does not "restrain or coerce" an employee in violation of section 8(b)(1)(A). Then tell students that, as we will learn in chapter 8, an employee does not have to be a member of the union in order to work in the bargaining unit and gain all the benefits of the CBA that the union has negotiated. Also remind the students of the scope of the DFR. So, if a union tries to enforce a rule that prohibits crossing a picket line, the employee can always resign from the union. That has some consequences – the loss of the ability to participate in union governance – but it does severely limit the union's ability to use its rules to maintain solidarity.

The last bit in the section on permanent replacements covers comprehensive campaigns because, it is worth pointing to students, unions increasingly have sought to exert leverage through mechanisms other than strikes, and the "corporate social responsibility campaign" is one of the few weapons left to them.

D. EMPLOYER WEAPONS

1. LOCKOUTS

2. PARTIAL LOCKOUTS

A lockout might be described as a layoff intended to force the union to accept an employer's bargaining position. Those pressed for time could skip this reading and lecture during the coverage of strikes on the law governing lockouts. Alternatively, professors might assign just the *International Paper* decision while covering the *Mackay Radio* line of cases. At a minimum, any professor who wishes to discuss unionization in professional sports should not focus exclusively on the law governing strikes while teaching economic weapons, for most work stoppages in professional sports have been lockouts.

In teaching the law of lockouts, it is important for students to understand *why* an employer would use a lockout, *when* a lockout might succeed (in times of job scarcity) and when it might fail (in times of labor shortage), and why lockouts might arguably be found to violate section 7. The text then explains the old distinction between offensive and defensive lockouts, which, although no longer of doctrinal significance, is a useful way to illustrate the competing policy arguments about why labor law might prohibit or permit lockouts. The notes on p. 796 and 804 are intended to get students to focus on the policy arguments for allowing or prohibiting employers to use a lockout as a bargaining tactic. As the text explains, the Supreme Court's 1965 decision in *American Ship Building Co. v. NLRB* abandoned the legal distinction between offensive and defensive lockouts, but it did not really address the difficult underlying issue: when is a lockout illegally coercive and when is it simply an exercise of economic power that is a permissible bargaining tactic? This, of course, is the same issue that the courts have struggled with in the law of strikes: when labor market conditions give one side so much leverage that it can effectively insist on terms, how are the Board and the courts to decide when the use of that economic weapon crosses the line from permissible weapon to illegal coercion?

Most of the recent cases on lockouts raise this fundamental policy dispute in the context of a partial lockout, which is one in which the employer wishes to lock out some or all of its unionized employees but to continue operations. Two different perspectives on the legality of operating during a partial lockout are offered in the Board's and the Seventh Circuit's opinions in *Midwest Generation*. The two opinions offer the opportunity to use the policy disputes about lockouts to teach not only the limits of the Board's power to balance economic power but also the role of the courts of appeals in reviewing the Board's policy judgments.

3. REPLACEMENT WORKERS DURING LOCKOUTS

International Paper presents a further manifestation of the same problem: if the employer can lock out its employees to pressure them, can it replace them so that they feel the economic pressure but the employer does not? Some professors may wish to provide background on the International Paper campaign, which was a protracted and bitter struggle involving a corporate campaign and a disastrous strike at the Maine facilities of the company. The story is told by Julius Getman in *The Betrayal of Local 14* (Ithaca, NY: ILR Press, 1990). Another perspective on the dispute and the question of what law should do about it is given by Deborah Malamud in her review essay on the Getman book, *Of Voice, Charisma, and the Bottom Line. Review of* The Betrayal of Local 14, 88 GEO. L.M. 691 (2000).

If you teach the use of replacement workers during lockouts, you might want to outline all the possibilities and ask students to decide which are ULPs. At one extreme one might put the following. The employees vote to unionize and their union is certified. They send their negotiating committee to meet with the employer. The employer responds insisting on a paycut and, to back up its demand, it locks out the newly-unionized entire bargaining unit and hires permanent replacements. A year later, the permanent replacements vote to decertify the union. At the other extreme, one might put the Board's initial position that hiring section 7 and 8(a) prohibited even temporary replacements during an "offensive" lockout (one initiated by the employer to pressure the union rather than in response to an anticipated strike). All the varieties of replacement workers -- temporary, permanent, and subcontracting during a lockout – fall in between. The students could discuss where they would draw the line and why, and whether the Board or the reviewing courts should make the decision.

E: STATUTORY PROTECTIONS FOR EMPLOYERS: SECONDARY ACTIVITY

This material can be taught in two or three class hours. If time is short, consider omitting the separate gates material (section E.2.c) and section E.4 at the end of the chapter (hot cargo agreements).

It is quite feasible to teach labor law without covering the law of secondary boycotts (more precisely called secondary activity, because it involves more than boycotts), and those with fewer than three units may be wise to do so. However, as firms increasingly use networks of contractors in the supply and delivery chain and in labor relations, the law of secondary activity has gained in policy and practical importance. The contemporary labor practitioner is highly likely to encounter secondary boycott issues and the law is notoriously complex and difficult to master, so professors are well-advised to consider training their students in this area. In addition, secondary activity

provides an ideal vehicle for teaching the technical skills of statutory analysis and of sorting out complex fact patterns and applying a complicated rule to them. Thus, whether you want to emphasize technical competence in statutory interpretation and factual analysis or large-scale policy debate about the use of economic weapons in labor disputes, the law of secondary activity offers great teaching opportunities.

1. THE PRIMARY-SECONDARY DISTINCTION

The chapter begins in Section 1 with a textual overview and an outline to help students master the intricacies of § 8(b)(4). Professors might wish to use the introductory problem on the Taco Bell boycott and the Fair Food Program of the Coalition of Immokalee Workers to analyze the text of § 8(b)(4)(B). The text has an outline of section 8(b)(4), and it is wise to put the text of the statute in front of students (either on a screen in the front of the room or by asking them to open the statute in class) to force them to read the language. Since the operative concepts (primary and secondary activity) are nowhere mentioned in the statute, much less defined, the challenges of interpretation are considerable.

The rest of the chapter is organized around the principal problems in the law of secondary activity: common worksites (Section 2) and consumer appeals (Section 3) and hot cargo agreements (Section 4). One can easily teach only Section 2 and 3, as the law of hot cargo agreements is highly specialized.

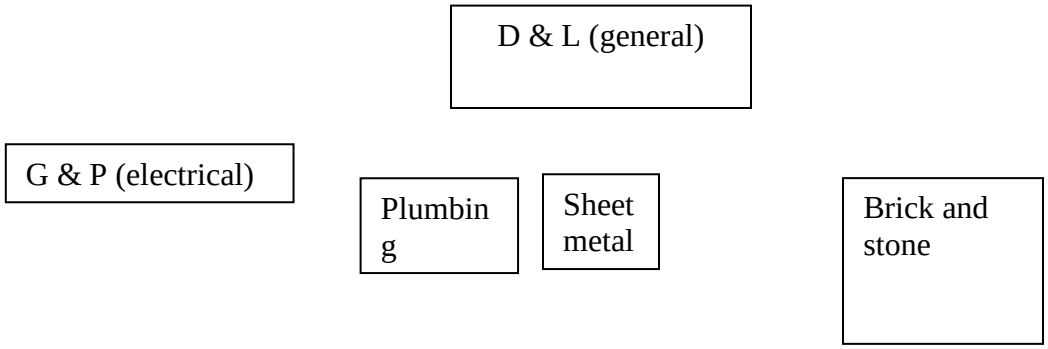
2. COMMON WORK SITES

Students find the law of common worksites terribly confusing. The easiest way to begin to clarify which rules apply where is to alert them to the structure of the chapter (the construction industry rule, the general rule (which is misleadingly called in many cases the “ambulatory situs” rule), and the separate gates rule. Also, note 1 on p. 841 sums up the rules.

In the late 1940s and early 1950s, when the law of secondary boycotts began to develop, the construction industry and shipyards were two of the few densely unionized sectors in which employees of multiple firms commonly worked together on the same premises and in which networks of contracts among firms was the dominant form of business organization. Thus, it was particularly significant when the Supreme Court held in the *Denver Building* case that the efforts of employees of one subcontractor to ensure that all work on the jobsite was done by union labor by pressuring the general contractor to hire only unionized subcontractors was an unlawful secondary boycott. It is also worth

noting, when you get to *Moore Dry Dock* (p. 825) that it was another early example of the common worksite that is today ubiquitous.

In teaching this case, there are multiple levels of understanding that one can seek to give students. First, you might advise them to draw a diagram of the transaction or the worksite (or both, depending on the case) so that they can keep the cast of characters and the targets of the activity clear. In this case, you might want to diagram the network of contractual relationships on the construction site.



Turning from method to substance, it is important to get them to focus on the statutory text and the strictly textual arguments about why pressure on the general contractor was construed to have a secondary object and on the textual arguments (rejected in that case) about why it did not have a secondary object. Second, one can ask questions about whether the Court's very narrow definition of a primary labor dispute, and very expansive definition of who is a neutral and what pressure is secondary, makes policy sense, either in the construction industry or more generally. Why does the fact that the general contractor hires a subcontractor to do part of the work make the general contractor immune to labor pressure designed to make the construction site an all-union job? If the general had done the work itself, and had hired nonunion electricians, then all the general contractor's employees would have had a primary dispute with the general when forced to work on the same jobsite with nonunion workers. Why does hiring a subcontractor make a difference? You might ask students why there was so much controversy over President Ford's veto of the bill that would have legislatively overruled the case that the Secretary of Labor to resign in protest.

When you move from *Denver Building* to *Moore Dry Dock*, you might explain to students that *Denver Building* articulates a general principle, and also a specific rule for the construction industry, and *Moore Dry Dock* states the rule that now applies generally in most common situs cases. It is called the "ambulatory situs" rule, but that is a misnomer – it is the rule for all cases in which the employees of the primary are working on the property of the neutral. In teaching *Moore*, you might draw a sketch of the worksite on the board to get students to visualize the challenges facing a union that wants

to picket a primary employer that works on a common situs without nearby public access. (You can find photos of the Moore Dry Dock in Oakland, California on Google images. It was huge.) Where could the union picket? Does that make sense as a matter of labor policy? What is the right balance between protecting neutral employers and allowing employees to protest the working conditions of one employer among many in a common worksite? Note 3 on p. 827 asks students to think about where the situs of a dispute is when the workers move around.

As the text explains, *Moore Dry Dock* invited employers to try to isolate firms that were subject to labor disputes to use separate entries and exits so that the multiple employers could prevent picketing at the places where the struck employer's employees crossed from public property into private property. *Local 761, IUEW (the General Electric case)* is the major case on whether the creation of separate gates allows an employer to insist that the union picket only at the gate used by employees of the employer in the labor dispute. Here you might draw a diagram of the worksite (one could describe Appliance Park as a castle surrounded by a moat with 5 bridges crossing it). Students sometimes have trouble finding the rule in the case, so you might want to state the rule, or ask a student to state it, and then ask them to apply it to the facts of this case or a similar one to be sure they can figure out what the case held.

The questions after the case focus on the policy and practical arguments arising in this area of law and on how the separate gates rule has been applied in later cases (Notes 3 and 4 on pp. 833-835). Note 1 (p. 833) allows discussion of the big picture: does the *General Electric* rule make sense in terms of the goals of the secondary boycott prohibition? Note 2 explains the result on remand and invites discussion about whether the NLRB correctly analyzed the facts in applying the new rule, and also invites discussion of the role of fact-finding under the *General Electric* rule and the possibility that an agency or reviewing court could achieve particular policy goals about secondary activity by disguising its policy-making as fact-finding. Notes 3 and 4 are drawn from two of the leading cases on the separate gates doctrine. The facts of both the *Carrier Corp.* case and the *Anchortank* case are very confusing, so if you teach these notes, be sure to spend time helping the students sort out the facts and applying the rule to the facts before you ask them to grapple with the policy issues raised in this area. One of us always makes drawings on the board of what she imagines the worksites looked like so that students can envision the difficulty the union would have in finding a place to picket.

The final case in the series, *Markwell & Hartz*, is really complicated and difficult, but it is a terrific vehicle for reviewing the material and debating the policy issues. As with the others, we recommend diagramming the work sites on the board, including the railroad tracks and the gates. (It doesn't really matter whether your drawing depicts the

actual site, so long as students see that to get to the neutrals' sites, the trains had to cross the site of the primary, so stopping trains leaving the main tracks and entering the primary's site would be primary if the train was bound for the primary but secondary if the train was just passing through en route to a neutral's site. *Markwell & Hartz* raises questions about the relationship between *Denver Building* and *G.E.* Note that in *Denver Building*, the subcontractor was the primary employer and the union argued unsuccessfully that the general contractor was also primary. In *Markwell & Hartz*, the general is primary and has isolated the neutral subs with dedicated gates. The union pickets the subs' gates. Under *G.E.* and *Carrier Corp.*, neutrals at a common situs who are involved in the regular day-to-day business of the primary may be picketed at the site. The relationship between *Denver Building* and *G.E.* divides the majority and dissent and also divided the Fifth Circuit on appeal, 387 F.2d 79 (5th Cir. 1967). Those pressed for time can skip it and still cover the law thoroughly, though you should consider assigning the notes on pp. 841-842 even if you do not assign the case itself because they sum up the law and also cover the ally doctrine, which is an exception to the *Moore Dry Dock* rule.

3. PERMISSIBLE SECONDARY APPEALS

If you are going to teach any aspect of the law of secondary activity, it is probably a good idea to cover this section because the law of consumer appeals arises constantly in practice. Moreover, the rules are not particularly difficult to sort out (once students have waded through the long proviso) and the issues raised are quite accessible to most students and fun to debate. If you skipped the material on the First Amendment and labor speech early in the chapter, and you want to cover consumer appeals, you might want to give a brief lecture surveying the law of freedom of speech, especially if you teach at a law school in which the First Amendment is not covered in a first-year constitutional law course. It is important for students to understand what "speech" is covered by the First Amendment, that the First Amendment applies only to state action, and how section 8(b)(4) might violate the constitution. Then, if you teach both of the cases in the section, you might want to make clear that there are two slightly separate rules at work: one a statutory protection for speech (in *Tree Fruits*) and one a quasi-constitutional rule (in *DeBartolo)* that was created to avoid the constitutional question that would be raised if the Court construed section 8(b)(4) to prohibit peaceful advocacy of a consumer boycott. Students often confuse the consumer picketing allowed in *Tree Fruits* with the publicity proviso to § 8(b)(4). It is useful to highlight that the proviso protects publicity *other than picketing*. The employers in *Tree Fruits* argued that because the proviso legalized non-picketing publicity, picketing must be illegal. But the majority, per Justice Brennan, concluded that the picketing in this case was not aimed at coercing Safeway to cease doing business with the Washington apple growers. Justice Black would have none of that. He regarded the statute as prohibiting the picketing and as therefore

unconstitutional. Justices Harlan and Stewart agreed with Justice Black's interpretation of the statute but would have upheld its constitutionality. In both *Tree Fruits* and in *DeBartolo*, the Court narrowly construes the meaning of coercion because of First Amendment concerns.

The notes after the cases contain questions designed to elicit both policy discussions about the desirable contours of the law and practical discussions about when employers would want to insist on their right to control the location of speech in a multi-employer worksite (see, for example, Note 2 on p. 853). It may be both refreshing to students and important in training them to remind students that the lofty questions about constitutional and statutory protections for speech and against coercion also present employers and unions with tough strategic questions about where worker protest will cause the least or greatest impact and on whom.

Those who want to teach a contemporary course will want to teach the squib cases on pp. 854-859 and the hypotheticals in the note on pp. 859-860. Students find the facts amusing (and easy) after some of the complicated secondary activity cases that precede these, and the hypotheticals allow plenty of opportunity for students to test their skills of argument to support what are usually strongly held views about whether or when certain protests should be banned.

4. HOT CARGO AGREEMENTS

For a long time, many labor law teachers skipped the law of hot cargo agreements on the grounds that it is complex, confusing, arcane, and highly specialized. It still is not for everyone. But the advent of corporate codes of conduct and other creative union efforts to pressure employers to enter into agreements respecting labor rights, and to use economic pressure to enforce those agreements, makes the law of hot cargo agreements newly relevant. The global supply chains that exist throughout modern manufacturing and sales resemble the domestic supply chains that characterized the garment industry in the United States in the late-nineteenth and early-twentieth centuries. An interesting and well-written article explains the similarities between then and now, and how garment worker unions devised ingenious contract solutions to the problem, in a way that might make the law of secondary activity and hot cargo agreements come alive: Mark Anner, Jennifer Bair & Jeremy Blasi, *Toward Joint Liability in Global SupplyChains: Addressing the Root Causes of Labor Violations in International Subcontracting Networks*, 35 Comparative Labor Law & Policy Journal 1 (2013).

If you discuss section 8(e) only briefly, you should at least draw students' attention to the exception for the garment industry. Students know that garments are

produced and distributed through supply chains and that the power and money is all at the top – with the brands or the retailers. That has been true in the garment industry for over a century. Organizing sewing shops was a fruitless exercise if the union couldn't negotiate and enforce a contract requiring the retailers or brands to deal only with jobbers and other intermediaries who agreed to buy only from unionized sewing shops. Without that, any sewing shop that unionized and raised wages would lose its contracts with the intermediaries who, in turn, competed ferociously to get contracts from the retailers or brands. The same thing is true today. The garment industry proviso recognized the need for enforceable contracts up and down the supply chain. It's the same kind of contract that is the foundation of the Coalition of Immokalee Workers' Fair Food Program.

If you want just to give a flavor, you could assign just pp. 860-868, and tell students to skip notes 6 through 9 on pp. 866-868. Confine the discussion to the very general policy question of whether unions ought to be able to pressure employers to enter into agreements protecting labor rights of everyone who works in a supply chain. Students should quickly see the secondary activity issues and, at a general level, you can discuss the question whether labor activists can use contracts to evade some of the strictures of the secondary activity law. You could assign section 8(e) without the cases interpreting it and treat this as a statutory interpretation and policy-debate exercise rather than asking the students to master the nuances of the Supreme Court's jurisprudence on hot cargo agreements. If you do so, you might consider assigning note 9 on p. 867.

The leading cases on hot cargo agreements (squibbed on pp. 860-865 and in notes 6 and 7 on pp. 866-867) pursue a convoluted line of reasoning to conclude that certain agreements (to preserve work) are legal and others (to claim new work) are not. This is a distinction so fine that lower courts (and many professors) find themselves at a loss to explain it clearly.

A more interesting and accessible branch of the law of hot cargo agreements is illustrated by the *Sheet Metal Workers* case on p. 868, which addresses the question whether agreements intended to prevent a construction contractor from creating a non-union subsidiary are unlawful. If you teach it, the most important practical assignment to consider along with it is note 2 on p. 870 which asks students if they could draft a contract provision designed to protect union jobs without running afoul of the prohibition on hot cargo agreements.

CHAPTER 7
LIFE UNDER THE COLLECTIVE BARGAINING AGREEMENT

We suggest that, in introducing this chapter, the teacher remind students that the National Labor Relations Act is a basically conservative statute. It represents a national policy favoring equalizing bargaining power and leaving the parties to negotiate their own terms and conditions of employment. The NLRA's ideal is a privately-ordered workplace in which the parties govern themselves. We saw this idea at work in chapter 5 where we learned that the NLRB has no authority to dictate terms to the parties and the consequences of that lack of authority for such issues as policing subjective good faith at the bargaining table and remedies for breach of the duty to bargain in good faith.

Chapter 7 is organized to enable teachers to begin by following through on that statutory ideal of a privately-ordered workplace and then explore the limits of this statutory ideal. It begins by looking at the traditional privately-ordered workplace, how the law facilitates and defers to that private ordering. The emphasis is on the role of the grievance and arbitration procedures adopted in more than 95% of collective bargaining agreements, the law's deference to that procedure and the judicial inroads in interpreting the anti-injunction provisions of the Norris-LaGuardia Act to facilitate that deference. Parts A – C examine the collective bargaining agreement as the principle source of law governing the workplace, the situation which existed in what David Feller termed the "golden age" of labor arbitration. *See* David Feller, The Coming End of Arbitration's Golden Age, *in Arbitration 1976: Proceedings of the 29th Annual Meeting, National Academy of Arbitrators* 97, 101 (Barbara D. Dennis & Gerald G. Somers, eds. 1976). Parts D and E examine the limits of this private ordering: protections for individual employees from their own unions and the interplay with the expanding direct legal regulation of the workplace. The entire chapter may be covered comfortably in 6 – 7 class hours.

A. INTRODUCTION and B. WORKPLACE SELF-GOVERNANCE UNDER THE COLLECTIVE BARGAINING AGREEMENT

Parts A and B can be covered comfortably in two to three class hours. The introductory problem provides a useful tool to begin class discussion. Students may be asked to catalogue the numerous ways in which Smith and/or his union may seek to reverse his discharge. They may be asked under what circumstances would Smith's interests and those of the union coincide and under what circumstances would they conflict. They may also be asked which of the ways that Smith and the union might seek to reverse his discharge are consistent with each other and which are inconsistent. If the collective bargaining agreement contains a grievance and arbitration procedure but does not have an express no strike clause, is it consistent for the union to strike to protest Smith's discharge? Is it consistent for Smith to bring a law suit for breach of contract? What about a law suit under Title VII or an unfair labor practice charge? Should it matter

whether the contract prohibits discrimination on the basis of race or union activity? Should it matter if the contract expressly requires employees to bring their Title VII or NLRA claims through the grievance and arbitration procedure?

Most labor law casebooks present *Lincoln Mills* as a principal case. *Lincoln Mills*, of course is the judicial tour de force where the Supreme Court interpreted section 301 of the Taft-Hartley Act as not only conferring jurisdiction on federal courts to enforce collective bargaining agreements but as a mandate to develop a federal common law of collective bargaining agreements. We think this can be more efficiently covered by lecture, noting that a basic tenet of the federal common law of collective bargaining agreements is that the grievance and arbitration procedure is the quid pro quo for the no strike clause. Students may be asked to revisit the opening hypothetical in light of this principle. They will see that a strike over Smith's discharge is inconsistent with this principle.

The teacher may ask students whether the advantages of having a grievance and arbitration procedure discussed on pages 874-76 apply to Smith's discharge. There is a good deal more money at stake in a dispute over a discharge than in the holiday pay dispute discussed on page 874. Lawsuits over allegedly wrongful discharges are brought all the time. Indeed, employment cases comprise the largest portion of the civil dockets of federal district courts and the largest portion of those cases are over discharges. In light of this, students may be asked, why grieve and arbitrate?

In the discussion, the teacher can point out that many lawsuits are resolved on motions to dismiss or for summary judgment. Such motions are virtually non-existent in grievance arbitration. Thus, Smith is much more likely to get a hearing on the merits of his discharge in grievance arbitration than in court. Discovery is limited in grievance arbitration. The teacher may remind students that they learned in chapter 5 that the parties have a duty to provide relevant information upon request during the grievance process. However, depositions are virtually unheard of in grievance arbitration. Grievance arbitration is not considered the practice of law and it is common for non-lawyer labor relations professionals to represent parties, particularly unions, in the arbitration hearing.

All of this means that grievance arbitration tends to be faster and less expensive than litigation. This makes reinstatement a more effective remedy. Studies show that the faster a discharged employee is reinstated, the more likely it is that the reinstatement will be successful, i.e., the employee will actually return to the job and will continue and progress on the job. Moreover, unlike an individual litigant, when the union obtains Smith's reinstatement through arbitration, Smith will be protected by the union when he returns to the job. Studies of reinstatement following arbitration awards are uniformly positive.

The teacher may ask whether the discussion of the role of grievance arbitration in the common controversy over the appropriate mix of qualifications and seniority in filling vacancies has any relevance to the reason to arbitrate Smith's discharge. The answer is that most collective bargaining agreements simply require just cause for discipline and

discharge. Students may be asked why? They should realize that if the parties tried to negotiate specific acts of misconduct or misfeasance and specific penalties, their talks would likely end in frustration. Such a detailed negotiated code would be highly impracticable. The parties could not possibly anticipate every, or even most, situations that might give rise to discipline, much less anticipate the array of factors, such as length of service and prior disciplinary record, that would go into the determination of whether a particular level of discipline is just. Consequently, most parties provide a general standard, just cause, that applies to all discipline. The grievance and arbitration procedure enables the parties to take this approach by allowing them to defer refinement of this general standard to case-by-case negotiation through the grievance procedure with the understanding that if the parties cannot agree on what just cause means in any given case, they agree that it means what their mutually-selected arbitrator determines it means.

1. ENFORCING THE AGREEMENT TO ARBITRATE

Use of the hypothetical Smith discharge to develop the comparative advantages of grievance arbitration and its role in the parties' self governance of their workplace nicely sets up discussion of the *Steelworkers Trilogy*. The first two cases of the *Trilogy* are excerpted in section 1 dealing with enforcement of the agreement to arbitrate while the third case follows immediately in section 2 dealing with enforcement of the arbitration award.

The driving rationale behind *American Manufacturing* (page 877) and *Warrior and Gulf* (page 879), is that a court should not touch the merits of the grievance in the guise of determining whether the grievance is substantively arbitrable. Thus, in *American Manufacturing*, the Court holds that even if a court believes that a grievance is frivolous, it must still order arbitration as long as the grievance is encompassed within the agreement to arbitrate. "[E]ven frivolous claims may have therapeutic values of which those who are not a part of the plant environment may be quite unaware." The merits of the grievance are for the arbitrator to decide, not a court, as it is the arbitrator's interpretation of the contract for which the parties bargained. The teacher may want to relate this back to the discussion of the advantages to Smith of arbitrating, rather than litigating, his discharge. As long as the union demands arbitration, Smith gets a hearing; there are no motions for summary judgment in grievance arbitration.

Warrior and Gulf (page 879) takes the discussion a step further. Here, the contract expressly provided that "matters which are strictly a function of management shall not be subject to arbitration . . ." The grievance challenged the employer's subcontracting of maintenance work that had been performed by bargaining unit employees. If subcontracting was strictly a function of management under the contract, then the grievance had no merit and the grievance was not arbitrable. In other words, the issue of arbitrability was necessarily intertwined with the merits in the grievance. The lower courts found that subcontracting was strictly a function of management under the contract and refused to compel arbitration. The Supreme Court reversed. The Court expounded at length distinguishing grievance arbitration from commercial arbitration and establishing grievance arbitration as an essential part of the parties' system of self-governance, rather

than a substitute for litigation. The Court admonished lower courts that they must avoid deciding the merits of the grievance in the guise of deciding arbitrabillity, as the merits are the exclusive province of the arbitrator. Consequently, the Court established a very heavy presumption of arbitrability. "An order to arbitrate the particular grievance should not be denied unless it can be said with positive assurance that the arbitration clause is not susceptible of an interpretation that covers the asserted dispute."

NOTES (pp.885-87)

The Notes following *Warrior & Gulf* allow for exploration of the consequences of the heavy presumption of arbitrability. The *Illinois Bell* case referenced in Note 5 (page 888) illustrates just how broad the presumption is. Note 2 (page 885) asks students to redraft the contact in *Warrior & Gulf* to preclude arbitration of the subcontracting grievance. Students should recognize that they must use very specific language to preclude arbitration. For example, they might expressly provide that dispute over the employer's decision to subcontract work shall not be subject to arbitration. Students may be asked to discuss the wisdom of an employer proposing such a clause in bargaining. The union is very likely to resist such a clause vehemently. Students should consider whether, if such a clause is agreed to, the union may strike over a subcontracting dispute.

Note 3 (page 885) raises the question whether the heavy presumption in favor of arbitration depends on the personal qualifications of the arbitrator. The answer, of course, is no. What matters is that the arbitrator is mutually selected by the parties to be their designated adjudicator to interpret and apply their contract. At this point, the teacher may wish to discuss with the class the typical methods of selecting an arbitrator. Sometimes the parties agree on a panel of arbitrators who they will use during the term of the contract. Sometimes, the parties simply agree to a specific individual for a specific case. One party may propose one or more arbitrators and the other party may select one of the proposed individuals. Alternatively, the parties may obtain a list of arbitrators from an agency such as the Federal Mediation and Conciliation Service (FMCS) or the American Arbitration Association (AAA) or a comparable state agency. These agencies have criteria for evaluating individuals who apply to be on their labor arbitration rosters. All prohibit arbitrators listed on their rosters from serving as advocates in labor relations matters and all require them to adhere to the Code of Professional Responsibility developed by the National Academy of Arbitrators. Once the parties obtain a list of five or seven names, each party may strike as many names as it finds objectionable and rank the remaining names in order of preference. If this process does not produce a mutually-acceptable arbitrator, they may ask for a second list and repeat the process. Alternatively, the parties may take turns striking one name each with the arbitrator remaining after all but one have been struck selected.

In striking and selecting arbitrators, advocates generally try to maximize their chances of winning. However, any arbitrator with a track record favoring one party in the type of dispute that is the subject of the grievance will probably be struck by the other party. Advocates also are concerned with how they lose if they lose. They prefer arbitrators who will provide well-written and well-reasoned opinions that they can refer

to in explaining to a grievant or a manager why they lost. They also prefer arbitrators who are likely to act in accordance with the parties' expectations. Arbitrators who are perceived to be loose cannons are not selected and arbitrators who behave like loose cannons are not likely to be selected again. The mutual selection process is the primary method of quality control in grievance arbitration.

The mutual selection process does have its drawbacks. Advocates tend to be very conservative in selecting arbitrators. They tend to avoid arbitrators who lack a track record on which the advocates may rely. Consequently, the established arbitrators who are most in demand often are unable to provide hearing dates for six months or more. This contributes to delay in resolving grievances, but advocates tend to be reluctant to employ a newer arbitrator who may be able to conduct a hearing sooner. The conservative nature of the selection process also makes it difficult for new arbitrators to break into the profession. Perhaps because of this, the labor arbitration profession remains dominated by whites and males.

Note 4 (pages 885-86) asks students whether they can reconcile *Granite Rock* with *A T & T*. Both cases hold that substantive arbitrability (in contrast to procedural arbitrability considered in Note 7 (page 887) is an issue for the court rather than the arbitrator unless the parties agree to submit it to the arbitrator. At first glance it would appear that the Court in *A T & T* employed the heavy presumption of arbitrability but the Court in *Granite Rock* seemed to show no deference to the arbitrator. The two cases may be reconciled based on the issues that were in dispute. In *A T & T*, arbitrability turned entirely on the interpretation of contract language and, in keeping with *American Manufacturing* and *Warrior and Gulf*, the Court employed the presumption of arbitrability to avoid intruding into the arbitrator's sphere of interpreting contract language. In contrast, *Granite Rock* concerned a threshold factual issue – whether the contract had been ratified and was in effect when the grievance arose – a matter that the court had to resolve and by resolving did not involve interpreting contract language.

The Note that begins on page 887 observes that the distinction the Court drew in *Warrior & Gulf* between grievance arbitration and commercial arbitration has eroded considerably in the past 25 years. Commercial arbitration remains primarily a substitute for litigation but a presumption of arbitrability comparable to the presumption in grievance arbitration has developed in light of changing attitudes on the Court. The note provides a preview of issues to be discussed in Part E.

2. ENFORCING THE ARBITRATION AWARD

Enterprise Wheel (page 890) and *Garvey* (page 894), although decided 41 years apart, can be read together to demonstrate the extreme deference courts give to arbitration awards. *Enterprise Wheel* deals with arbitral interpretation of the contract and *Garvey* deals with arbitral findings of fact.

The broad deference flows from the role of the arbitrator in the parties' system of workplace self-government. The parties have agreed that if they cannot agree on what their contract means in a given case, it means whatever their mutually-selected arbitrator says it means. Thus, the Court in *Enterprise Wheel* tells us that an arbitrator may not "dispense his own brand of industrial justice," but the award is to be enforced "so long as it draws its essence from the collective bargaining agreement. If the opinion accompanying the award is ambiguous, the ambiguity must be resolved in favor of enforcement. *Garvey* adds that the award is to be enforced as long as the "arbitrator is even arguably construing or applying the contract and acting within the scope of his authority." In the rare circumstances where a court finds that the arbitrator exceeded the scope of his or her authority, the court is not to decide the underlying dispute but is to simply vacate the award and leave open the possibility of further arbitration proceedings.

Garvey is an extraordinary case. The Court, in a brief per curium opinion, summarily vacated the Ninth Circuit's decision based on the petition for certiorari and the response to the petition. It did not wait for briefs or oral argument. The Court effectively said that arbitrators are always acting within the scope of their authority when they make factual findings and consequently their factual findings are off limits to court review. "[I]mprovident, even silly, factfinding does not provide a basis for a reviewing court to refuse to enforce the award."

The teacher may ask students what remedy a party has when an arbitrator issues an award that, in the words of Justice Stevens' dissent in *Garvey* is so untethered to the agreement or the record as to be completely inexplicable and bordering on the irrational. A party may try to negotiate to add specific language to the collective bargaining agreement that effectively nullifies the future effect of the award. Of course, the other party may not agree to this and, even if agreeable, will probably seek offsetting concessions. The party that lost the award may also not comply in the future (It must comply in the actual case.) and arbitrate the issue another time before another arbitrator, trying to convince the second arbitrator that the award is so off base, it should not be followed. The party may also decide never again to use the arbitrator who rendered the untethered award.

NOTES (pp. 892-94 and pp.897-901)

Note 3 (pages 893-94) illustrates just how broad the deference is. In *Brentwood Medical Associates*, the Third Circuit enforced an arbitration award even though the arbitrator relied, in part, on contract language which, it turned out, was not contained in the contract. Note 4 (page 894) presents a rare example of when a court may find that an award does not draw its essence from the contract and represents the arbitrator's own brand of industrial justice. Students may be asked how *Amax Coal* differs from all of the other cases reviewed. They should realize that the arbitrator essentially found that the company did not violate the contract but imposed a remedy anyway.

Note 2 (pages 897-99) can be used to generate a lively discussion to conclude consideration of when awards draw their essence from the contract. Note the three

different routes suggested that the arbitrator might take to the same result, reinstating Jones. Students may come up with others which can be explored in class discussion. The first two rationales given B a finding that the six months began to run on October 29 or a finding that Jones did not have more than one absence per month B amount to interpretations of the last chance agreement. Although they would appear to be contrary to the probable intent of the agreement, that is for the arbitrator to decide, not a court. However, a determination that the May 5 absence should have been excused would appear to be applying the arbitrator's own brand of industrial justice in light of the last chance agreement's express language which calls for termination if Jones is absent "for any reason whatsoever including illness" more than one day per month.

Associated Electric Cooperative (discussed on pages 898-99) provides another wrinkle on last chance agreements and the scope of arbitral authority in general. Note one of the bases for enforcing the arbitrator's award was the permissible arbitral finding that the LCA was rescinded for mutual mistake (both parties believed the grievant's test would be positive). The instructor may wish to ask students whether all common law contract defenses are available or whether arbitral application of some of them could exceed the arbitrator's authority. For example, if the arbitrator had refused to enforce the LCA because he or she found it unconscionable, would the arbitrator be applying "his own brand of industrial justice," or acting within the scope of the arbitrator's authority?

Northern States Power discussed in Note 3 (page 899) makes for interesting class discussion and possible contrast with *Brentwood Medical Center*. The arbitrator found that management was justified in its decision but then relied on mitigating factors to award reinstatement without back pay. Isn't the arbitrator's finding that management was justified ambiguous and shouldn't it be interpreted in a manner to uphold and enforce the award? The dissent seemed to think so but the majority seemed to equate the finding that management was justified with a finding of just cause. The instructor may wish to point out that the Code of Professional Responsibility for Arbitrators of Labor Management Disputes precludes an arbitrator from clarifying an award unless both parties consent. This provides an opportunity to raise questions of strategy. Should the lawyer for the union in *Northern States Power* have asked the lawyer for the employer to consent to having the arbitrator clarify the award? Should the employer's lawyer have consented? What are the strategy considerations involved? Ask students if their answer might be different if they were in the Third Circuit.

Note 4 (pages 899-90) provides an opportunity to discuss interest arbitration if the instructor is so inclined. Alternatively, it can be skipped but we encourage tackling it. This is a good opportunity to question the line between grievance or rights arbitration and interest arbitration. Recall the example of the relative ability clause that provides that seniority governs in filling vacancies if qualifications are "relatively equal," discussed on pages 875-76. Here the parties have agreed on the language knowing they disagreed on the meaning of that language, leaving refining its meaning to case-by-case negotiation with an arbitrator to decide if the parties are unable to agree. Is this a form of interest arbitration disguised as grievance arbitration? Is it different from what the parties agreed to in *Hamilton Patk Health Ctr.*, where they agreed to a reopener and that if they could

not reach agreement when the contract was reopened, they would submit their dispute to an arbitrator. Note that the court enforced the arbitration award even though the reopener was for only one year but the award covered four years, because the arbitrator found that the parties agreed to a multi-year arbitration. But the court vacated the arbitrator's award that if the parties could not reach agreement following a future reopener they would submit their disagreement to arbitration, because the use of interest arbitration is a – permissive subject of bargaining under the NLRA and, absent express agreement of the parties, the arbitrator lacked authority to impose it. Interest arbitration is used much more frequently in the public sector. For a similar holding see *Skokie Firefighters Union, Local 3033 v. Illinois Labor Relations Board*, 74 N.E.2d 1023 (Ill. App. 2016), holding that an interest arbitrator lacked authority to consider a dispute over a permissive subject of bargaining.

Note 5 (pages 900-02) should generate considerable student interest as it involves the litigiation arising out of the NFL's suspension of New England Patriots quarterback Tom Brady over the "deflategate" incident in the 2015 AFC championship game. Here, NFL Commissioner Roger Goodell, following an investigation, imposed a four-game suspension on Brady. Under the collective bargaining agreement between the NFL and the NFLPA, Brady was entitled to a hearing before a hearing office appointed by the Commissioner. The contract expressly allowed the Commissioner to appoint himself as hearing officer and he did so. Not surprisingly, he upheld his own prior decision. The court considered this to be an arbitration and held that the Commissioner's inherent bias was not a ground for vacating his award because the parties, in their contract, authorized him to serve as arbitrator. The instructor may ask the class whether the procedure provided for in the NFL-NFLPA agreement should even be considered arbitration given the absence of a neutral arbitrator. As a matter of policy, should we allow parties to agree to proceed before an inherently biased arbitrator? Are there limits to the deference afforded to the parties' system of workplace self-governance? On the other hand, these were two very sophisticated parties and presumably the NFL made significant concessions to the NFLPA to get the right to have the Commissioner review his own disciplinary rulings. The instructor may wish to point to the Code of Professional Responsibility for Arbitrators of Labor-Management Disputes which provides in section 2(B) that an arbitrator must disclose any relationship or other circumstance which might reasonably raise a question about the arbitrator's impartiality but following disclosure the arbitrator may serve if both parties so desire but "[i]f the arbitrator believes or perceives that there is a clear conflict of interest, the arbitrator should withdraw, irrespective of the expressed desires of the parties."

Eastern Associated Coal (page 902) injects another ground for a court vacating an arbitration award: that the award is contrary to public policy. Teachers may ask the class, "Wasn't Smith's having marijuana in his system while on duty in a safety sensitive job contrary to public policy?" Students should realize that the legal issue is not whether the activity that resulted in the grievant's discharge is contrary to public policy but whether the award reinstating the grievant is contrary to public policy.

The Court says that an award may only be vacated on public policy grounds where the award itself is contrary to a well-defined and dominant public policy found in laws and legal precedents rather than general considerations of the public interest. But, the majority refuses to adopt a firm rule that a court may only vacate an award where it violates positive law. Justice Scalia suggests in his concurring opinion that there is no practical difference between an award contrary to a well-defined and dominant public policy and one which violates positive law. The teacher may ask students if they can think of a situation which fits the bill. Arguably the *Amtrak* case discussed in note 3 (pages 907-08) may fit the bill.

The teacher may point out that *Eastern Associated Coal* is the Supreme Court's third opinion on the public policy exception. In *W. R. Grace & Co. v. Rubber Workers Local 759*, 461 U.S. 757 (1983), the Court held that an award that ordered back pay to male employees laid off ahead of less senior female employees pursuant to an EEOC conciliation agreement was not contrary to public policy. The Court suggested that the employer could have complied with both the conciliation agreement and the contract by not laying off anyone and that its dilemma was of its own making. In *Paperworkers v. Misco*, 484 U.S. 29 (1987), the Court reversed a lower court's refusal to enforce an award reinstating an employee who operated a hazardous machine and was discharged after he was found in the back seat of a car in the employee parking lot with marijuana smoke in the air and a marijuana cigarette burning in the ashtray of the front seat. The lower court had vacated the award on the ground that it contravened a public policy against operating dangerous machinery under the influence of drugs but the Supreme Court held that the purported public policy relied on by the lower court was rooted in common sense but was not found in laws and legal precedents. This history suggests that Justice Scalia was right: the Court will never find an award contrary to public policy unless the award violates positive law.

The teacher may ask the students why this is so. The teacher might ask students if they see any analogies between the public policy cases and the arbitrability cases. In both types of cases, the Court cabins the judicial inquiry for similar reasons. In determining whether a grievance is arbitrable, courts are to order arbitration unless it can be said with positive assurance that the grievance falls outside of the arbitration clause to avoid deciding the merits of the underlying grievance in the guise of ruling on arbitrability. Students should be able to see that a broader view of when an award violates public policy could similarly result in courts deciding the merits of a grievance in the guise of public policy review.

3. A GLIMPSE AT ARBITRAL COMMON LAW

A good approach to the three arbitration awards presented is to focus attention on the questions posed in Notes 1 and 2 (page 918). *Uniroyal* (page 909) involves subcontracting where the collective bargaining agreement does not expressly prohibit or regulate subcontracting. Arbitrator Nolan speaks of arbitral guidelines where such subcontracting nonetheless violates obligations implied in the contract. But he candidly

admits that there are almost as many guidelines as there are arbitrators and proceeds to add his own list to the mix. It is difficult, perhaps impossible, to reconcile Arbitrator Nicholas's award in *Kroger* (page 911) with Arbitrator Murphy's award in *Buckeye Feed Mill* (page 915). Both involve discharges for theft and the record in *Kroger* suggested that the grievant intended to pay for the frozen dinner at the end of her shift but Arbitrator Nicholas will have none of that and upholds the discharge because grievant "gave the appearance of theft and compromised Management's confidence in her honesty," while Arbitrator Murphy reinstates the employee who admiited stealing without back pay because of the employee's lengthy tenure with the employer.

Arbitral common law reflects a type of legal realism. The law is whatever the arbitrator says it is in any given case. The teacher should ask students if this matters. Students may answer this question on multiple levels. It certainly matters to the parties and advocates, which is why advocates pay so much attention to arbitrator selection. But to the courts, it does not matter at all. The merits of the grievance are for the arbitrator to decide and, as the *Garvey* case highlights, courts may not even require that the same arbitrator decide cases consistently.

NOTES (page 918)

Note 3 (page 918) demonstrates just how shallow the prohibition on arbitrators basing their awards on their own brand of industrial justice is. When an arbitrator is interpreting and applying a broadly worded provision of a collective bargaining agreement, such as a recognition clause or a just cause provision, the arbitrator is necessarily applying his or her own brand of industrial justice. Yet, that is exactly what the parties in those circumstances have bargained for. The answer is for a party to negotiate for more specific language in the contract.

C. THE COLLECTIVE BARGAINING AGREEMENT AND THE NORRIS-LAGUARDIA ACT

1. ENJOINING BREACHES OF THE NO STRIKE CLAUSE

Note 3 (pages 932-33) provides an excellent vehicle for introducing this material. Ask the student to list the possible remedies that the employers may have against the wildcat strikers. The list should include:

> Disciplining or discharging the strikers. The students should recall from chapter 6 that a strike in breach of a no strike clause is not protected activity. Consequently, such strikers may be disciplined and even fired. Ask students how the client will likely react if they suggest firing the strikers. The client will probably either laugh or ask the attorney if counsel is crazy. Firing the strikers will not get the trucks rolling again. Driving a new car transport rig is a highly skilled job requiring a specific license. There are not likely to be a ready supply of people possessing the qualifications. Even if there is a supply of potential replacement drivers, many are

not likely to be bold enough, or some would say crazy enough, to cross a picket line of angry Teamsters to take their jobs away. But, even if replacement is feasible, it is highly unlikely that it is desirable. New car transport drivers are entrusted with equipment and merchandise worth hundreds of thousands of dollars and they operate their rigs virtually unsupervised. The employers have to trust their drivers to transport the merchandise to dealers across the country safely and on schedule. In the mid 1970s, when the wildcat strike took place, there was no GPS technology to enable companies to track their trucks' locations. Even today, GPS technology merely means that the companies learn of disasters faster than in the past; it does not prevent disasters. The striking drivers have probably worked for the companies for many years and over that time have demonstrated that they are trustworthy and effective workers. The companies do not want to fire them. The companies want them back behind the wheel.

Giving in to the strikers' demands. This is impossible. The strikers' demands are aimed at their union and the companies do not control the union.

Suing the union for damages for breach of the no strike clause. This option is a total non-starter. The union has not breached the no strike clause. It has neither called, authorized nor ratified the strike.

Suing the striking drivers for breach of the no strike clause. That is something the companies did in the aftermath of the actual strike. The litigation reached the Supreme Court in *Complete Auto Transit, Inc. v. Reis*, cited in Note 2 (pages 931-32), where the Court held that individual employees are immune from suits for damages for beach of a collective bargaining agreement. Even if the Court had decided the opposite, a lawsuit for damages does not solve the companies' immediate problem: they will lose their most important customers if they do not get their trucks rolling again.

The discussion of the wildcat strike should lead students to see that an injunction ordering the strikers back to work is the only real effective remedy for breach of the no strike clause. Recognizing this reality is key to understanding the Court's decision in *Boy's Markets* (page 921). If the no strike clause is the quid pro quo for the grievance and arbitration procedure, employers will be less likely to agree to grievance and arbitration procedures if they are unable to obtain effective enforcement of the no strike clause. If federal policy favors grievance and arbitration procedures, then such policy favors implying an exception to the anti-injunction provisions of the Norris-LaGuardia Act. Since that federal policy is codified in the Taft-Hartley Act, which was enacted after the Norris-LaGuardia Act, the Court is able to imply in Taft-Hartley a limited exception to Norris-LaGuardia.

Of course, the new car transport companies still cannot obtain their injunction. This is because in *Buffalo Forge* (page 927), the Court confined the exception to Norris-LaGuardia to cases where the strike in breach of the no strike clause is over a dispute that is arbitrable. Hence, in *Buffalo Forge*, the sympathy strike was not enjoinable. Similarly,

the wildcat strike against the new car transport companies was over grievances the strikers had against their union. The grievances were not arbitrable and the strike may not be enjoined.

Reading *Boys Markets* and *Buffalo Forge* together, students should see that the purpose of the injunction is to preserve the integrity of the grievance and arbitration procedure by preventing the union from striking as an end run around the procedure. This becomes even more evident considering *Gateway Coal* (page 933), where the contract contains a grievance and arbitration procedure but no express no strike clause. The Court implies a no strike obligation anyway. The existence of a grievance and arbitration procedure implies an obligation to use it and not avoid it by striking. In *American Manufacturing* and *Warrior & Gulf*, the Court essentially told employers that if they do not want particular matters subject to arbitration, they need to spell them out with very specific express language. In *Gateway Coal*, the Court is similarly telling unions that if they want to retain the right to strike during the term of a collective bargaining agreement containing a grievance and arbitration procedure, they must spell that out with very specific express language. Some contracts do preserve the right to strike in specifically delineated circumstances. The most common such circumstances are safety and health violations and failure by the employer to make required payments to union-administered pension or health and welfare funds.

2. ENJOINING EMPLOYER CONDUCT PENDING ARBITRATION

Recognition that the *Boys Markets* injunction is designed to preserve the integrity of the arbitration procedure facilitates understanding so called reverse *Boys Markets* injunctions exemplified by *Lever Brothers* (page 935). Injunctions are available against employers where necessary to preserve the status quo so that an arbitrator will be able to award an effective remedy should the arbitrator sustain the grievance. Otherwise, the employer's unilateral conduct, just like the union's strike, would amount to an end run around the grievance and arbitration procedures.

D. THE INDIVIDUAL AND THE COLLECTIVE PROCESS

We present the duty of fair representation and related material in this chapter recognizing that this material applies not only to administration of the contract but also to its negotiation. However, most fair representation claims arise as part of hybrid DFR-§ 301 breach of contract claims so we believe it is best to consider it in conjunction with contract administration. Essentially, this material can be thought of as restraints that the law places on the union and employer's private ordering of the workplace for protection of the individual employee.

Teachers may want to project the text of section 301 on the screen. Students should see that the first sentence is ambiguous. Does the phrase "between an employer and a labor organization" modify "suits" or "contracts"? In *Smith v. Evening News Ass'n*, the Court held that it modifies "contracts," and allowed individual employees to sue their employers for breach of a collective bargaining agreement. But what the Court gave in

Smith, it restricted in *Republic Steel Corp. v. Maddox*, holding that the employee must exhaust the contractual grievance procedure and in *Vaca v. Sipes* and *Hines v. Anchor Motor Freight, Inc.*, that the employee is bound by the result of the grievance procedure unless the union breached its duty of fair representation.

The teacher may want to ask students if this is fair to the employee. Many students' intuitive reaction will be that it is not. Students may reconsider that intuitive reaction when they recall the roll of grievance arbitration as a vehicle of union-management self-governance of the workplace. The teacher may remind them of the commonly found relative ability clause which provides that seniority will govern the filling of vacancies when qualifications are relatively equal. Ask students whether such a provision confers any specific rights on any employees? This previews the question raised in Note 4 (page 949).

1. THE UNION'S DUTY OF FAIR REPRESENTATION

We have divided this section into three subsections: Origins of the Duty, Substantive Standards of Conduct, and Enforcement Procedures and Remedies. Students need to know about the enforcement issues; such as limitations period, exhaustion of internal union remedies, availability of jury trial, the absence of punitive damages, and allocation of damages between union and employer; but we recommend covering these with a handout or lecture or just assigning the reading of Subpart C. We suggest that classroom time be devoted to the origins of the DFR and to its substantive standards as these make for fascinating discussion.

The excerpt from the Malin article introduces the students to *Steele* and the role that combating racial discrimination played in developing the DFR. This reached its zenith with the Court's decision in *Brotherhood of Railway Trainmen v. Howard* (Note 1, page 940) where the Court found a DFR breach by an all white union against African American workers even though the union was not their exclusive bargaining representative.

The teacher may ask the students to evaluate the Court's development of the DFR as a civil rights tool. Why not decide *Steele* the way the plaintiffs presented the case to the Court - as an unconstitutional denial of equal protection because the exclusive representative excluded African Americans from membership even though it represented them in negotiating with their employer? Ask students what the consequences would have been had the Court decided the case on equal protection grounds. It is likely that such a decision would have forced unions to dismantle racially segregated locals, whereas the construction of the DFR as a labor law doctrine merely regulated how segregated unions acted toward the workers of color who they represented but who they excluded from membership.

The teacher may then turn attention to *Ford Motor Co. v. Huffman*. The Court rebuffed the plaintiffs' contention that by awarding seniority credit to returning veterans who had not worked for Ford before the war, the union based a decision on a matter that

was irrelevant to the workplace and therefore breached its DFR. Ask students to assess the union's rationale that the agreement was justified to prevent unrest in the bargaining unit among returning veterans who believed they were entitled to seniority credit even if they did not work for Ford before the war. Is that any different than a desire by the union in *Steele* to prevent unrest in the bargaining unit among junior white employees who believed, in light of existing practices subjugating blacks, to have the firemen jobs ahead of more senior African Americans. The question can be brought even more sharply into focus by asking the students at whose expense did the returning veterans get the seniority credit. The answer, of course, is the seniority credit enabled them to move ahead of the women who had taken factory jobs during the war, replacing the men who had gone to fight.

Of course, use of the DFR as a tool of social policy with respect to workplace discrimination was greatly reduced by enactment of the Civil Rights Act of 1964. Title VII provided a much sharper tool for attacking union racial and gender discrimination than the DFR, as Title VII reached all union action, including the admission of people to membership, not just union action as an exclusive bargaining representative. This raises the question of what purpose does the DFR now serve. Answering that question likely drives the development of the general DFR standard.

We recommend treating *Vaca v. Sipes* (page 941), *Air Line Pilots v. O'Neill* (page 944) and *Humphrey v. Moore* (page 947) together. The three cases deal with the substantive standard of conduct imposed by the DFR and in all three, the Court adheres to a standard of avoiding conduct that is arbitrary, discriminatory or in bad faith. In *Vaca*, the Court adds that the union would have breached its duty if it had ignored the grievance or processed it in a perfunctory way. Challenge students to go beyond the Court's rhetoric and focus on the limited holdings in all three cases. In *Vaca*, the Missouri Supreme Court held the union liable for declining to arbitrate because the court believed that the grievance had merit. Students should be able to see that the Missouri court effectively held the union strictly liable for failing to arbitrate a grievance that the court later determined was meritorious. In *O'Neill*, the lower court had held the union liable because the settlement agreement it reached with Continental was worse than just giving up, i.e. calling off the strike and making an unconditional offer to return to work. But, that conclusion was premised on developing case law which held that a striking pilot was not replaced until the replacement actually assumed the cockpit – merely hiring on and engaging in the mandatory training program was insufficient. Yet, at the time the agreement was reached that case law had not yet developed and the lower court in effect held the union strictly liable for not foreseeing that development. In *Humphrey*, the Kentucky Court of Appeals also seemed to hold the union strictly liable, this time for simultaneously representing two groups of employees with conflicting interests. Thus, the holdings of all three Supreme Court decisions can be portrayed as rejecting a strict liability standard of care under the DFR.

NOTES (pages 948-49)

Vaca, *O'Neill*, and *Humphrey* leave a vast area untouched for the lower courts to decide. Notes 2, 3, and 4 (pages 948-49) facilitate discussion of some of these issues. The teacher might contrast the hybrid DFR-§ 301 lawsuit with the Court's statement in *Garvey* that generally when a court finds a defect in an arbitration award, it should not decide the merits of the underlying grievance but should merely vacate the award allowing the possibility of further proceedings in arbitration. The hybrid DFR-§ 301 action is an exception to this approach because once the court finds a DFR breach, it reaches the employee's 301 breach of contract claim against the employer. The teacher may ask students whether the policies that favor arbitral over judicial interpretation and application of collective bargaining agreements mandate that courts interpret the DFR standard of care strictly to cabin this exception.

2. RIGHTS OF RETIREES

Rights of retirees is a very timely topic. It is also an area where the law is still developing and thus makes for fascinating class discussion.

We suggest that teachers begin by asking students whether *Republic Steel Corp. v. Maddox* applies to retirees. Students should be reminded of the *Pittsburgh Plate Glass* case from chapter 5 and should see immediately that since retirees are not in the bargaining unit and since the union does not serve as their exclusive representative, they are not bound to exhaust the contractual grievance procedure. Instead, they may sue their former employers directly under section 301. Note 3 (page 959) discussed the differing approaches courts have taken to whether employer and retiree consent are necessary for a union to arbitrate claims over retiree benefits brought on behalf of retired workers who are no longer part of the bargaining unit.

Next, the teacher may ask the students whether there are reasons that retirees might want to take their claims through the grievance procedure. The most obvious reason is that the grievance procedure will likely resolve the dispute faster than a lawsuit and for retirees speed may be crucial. But under the typical collective bargaining agreement, the union controls access to the grievance procedure, grievance processing, and the decision to arbitrate. Thus, retirees seeking to have their claims adjudicated through the grievance procedure must enlist their former unions to represent them.

The teacher should follow up asking the students whether a union has an interest independent of the retirees in grieving and arbitrating a unilateral change in retiree benefits. Students should realize that the union's interest stems from its status as the party to the collective bargaining agreement. Certainly, it would seem that the union should be allowed to enforce its own contract. Students may be asked whether, and if so under what circumstances, the union's interests may conflict with the retirees' interests.

In *M & G Polymers v. Tackett* (page 952) the Supreme Court settled a decades-long division among the circuits as to how to interpret collective bargaining agreement retiree medical (and sometimes life insurance) benefits provisions in determining whether

the benefits vested for the life of the retiree. As discussed on page 951, since its seminal decision in *UAW v. Yardman* in 1983, the Sixth Circuit effectively presumed that retiree medical benefits were vested for life. In *Tackett*, the Supreme Court rejects the Sixth Circuit's approach. The Court declares that collective bargaining agreements are to be interpreted in accordance with ordinary principles of contract law (page 955) and goes on to find that the Sixth Circuit's approach conflicts with those principles in numerous ways. It is particularly harsh on the Sixth Circuit's view that the parties when negotiating retiree benefits likely intend them to vest for life as "derived . . . not from record evidence, but instead from its own suppositions about the intentions of employees, unions and employers negotiating retiree benefits." (page 956). The court further criticizes the Sixth Circuit for disregarding a general principle of contact law against resolving contractual ambiguities in favor of lifetime commitments, for not giving effect to the collective bargaining agreement's duration clause and for misinterpreting contract law regarding illusory promises.

Note 2 (page 959) provides a vehicle to raise the question whether the Supreme Court's view of collective bargaining agreements has changed. (We will return to this question in connection with *14 Penn Plaza v. Pyett* on page 986.) The instructor might wish to project slides with contrasting language from *Tackett* and from *Warrior and Gulf*, one of the three cases in the *Steelworkers Trilogy*. From *Tackett*:

> We interpret collective-bargaining agreements, including those establishing ERISA plans, according to ordinary principles of contract law, at least when those principles are not inconsistent with federal labor policy. "Where the words of a contract in writing are clear and unambiguous, its meaning is to be ascertained in accordance with its plainly expressed intent." In this case, the Court of Appeals applied the *Yard–Man* inferences to conclude that, in the absence of extrinsic evidence to the contrary, the provisions of the contract indicated an intent to vest retirees with lifetime benefits. As we now explain, those inferences conflict with ordinary principles of contract law.
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> . . . . .
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> [T]he Court of Appeals derived its assessment of likely behavior not from record evidence, but instead from its own suppositions about the intentions of employees, unions, and employers negotiating retiree benefits. . . . Although a court may look to known customs or usages in a particular industry to determine the meaning of a contract, the parties must prove those customs or usages using affirmative evidentiary support in a given case. *Yard–Man* relied on no record evidence indicating that employers and unions in that industry customarily vest retiree benefits. Worse, the Court of Appeals has taken the inferences in *Yard–Man* and applied them indiscriminately across industries.

From *Warrior and Gulf*:

> The labor arbitrator's source of law is not confined to the express provisions of the contract, as the industrial common law—the practices of the industry and the shop—is equally a part of the collective bargaining agreement although not

> expressed in it. The labor arbitrator is usually chosen because of the parties' confidence in his knowledge of the common law of the shop and their trust in his personal judgment to bring to bear considerations which are not expressed in the contract as criteria for judgment. The parties expect that his judgment of a particular grievance will reflect not only what the contract says but, insofar as the collective bargaining agreement permits, such factors as the effect upon productivity of a particular result, its consequence to the morale of the shop, his judgment whether tensions will be heightened or diminished. For the parties' objective in using the arbitration process is primarily to further their common goal of uninterrupted production under the agreement, to make the agreement serve their specialized needs.

The teacher might raise the question of whether an arbitrator considering a retiree benefits case today is bound by *Tackett* and *CNH Industrial*. Prior to Tackett, one of the authors of the casebook had a case as an arbitrator that arose in Indiana and raised the question whether the arbitrator was bound by the then Seventh Circuit approach of a presumption against vesting. The arbitrator ultimately held that even under the Seventh Circuit's narrow standard, the benefits under the contract before him were vested. *RBC Precision Prods., Inc.*, 127 Lab. Arb. (BNA) 675 (2009) (Malin, Arb.).

3. SUPER-SENIORITY AND HIRING HALLS

Teachers may begin a discussion of super-seniority for union officials by asking why a union might negotiate for such a provision. Is this a case of the negotiators placing their personal interests above those of the bargaining unit collectively? On the other hand, serving as a union officer while simultaneously working full time for the employer is a thankless job. Most local officers receive little if any monetary compensation and make themselves available to members outside of work, spend countless hours on union business and risk incurring the wrath of management. Is there anything inherently wrong with allowing them to reward themselves by negotiating for super-seniority?

The law governing super-seniority is relatively straight forward. The grant of super-seniority to union officers discriminates on the basis of section 7 activity but the discriminatory effect is comparatively slight. Consequently, if the grant of super-seniority serves a legitimate business purpose, it is legal. However, providing a perk of office to union officials is not a legitimate business purpose. Promoting stability in labor relations is a legitimate business purpose but it justifies only a grant of super-seniority limited to layoff and recall and only a grant to shop stewards or those who perform shop steward functions, primarily grievance processing.

Hiring halls in general and the *Jacoby* case (page 963) provide one final fascinating opportunity to consider the delicate balance between the privately-ordered workplace and the rights of the individual worker. *Jacoby* came before the D.C. Circuit twice and each time had a different panel. In the first case, reprinted in the book, the court remanded to the NLRB because the NLRB's decision to depart from its earlier precedent holding a union liable where it departs from objective criteria for hiring hall referrals due

to negligent administration was premised on a faulty reading of Supreme Court precedent, including *O'Neill*. The second time, on appeal after remand, a different panel upheld the Board's refusal to hold the union liable for negligence in administering the hiring hall. Students can be challenged to discuss whether there is any justification for the "heightened duty" standard for unions operating hiring halls. Does hiring hall operation tend to encourage union membership? Does a hiring hall present a greater than usual opportunity to hide discrimination against disfavored workers?

E. THE INTERPLAY BETWEEN THE CONTRACTUAL GRIEVANCE PROCEDURE AND "EXTERNAL" PUBLIC LAW

The first three parts of this chapter examined the law's preference for and deference to a privately ordered workplace governed by the union and the employer. Part D examined the limits set by labor law doctrine on that private ordering to protect individual employees. The instant part recognizes that the collective bargaining agreement now coexists with an extensive statutory and common law regulation of the workplace. Part E begins by covering the relationship between the parties' private law of the collective bargaining agreement and the National Labor Relations Act. It then considers the relationship between the grievance and arbitration procedure and claims arising under statutes, whether an employee can be compelled to take those claims through the grievance and arbitration procedure and, regardless, what happens in the statutory litigation if the employee voluntarily grieves and arbitrates the incident that gave rise to the grievance and the statutory claim. Finally, the part examines the impact of the public law on the arbitration process itself.

A useful way to introduce this material is to suggest a hypothetical claimant who is fired for allegedly swinging at, and missing, a supervisor. The claimant is also a shop steward who aggressively pursues grievances on behalf of fellow bargaining unit members. One series of grievances alleges that certain male supervisors, including the one who the claimant allegedly assaulted, were sexually harassing female employees. Another grievance alleges that hearing protection provided by the employer to employees working in an extremely noisy operation is defective, that the employer has taken no steps to repair or replace it and has required employees to work without adequate hearing protection. The claimant also complained about this matter to OSHA. The claimant contends that he never swung at the supervisor. Rather, the claimant says that the supervisor approached him yelling that the claimant was trying to get the supervisor fired and the claimant merely raised his arms to protect himself against the supervisor's attempt to hit him. Ask students to list the forums in which the claimant might seek redress. They are:

A grievance contending that the employer lacked just cause for discharge.

An unfair labor practice charge contending that the employer discharged the claimant for pursuing grievances, activity protected by NLRA § 7.

A complaint to the Department of Labor for retaliation for filing an OSHA complaint in violation of OSHA § 11(c).

A Title VII retaliation claim alleging that the discharge was motivated by the claimant's actions opposing violations of Title VII (the sexual harassment).

A common law battery claim against the supervisor and, perhaps, vicariously against the employer.

1. THE GRIEVANCE PROCEDURE AND THE NLRB

The NLRB's deferral doctrines (*Collyer*, *Spielberg*, and *Dubo*) are very important in the everyday practice of labor law. We summarize their history textually and then present the *Hammontree* case (page 972) because its three opinions provide an ideal pedagogical tool to focus student attention on the theoretical and policy differences that underlie the positions of those who advocate or oppose deferral.

Hammontree of course involves the appeal of a Board decision to *Collyerize* an 8(a)(3) discrimination charge, but the opinions can be applied to *Collyerization* of 8(a)(5) charges and to post-arbitration deferral under *Spielberg*. Dissecting the three opinions in class can lead to lively discussion over who is correct. Alternatively, the teacher may assign students to present and defend the views of Judges Wald, Edwards and Mikva.

Judge Wald views the issue as one of *Chevron* deference. Initially, she finds that deferral is not contrary to any statutory mandate, be it sections 10(a) or (m) of the NLRA or section 203(d) of the LMRA. She then concludes that deferral is a reasonable exercise of the Board's carrying out its responsibility for the overall administration of labor-management relations. Taking off from this point, students may be asked what administrative and labor relations concerns justify the Board's deferral policy. These include the statutory and policy preference for resolution of disputes through the contractual grievance procedure, a view that requiring the matter to be taken through the grievance procedure is likely to lead to a faster resolution than if it is processed through the Board, and allocation of Board resources – they can be better spent on unfair labor practice charges for which there is no alternative forum in which to seek redress.

Judge Edwards views the NLRA as focused primarily on organizing and negotiating the collective bargaining agreement. Once the parties have agreed to a contract, in Judge Edwards' view, the statute defers to the parties' self governance through the grievance and arbitration procedure. Thus, according to Judge Edwards, at this juncture the parties have waived the right to the NLRA's unfair labor practice processes and Hammontree may be compelled to take his claim through the contractual grievance procedure.

Judge Mikva, in contrast, views the deferral doctrine as an abdication by the NLRB of its responsibility and as outside its authority. In Judge Mikva's view, Congress gave the Board exclusive responsibility to prevent unfair labor practices and expressly prevented private parties from interfering with that authority. But even Judge Mikva appears willing to allow the Board to *Collyerize* 8(a)(5) cases because they turn on

interpretations of the collective bargaining agreement. Can Judge Mikva's analysis be extended to preclude *Collyerization* of any charges?

Teachers who have the time may engage students in a discussion of strategy issues raised by the Board's deferral policies. A union or employee must decide initially whether to file a grievance or an unfair labor practice charge. If the union chooses to file an unfair labor practice charge, the employer then has to decide whether to ask the Board to *Collyerize*. Note that the Board only *Collyerizes* if the employer agrees to waive any procedural obstacles to arbitration. Thus, the employer can ultimately overrule the union or employee's choice of forum. Strategic concerns focus on the differences in the claims (breach of collective bargaining agreement versus violation of statute), including differences in the burdens of proof; whether a party prefers to adjudicate before an assigned administrative law judge or an arbitrator that the party has had a role in selecting; and differences in remedies available in each forum. It is also important to point out that most of the decision making concerning deferral to the grievance process occurs at the Regional Director level. When the Regional Director *Collyerizes* an unfair labor practice charge, he or she will give the parties a notice to provide the arbitrator which asks the arbitrator to send a copy of the award to the Regional Director.

2. GRIEVANCE ARBITRATION AND STATUTORY CLAIMS

We suggest that the teacher lead the students to see an evolution of how the Court regards grievance arbitration from the *Steelworkers Trilogy* to *14 Penn Plaza, LLC v. Pyett* (page 986). In the *Trilogy*, the Court regards arbitration as a substitute for workplace strife and a vehicle of the parties' system of workplace self-governance. In *Alexander v. Gardner-Denver Co.*, the Court's analysis that the statutory claims were independent of the collective bargaining agreement was driven largely by the views expressed in the *Steelworkers Trilogy*, that the arbitrator's role was to serve as a vehicle of the parties' private process of workplace self-governance and not as a public adjudicator of statutory claims. In *Wright v. Universal Maritime Corp.*, the Court acknowledged this as the role for which grievance arbitration has been recognized and, in light of it, refused to apply the presumption of arbitrability to statutory claims. The Court said, "The presumption does not extend beyond the reach of the principal rationale that justifies it, which is that arbitrators are in a better position than courts *to interpret the terms of a CBA*." In *Pyett*, the Court did not even mention the role of grievance arbitration in workplace self-governance and clearly regarded it as a substitute for litigation ("Parties generally favor arbitration precisely because of the economics of dispute resolution."). The Court regarded the union as the individual employee's agent in agreeing to waive access to the federal judicial forum, making no distinction between the union acting as agent for the employees collectively and for individual employees. To the Court, employees are sufficiently protected because they may bring DFR claims against their unions and may sue their unions under EEO statutes.

NOTES (pages 995-998)

Note 1 (page 995) raises the shift in the Court's view of grievance arbitration discussed immediately above. The instructor may wish to recall the discussion comparing *Tackett* to the *Steelworkers Trilogy*. The instructor may wish to raise the question whether the Supreme Court no longer regards collective bargaining agreements as any different from ordinary commercial contracts. Note 3 (page 996) begins by examining the issue that the Court left open in *Pyett*. There are at least three possible answers to the question. 1) The mere presence of the ability of the union to block arbitration of a statutory claim because the union retains control over the decision to advance the claim to arbitration is sufficient to preclude enforcement against the employee of the agreement to arbitrate statutory claims. 2) The agreement to arbitrate is enforceable against the employee even though the union exclusively controls the grievance process unless the union refuses to take the claim to arbitration. 3) Where the union controls the grievance process, the employee is bound by the union's actions even where the union refuses to arbitrate the statutory claim because the employee may sue the union for breach of the duty of fair representation. Note 3 reports the first reported lower court decision dealing with the issue that the Supreme Court left open. In *Kravar*, the Southern District of New York held that the identical collective bargaining agreement could not be enforced against the plaintiff where the union refused to arbitrate the plaintiff's ADA claim.

Note 3 goes on to relate the modifications RAB and Local 32BJ made to their process for grieving statutory claims in light of *Pyett*. The teacher might ask the class to evaluate the changes. On the one hand, the changes may be thought to have provided low wage employees with a forum to adjudicate their discrimination claims that is more accessible than federal court. On the other hand, the arbitrator is selected from a panel agreed to by RAB and the union, i.e. one in which the employee was not involved in developing, and the arbitrator has no authority to order relief that would require amending the collective bargaining agreement. Query whether a claimant seeking such relief may avoid the grievance and arbitration process entirely and sue in federal court?

Note 4 (page 997) can be expanded to include the attorney's ethical obligations. Union lawyers almost universally maintain that the union, and not the individual grievant, is their client and the contract is the union's contract, not the employee's. Thus, for example, in a grievance alleging that the employer lacked just cause to discharge the grievant, the union may settle the grievance even if the grievant objects. The teacher may raise the question whether this approach applies when the union is representing the employee on a statutory claim. Does the union's lawyer become lawyer for the employee?

The teacher may also raise questions of strategy in light of *Pyett*. Note 7 (page 998) asks whether waiver of the judicial forum is a mandatory subject of bargaining. In dicta, Justice Thomas opined that it is. We don't see how an employer can unilaterally impose such a waiver on the employees but an employer probably may insist on such a wavier to impasse. Should an employer do so? A provision like the one in *Pyett* can be advantageous to an employer by compelling the consolidation of all of an employee's

claims in a single forum – grievance arbitration. On the other hand, it may lead to a greater number of grievances and may make grievances more difficult to settle.

The Malin & Werner article cited in note 8 (page 998) has some interesting findings. Workers fared significantly better in arbitration than they did before the Human Rights Tribunal of Ontario. After controlling for numerous factors that may have explained the difference, the authors concluded that the overwhelming reason for the dfifference was that all claimants in arbitration were represented, usually by a union-provided lawyer but otherwise by a non-lawyer labor relations professional, whereas a majority of claimants before the Tribunal were self-represented. They also found that claims were resolved significantly more quickly in arbitration than before the Tribunal. Significant differences occurred at two stages in the process. First, most initial claims of discrimination arose while the claimant was still employed by the employer. In arbitration, claimants grieved those matters right after they happened but before the Tribunal, claimants did not file until after they were fired. Second, the amount of elapsed time between the end of the hearing and the issuance of the decision was significantly shorter in arbitration than before the Tribunal, a result the authors attribute to the arbitrator's need to maintain acceptability with the parties (and delay in issuing decisions is one way an arbitrator can lose acceptability). The authors found arbitrators were less likely to cite positive legal authority (statutes, tribunal decisions and court decisions) than Tribunal adjudicators and were more likely to criticize or refuse to follow precedent. Arbitrators were more likely than Tribunal adjudicators to award reinstatement as a remedy (although the Tribunal had authority to order reinstatement it never did in the time period that was studied) but less likely to award so-called "public interest remedies," i.e., developing or revising human rights policies, training managers and employees and reporting to outside authority on compliance. These public interest remedies are regarded by employers as highly intrusive and the authors suggested that arbitrators were deterred from awarding them by their need to maintain acceptability.

A NOTE ON THE PRECLUSIVE EFFECT OF ARBITRATION (pages 968-1002

Pyett considered an action to compel an employee to arbitrate statutory EEO claims under the collective bargaining agreement's grievance and arbitration provision. *Gardner-Denver*, however, involved a case where the employee grieved and lost and then sued under Title VII. The Court held that he was entitled to a de novo trial with the arbitration award, at most, admitted as evidence in the trial. The courts in *Collins* (page 998) and Mathews page 999) divide over whether that aspect of *Gardner-Denver* was substantially undermined even before *Pyett*. Note that the court in *Collins* relied on the arbitration award to find the absence of issues of material fact with respect to the causal link between the alleged discrimination and the plaintiff's discharge. Following *Pyett*, courts might go further, as the district court did in *Mathews* and give arbitration awards res judicate or collateral estoppel effect with respect to subsequent litigation. In *Mathews*, the district court found it significant that the plaintiff had participated in the earlier arbitration proceeding with her own lawyer, rather than with union representation. However, under the reasoning that the union is appropriately acting as agent for the employee, the employee's representation by his or her own lawyer would not seem to be

relevant. The Tenth Circuit reversed the district court reasoning that *Gardner-Denver* continued to control as long as the collective bargaining agreement did not clearly and unambiguously waive the right to litigate in court.

3. ARBITRAL CONSIDERATION OF PUBLIC LAW CLAIMS

This section opens with an excerpt from the Malin & Vonhof article that orients students to the Meltzer-Howlet debate on the role of external law in grievance arbitration. Arbitrators have come under increasing pressures to resolve issues of public law that arise in grievances. The article points out that the greatest source of such pressure is not the EEO laws but rather the Family Medical Leave Act. Notes 2 and 3 (pages 1003-04) provide useful vehicles for exploring the impact. The teacher may also ask whether, in light of *Pyett*, the answer to the questions posed in the notes varies depending on whether the contract expressly obligated the employee to grieve and arbitrate FMLA claims.

Coastal Oil (page 1004) relies on a statute, the Massachusetts Workers Compensation Law, in taking a remarkably broad view of arbitral authority – in this case the authority to order reinstatement of an employee in the bargaining unit covered by the collective bargaining agreement into another bargaining unit governed by a different collective bargaining agreement. As Notes 1 and 3 (pages 1007 & 1008) make clear, the state and lower federal courts are not in agreement over arbitral resolution of grievances based on external public law. A useful problem to pose to the students to bring this issue sharply into focus may be found in the Malin, Revisiting the Meltzer-Howlett Debate on External Law in Labor Arbitration: Is it Time for Courts to Declare Howlett the Winner, 24 ABA J. Lab. & Emp. L. 1 (2008):

> Assume that a collective bargaining agreement provides, "All leaves of absence and any extensions thereof shall be without pay." Assume further that the contract provides, "Vacations shall be scheduled in accordance with the needs of the Company and employee preferences in accordance with seniority." For many years, the parties have followed a procedure whereby in early January, the company decides the maximum number of employees who may be on vacation on any given day and distributes vacation preference forms. Employees complete the forms specifying the dates they wish to take vacation and the company grants those requests by seniority until it reaches the maximum for any given date.
>
> Walter Worker's length of service entitled him to four weeks vacation per year. He participated in the vacation scheduling process and received vacation scheduled for the middle two weeks of August and the three days before Thanksgiving and two days following the Thanksgiving weekend. He retained one week of his entitlement to use at other times. The practice was to allow employees who did not schedule their entire vacation entitlement through the formal scheduling process to take vacation days at any time as long as they gave at least 48 hours' notice and the maximum number of employees on vacation for the requested date had not yet been met.

In early May, Worker's minor child was injured severely in an accident. Worker took time off to be with his child, exhausting his three weeks of accumulated sick leave. He then returned to work. Shortly thereafter, he learned that his child was scheduled for surgery for the last week of June and could expect a lengthy recovery period with the most critical time being the two weeks after surgery. Worker applied for and was granted Family Medical Leave Act (FMLA) leave to care for his minor child. He then requested to substitute his paid vacation time for the otherwise unpaid FMLA leave. However, because the three weeks in late June and early July were filled with the maximum number of employees scheduled for vacation, the company denied his request.

Worker filed a grievance and after the company denied the grievance at every preliminary step of the grievance procedure, the union demanded arbitration. The arbitrator sustained the grievance. If the company sues to vacate the arbitrator's award, will and should a court enforce the award? Will and should it matter how the arbitrator crafts the award? For example, will and should it make a difference if the arbitrator finds that the collective bargaining agreement allowed the company to deny Worker's vacation request but the denial violated Worker's FMLA right to substitute accrued paid vacation time for unpaid FMLA leave, and ordered the company to grant the request? Alternatively, what if the arbitrator interpreted the contractual provision that "vacations shall be scheduled in accordance with the needs of the company" to require scheduling Worker's vacation in accordance with the company's need to comply with the FMLA? What if the parties, recognizing that the date of the surgery was fast approaching, agreed to an expedited procedure whereby they submitted stipulated facts to the arbitrator, argued the matter orally and had the arbitrator issue a short form award within 48 hours. The award gave no rationale but sustained the grievance?

Teacher's Manual: LLCWP

CHAPTER 8

UNIONS AND ACTIVISM: EXPANDING THE BOUNDARIES OF THE MODERN LABOR LAW PRACTICE

A. INTRODUCTION

This chapter aims to train new labor lawyers to address new forms of legal, political and social activism around working conditions, both in the US and globally. One can begin by talking about the kinds of work that labor lawyers often do. On the union side, lawyers are likely to find themselves not just handling collective bargaining, arbitrations, unfair labor practice proceedings, and federal court litigation, but also helping to organize workers centers, working with community groups in local and state-level legislative and administrative proceedings on labor issues, and participating in wide array of federal, state, and local legislative or regulatory proceedings as part of a corporate social responsibility campaign. On the management side, labor lawyers find themselves responding to labor's new initiatives, as well as planning or publicizing corporate codes of conduct, traveling to or coordinating with lawyers or contracting partners in India, China, and all over the developing and developed world to work with suppliers and contracting partners on labor conditions. Cities are increasingly seeking to improve wages and working conditions through local legislation mandating sick leave, fair scheduling, and even to support organizing in gig work, and so labor lawyers lobby local governments on such ordinances or lobby state governments to prevent their enactment. For all these reasons, the modern labor law practice involves much more attention to state and local law than the conventional labor course usually emphasizes, and much more attention to the law regulating political activism.

This chapter obviously does not attempt to cover all the relevant law – courses on Employment Law, Election Law, State and Local Government, and many other topics do that – but it does introduce students to the new institutions in the labor-management relationship and new approaches to organizing and representation, as well as the growing importance of international codes of conduct, grass-roots activism, and political involvement at every level of government. The chapter also covers the federal labor law regulating union finances and internal union affairs, topics that have gained importance in the last decade as the Supreme Court had decided a steady stream of cases restricting union fees and the involvement of unions in political activity. Those who have taught from the other major labor law casebooks will find the basic coverage of internal union affairs to be familiar, but the emphasis is less on the technicalities and more on the strategic use by labor and management of the law governing union governance and union dues.

Chapter 8 can be covered in four class hours. Those pressed for time can cover either the new forms of activism material in two class hours or internal union governance and union dues in two classes.

The chapter begins with a problem drawn from a number of recent campaigns. The first considers the many cities that have enacted local ordinances – all of which were the product of local organizing. The second is the Seattle ordinance that provided a framework for collective bargaining by for-hire car drivers. The third is the Coalition of Immokalee Workers' Fair Food Program. The fourth is based on the Fast Food Workers campaign. The final one is, of course, the matter of fair share fees and union dues. As with all the other discussion problems that appear at the beginning of the chapters in this book, it is possible to use this discussion problem in class when you first begin to cover this material. A discussion at the beginning will be relatively uninformed (at least by students) about the law, and will tend to focus on policy. It is also possible to postpone discussion of the problem until students have covered the basic legal rules and then to treat the problem like a conventional factual hypothetical that is to be analyzed according to rules.

B. NEW LABOR ORGANIZATIONS AND NEW FORMS OF WORKER ACTIVISM

1. NEW FORMS OF LABOR ORGANIZATION

This section describes worker centers (which is a term used loosely to refer to a wide variety of worker organizations that are not unions). This section of the book can either be taught in a doctrinal fashion focusing on NLRA section 2(5) to get to the underlying policy issues or more from the perspective of legal sociology. When and why do worker organizations succeed? Why are they vulnerable as institutions?

It might help introduce the material by asking students to identify the differences between workers centers and labor unions. What do they do with/for workers that unions don't (or haven't)? What do they *not* do, and why? You might then ask questions about the structure and sustainability of worker centers: How are worker centers organized? How do they finance their activities? Then you might ask: Why do unions support worker centers? When or why might a union *not* wish to support a worker center?

Those who wish to anchor the discussion in legal doctrine may focus on why these organizations are or are not "labor organizations" within the meaning of section 2(5) and use that discussion as a review of some of the areas already covered. If you choose this approach, assign sections 1 and 2 as background reading and focus class

discussion on section 3 (which begins on p. 1026). Discussion suggestions for section 3 are below.

2. NEW FORMS OF WORKER ACTIVISM

This section begins with an excerpt of Jennifer Gordon's article on so-called "corporate social responsibility campaigns." As worker activism in the 1980s illuminated the ways in which corporations sometimes used their economic and political power to achieve businesses advantages at the expense of the environment, workers, consumers, or neighborhoods, corporations responded by touting the ways in which they were socially responsible. Thus the corporate campaign was met by the corporation's own "social responsibility" campaign, and the concept of "corporate social responsibility" became a battleground between corporate PR who wanted to create and preserve value in the corporate brand and worker and environmental activists who sought to use the value of the brand and the corporation's code of social responsibility to force the corporation to adhere to its promises about job creation, good wages, safe operations, and environmental responsibility. Professor Gordon describes this phenomenon and argues that only when workers are involved in designing, monitoring, and enforcing the corporation's code of social responsibility will corporate social responsibility be a meaningful constraint on corporate conduct as opposed to marketing.

The notes after the Gordon excerpt propose topics for discussion to illuminate what worker-driven corporate social responsibility (WDCSR) is and how two different WDCSR campaigns (one domestic, the other international) operate.

The Narro excerpt describes tactics. Narro shows how a worker center (NDLON) used high-profile protest and law to mobilize and organize day laborers, to publicize deplorable working conditions, and to seek transformation at the local level of the day labor market.

3. NLRA PROTECTIONS FOR AND RESTRICTIONS ON WORKER CENTERS AND WORKER-DRIVEN CORPORATE SOCIAL RESPONSIBILITY CAMPAIGNS

With the Gordon and Narro excerpts as background, you can generate class discussion about what role labor law plays in protecting or restricting worker campaign activity by asking students to consider the extent to which section 7 applies. Subsection a. first covers some issues regarding section 7 protection, then considers whether section 7 or other law restricts employer retaliation against workers' campaign activity. Subsection b. is a very brief discussion of preemption. Because the preemption chapter (chapter 10)

comes at the end of the book, professors who teach the book in order may cover preemption at the end of the semester or perhaps not at all if they fall behind. Preemption is hugely significant in many worker center campaigns because most (at least most U.S.-based campaigns) rely on local law. Hence, we offer a brief preview of the most pertinent aspects of preemption law here.

a. Section 7 Protection for Worker Campaign Activism

As illustrated by *Orchard Park Health Care Center* (p. 1027), there is nothing distinctive about worker center activities or a worker driven corporate social responsibility campaign; the applicability of section 7 to the use of political pressure on the issue of working conditions is settled. It is clear that section 7 protects "concerted activity … for mutual aid and protection" broadly defined. The scope of section 7 protection for activity other than the most traditional labor activities of bargaining and picketing is covered in detail in other parts of the book, and there is no need to rehearse all of that here. But you might use this for a quick review:

1. Does the scope of section 7 protection turn on whether a Worker Center is a "labor organization"? [no.]

2. What unfair labor practice remedies are available to workers if they experience workplace discipline or firing because of their support for the worker center or similar organization? [section 8(a)(1) and 8(a)(3) claims]

3. Would these organizations be subject to unfair labor practice charges under section 8(b)? [No, unless they are labor organizations, and at the moment they are not. This is the issue dealt with very briefly in subsection c. on pp. 1037-38.]]

4. Would these organizations face liability for secondary activity under section 303? [No, so long as they are not labor organizations. See subsection c. on pp. 1037-38.]]

The section then covers section 7 protection against retaliatory litigation. Students who have taken Employment Law or Employment Discrimination may be familiar with the general concept of anti-retaliation protections in the law, and with the types of legal issues that arise about how broadly the anti-retaliation provisions should apply. But for those who have never encountered the concept of anti-retaliation law before, it might be helpful to discuss why a law that grants basic rights would also grant a right to be free from retaliation for asserting them, and why the breadth of the anti-

retaliation provision is often controversial. Notes 1 and 2 after the *Orchard Park Health Care Center* case raise these issues. Note 3 raises the question whether an employer's decision to trigger an immigration raid should be understood as illegal retaliation, and the difficulties that Obama Administration experienced in coordinating the efforts of the protective labor agencies (DOL and NLRB) with the efforts of the immigration enforcement agencies. Note 4 is based on the long and ultimately successful UFCW organizing campaign at the Smithfield packing plant in Tarheel, North Carolina, which was the largest pork processing plant in the United States. Reasonable arguments can be made for both management and the worker as to whether either the firings or the statements are unfair labor practices. Students should be urged to consider the importance and difficulty of fact-finding in these types of cases as well as the ongoing debate about how much section 7 protections should be deemed to overlap with anti-retaliation protections available under other laws.

All of this material, provides excellent opportunities to ask students to think about the role of the lawyer. There are professional ethics questions you might raise, such as the ethical limitations on filing litigation for purposes of gaining tactical advantage in a political or economic struggle. In Note 4(b) on p. 1031, you might want to flag for students that in some states it is a violation of a lawyer's professional duties to threaten to initiate administrative or criminal proceedings to gain a tactical advantage in a civil case, and it's an interesting question whether a lawyer can counsel a supervisor to do that which the lawyer herself would be prohibited from doing. There are tactical questions you might raise, both for the union and for the company, about the role of lawyers in shaping the direction of political activism. On the union side, how can the lawyer use legal proceedings to empower an organizing campaign? What is the risk that filing legal proceedings will cause workers to be excessively reliant on adjudication? How should lawyers and organizers collaborate to attain the right balance between legal and social/political/economic pressure? On the management side, you might ask how the company should consider the advantages and disadvantages of filing litigation against the union or the workers.

If you plan to cover retaliatory litigation by employers, you might want to give students a handout summarizing some of the major principles of law. The following might be a good starting point:

Retaliatory Litigation

I. Introduction

A. Employers challenge corporate campaigns through litigation filed under state (defamation, interference with business) and federal (RICO, antitrust) theories.

B. Why is an employer lawsuit against a union or employees under state or federal tort or statutory law a powerful weapon?

II. Theories to challenge retaliatory litigation

A. Anti-SLAPP statutes (state law only)

1. A Strategic Lawsuit Against Public Participation is one intended to deter critics of a policy by burdening them with the costs of defending a suit alleging claims like defamation, or business torts like interference with prospective business advantage.

2. An anti-SLAPP statute allows a defendant to file a motion early in litigation to strike a complaint if the complaint is intended to silence speech or conduct protected by the First Amendment freedom of speech or right to petition clauses. California's anti-SLAPP statute also applies to speech in a public forum about an issue of public interest or to any other petition or speech conduct about an issue of public interest. The filing of an anti-SLAPP motion stays discovery. The plaintiff in the suit must prove that the suit is legally meritorious and is not vexatious. The denial of an anti-SLAPP motion is immediately appealable.

B. Fed. R. Civ. P. 11

C. NLRA § 8(a)(1)

1. When and why is retaliatory litigation arguably a § 8(a)(1) violation?

2. Why might legal restrictions on the ability of employers to file retaliatory litigation be problematic? (Consider 1st amendment)

3. The *Bill Johnson's Restaurant* rule – litigation violates § 8(a)(1) if

a) suit is unmeritorious; and

b) was brought with intent to interfere with § 7 rights

4. The *BE&K* rule (which replaced the *Bill Johnson's* rule) –

a) the Board must find employer sued for "subjectively non-genuine" reasons, rather than with an intent to interfere with § 7 rights, and

b) employer intended to use court process, not just the outcome of the suit, to interfere with § 7 rights.

c) On remand, the Board went further held that a suit that has a reasonable basis in fact/law cannot be retaliatory in violation of § 8(a)(1) regardless of employer's motive for filing.

D. RICO suits

1. There is controversy over whether corporate campaign activity – whether protected under § 7 or otherwise – can be the "predicate acts" of extortion making union activists civilly or criminally liable under the federal Racketeer Influenced & Corrupt Organizations Act (RICO).

2. RICO contains criminal and civil penalties (including forfeiture and treble damages) applying to anyone who commits a listed predicate offense on two or more occasions while participating in the operation of a legitimate business or union. Predicate offenses include many crimes of violence (e.g., murder, arson, robbery) and financial crimes (e.g., extortion).

3. The central element in employers' RICO challenges to worker campaigns is the allegation of extortion.

    a) Extortion means the obtaining of property from another, with his consent, induced by wrongful use of actual or threatened force, violence, or fear

    b) The point of a corporate social responsibility campaign is to impose extended economic pressure on companies, to instill a sufficient fear of economic loss so as to squeeze the employer and extract procedural or substantive concessions in the areas of union recognition or collective bargaining.

4. Does a campaign seek to obtain *property*?

    a) A worker driven CSR campaign may be an attempt to pressure an employer to restrict or abandon its right to control the nature of the union recognition process covering its own employees, or the right to refuse to engage in collective bargaining with the union, or the right to set working conditions without some input from workers. The employer also is denied its right to do business with its customers free from repeated verbal attacks on its goodwill and reputation. The union may also seek to extract pay increases, safety protections, health benefits, and other improvements in working conditions that have a tangible economic value.

5. Does it matter what union aims to do with the *property* if it is?

    a) The union perpetrating the criticism is not attempting to obtain the property rights that are the object of their coercive campaign. Unions do not seek to exercise for themselves, or to sell or transfer, the employer's right to refuse to enter into a neutrality agreement, or to oppose card check recognition or collective bargaining, or the pay increases.

6. Is the union's effort to *induce* the employer *wrongful*?

a) Should labor law define the scope of wrongfulness? For example, if the union uses prohibited secondary tactics, is the inducement wrongful under RICO?

b) If the union's tactics are all protected by § 7 can they still be wrongful under RICO?

C. UNIONS AND INTERNATIONAL LAW

A challenge that all of us face in teaching any substantive course on American law is the extent to which we should teach the global or international aspects of the subject. As capital and labor have become international over the last few decades, the protection of American labor standards increasingly seems to call for international action. This section of the chapter takes as its principal point of departure the protection of American labor standards from the perceived threat posed by (a) the off-shoring of jobs to lower-wage economies and the issue of regulating global supply chains; and (b) the immigration of vulnerable and easily exploited workers. (This, of course, is not the only point of departure one could use to consider the international law regulating labor standards.) The chapter surveys a number of the legal strategies that American labor activists have used to confront the challenge of globalization.

International law is a vast and complex field, and it is hard to teach the international aspects of a subject like labor law without students having some knowledge of international law. It is difficult as a teacher to know how much detail to expect students to master in order to balance breadth of coverage and awareness of the intersection of this field with many others, on the one hand, with the rigor of analysis that we traditionally expect of students, on the other. This book assumes students have little or no knowledge of international law, and thus it attempts to provide only an introduction to some relevant international legal institutions and concepts. We have chosen to give a basic overview of the relevant law and to focus students on the policy issues. Thus, as teachers, we would not treat this as an area of the course in which we expect doctrinal mastery but instead as an area in which we expect students to think carefully about policy and about strategic issues. At those law schools requiring students to take international law, this book may seem unduly simplistic and teachers may wish to supplement the material in the book with cases or other materials that will allow greater substantive rigor in legal analysis than this book will provide.

One might structure a class discussion of this material as a mixture of lecture and discussion along the following lines:

1. Labor rights are treated as human rights under the major international treaties: Universal Declaration of Human Rights (1948); International Covenant on Civil and Political Rights (1966), and the International Covenant on Economic, Social and Cultural Rights (1966). Why are labor rights treated as human rights in treaties? Why are they not treated similarly in the U.S. Constitution?

2. The principal international entity that is supposed to protect workers' rights is the International Labor Organization, which was created by the Treaty of Versailles at the end of WWI but became part of the UN after WWII. ILO Declaration of Fundamental Principles and Rights of Work articulates core labor standards: (a) Freedom of association and right to bargaining collectively; (b) Elimination of forced labor (c) Abolition of child labor; (d) Elimination of discrimination. In addition, there are hundreds of ILO conventions addressing a variety of labor standards, including some that are quite specific

3. Enforcement of human/labor rights under international treaties is weak. Why is that?

4. Labor advocates have turned to trade treaties to provide more effective protection for labor rights. Examples: (a) The ongoing negotiations under a series of trade agreements (the GATT negotiations and the origins of the WTO); (b) The World Trade Organization and the controversy over labor rights in trade negotiations; (c) The inclusion of labor rights in regional trade agreements like NAFTA. Why did labor turn to trade treaties? Should labor rights be linked to trade agreements? What are the arguments pro and con?

5. Labor advocates have looked to provisions of United States law enforceable in U.S. courts to protect labor rights internationally. One of the most significant has been the Alien Tort Statute, also known as the Alien Tort Claims Act. You might ask why Congress enacted the Alien Tort Statute in 1789. Then you can ask how a court should determine which violations of labor standards are "violations of the law of nations" (which is the operative concept for liability under the ATS). You may find some students offering ideas about the original intent of the statute, some about the role of U.S. courts in combating human rights abuses overseas. After a short period in the last decade of the 20th century and the first decade of the 21st century in which it appeared that the ATS might be a source of rights enforceable in U.S. courts, the Supreme Court has held that non-U.S. corporations cannot be sued under the ATS or for conduct outside the U.S. that did not affect U.S. nationals (p. 1049).

6. "Soft Law": Fair Trade Agreements and Codes of Conduct. You might discuss codes of conduct from both the perspective of labor advocates and from the perspective of corporate counsel. This overlaps with the Jennifer Gordon excerpt covered in section B.2 (p. 1019), and if you already covered that you needn't rehash it here. Alternatively, if you did not cover it, you might assign the Gordon excerpt on pp. 1019-1022 here.

On the labor side -- What are the advantages of using codes of conduct as a device for improving labor standards abroad? Are codes of conduct more of a "legal" strategy or a "political" strategy? What mechanisms are necessary to make codes of conduct effective in protecting labor standards? The key point is that workers must be involved in monitoring compliance because they really know what is happening and the agreement must be enforceable.

On the corporate side -- What might influence a corporation to enter into a code of conduct? What would influence company officials who would press for rigorous (or lax) enforcement of the provisions of the code of conduct? Which company employees will be charged with overseeing compliance with the code of conduct? How would the person respond differently depending on whether he or she is a lawyer?

7. Other strategies for cross-border monitoring and advocacy on labor standards. In addition to asking students to discuss the questions in the book, including what they think of the Jennifer Gordon "transnational labor citizenship" proposal, this is an excellent opportunity to encourage creative thinking by students. What other strategies should U.S.-based labor activists pursue to deal with labor standards abroad? What can companies do to remain competitive without exploiting workers overseas (whatever exploitation means)?

D. REGULATION OF UNION POLITICAL ACTIVITY, UNION SECUTIRY, AND UNION FINANCES

1. A CAMPAIGN FINANCE PRIMER

A great deal of disparate and highly technical law is implicated by the material covered in this section. This presents some challenges for the teacher. It probably will help students if you state explicitly what you expect students to get out of this material; those of us who have taught this material make clear that we do not expect them to know the law described in these sections and that we treat it as general background only. You might assign this as background reading but then tell the students that you'll discuss the material on domestic political involvement of unions when you discuss the regulation of internal union governance and finances under the constitution (*Janus* is now the main case) and under the NLRA.

One might start by explaining that a major part of the success of unions, both at the local level and at the state and federal levels, is political. They can influence politicians and enforcement of law in part because they lobby, they get out the vote, and they make campaign contributions or design and fund issue advertisements. While this may not be immediately clear to students (or professors) in areas with few unions, anyone familiar with the nuances of California politics, or the politics of many major urban areas on either coast, will recognize the tremendous significance of unions in politics. Anecdotally, one can illustrate the phenomenon with the fact that the SEIU, which was the largest union in the United States in 2008, mobilized a huge number of its 2+ million members in the November 2008 election, which made a difference in Obama's election. In response, a major Republican political strategy in the upper Midwest (notably Wisconsin) was to reduce the power of unions, and that campaign succeeded (in Wisconsin and Michigan), thus turning once solidly blue states red. That, of course, was the key to the Trump election in 2016. Thus, much of what labor lawyers need to think about is election law. Moreover, major industry groups and employer organizations are acutely aware of the impact of unions in politics and are very interested in counteracting or limiting it to the extent possible. The National Right to Work Committee, which is funded by large firms as well as by individual members, has run a major legal and political campaign over the last 60 years seeking to reduce the ability of unions to spend money on politics. Indeed, if you are so inclined, you could teach a significant part of Part D of this chapter as the results of a carefully organized, skillfully conducted, and largely successful legal and political campaign on the National Right to Work Committee. One might say that the NRWC changed the path of the law in a way comparable to the way the NAACP changed the law of race discrimination between the 1940s and the 1960s.

To begin with, you might ask students to consider some of the practical and policy issues underlying all of election law: (1) What are the purposes of regulating campaign expenditures and other election related speech? (2) In what respects are campaign expenditures treated as constitutionally protected speech? Should they be?

You might then ask about some of the fundamental issues regarding union and management political activism: (1) Should campaign expenditures by corporations be regulated more or less strictly than campaign expenditures by unions? (2) What are the analogies between corporations and unions and what are the differences?

2. THE REGULATION OF UNION SECURITY AND UNION DUES: HISTORY AND OVERVIEW

Many professors skip the material on union dues and internal union affairs. It is technical and it is traditionally an area that only the union-side labor lawyer, and officials at the United States Department of Labor, really needed to know. Today, however, there is a good argument for covering at least some of this material. After Justice Alito joined the Supreme Court, he led a successful effort to change the law to require that all public sector employment be on a right-to-work basis as a matter of the First Amendment; that effort began in *Knox v. SEIU Local 1000* in 2012 (p. 1064) and culminated in *Janus v. AFSCME Council 31* in 2018 (p. 1065). Whether or how unions can gather money from workers they represent and spend some portion of that money on politics has become a very hot issue, so students often find this material to be topical, interesting, and important. So, even if you are pressed for time, you might consider covering just section 2 and 3 of this part of the chapter (the overview and *Janus*).

This section of the chapter begins with a textual explanation of the origins and the current configuration of the law governing rules requiring workers represented by a union to join or to contribute financial support to the union. You should spend a few minutes making sure that students understand the basic concepts of union security and how the different types of union security arrangements differ. Students (and even many lawyers) are often confused by the distinction between a union shop and an agency fee shop, and they don't understand the difference between what unions and employers can require with respect to union dues in right-to-work states and in other states. They also confuse the rule for public sector unions (no compulsory payments can be required) and the rule that (for the moment) still prevails in the private sector (under section 14(b)'s exception to broad NLRA preemption, states can prohibit any form of compulsory payment and 27 states currently do, but in the other 23 states workers can be required to pay fair share or agency fees but not full union dues). This is all explained and defined in the text, but it would be a mistake to assume that students will read it carefully enough to master the distinctions without class discussion.

The fundamental premise of the whole body of law on the collection of union dues is that the dissenting employee's right to free speech is curtailed by the union's use of money to advocate positions with which he disagrees. This was a controversial position in the first cases in which it was raised, as illustrated by the dissenting opinion of Justice Frankfurter excerpted on p. 1062. It is now assumed by many that expenditure of money is speech, and, therefore, that the collection of money could consist in compelled speech. You can have a lively debate if you ask students to return to first principles and consider the arguments on both sides of this issue. You might ask students to think about all the kinds of organizations that gather money from members and spend it on activities that are arguably political. Besides corporations (which may be said to spend money gathered from shareholders or employees), there are state bar associations, pension funds

and health insurance companies, trade associations, homeowners' associations, professional associations, churches and other religious groups, and a huge array of membership organizations, some of which have explicitly political purposes (like the ACLU or the National Rifle Association) and some of which do not (like the Boy Scouts of America). You might ask students to be alert to the question whether the potential for coercion that animates the Court's decision in *Janus* is greater or lesser with respect to unions than with respect to all these other organizations.

3. PUBLIC SECTOR UNION SECURITY AND DUES

There are at least three categories of things students need to learn about union dues in the public sector. First, there is the background of the law covered in subsection 2 above. If you didn't assign it, you should lecture on it. Be sure students understand background legal rules: The union is the exclusive representative of employees under virtually all state/local labor laws. Because the First Amendment treats union membership as a matter of freedom of association, no employee may be compelled to join the union that represents him or her. Prior to *Janus*, state law determined whether unions and government employers could negotiate and enforce a collective agreement requiring all represented employees to pay fees to the union for the employee's pro rata share of the union's costs in negotiating and administering the collective agreement. Under the First Amendment as construed in *Abood*, unions could not charge objecting employees for costs of "political" activities not germane to the union's responsibilities as the exclusive representative. Finally, under all state and local laws, the union owes a duty of fair representation to all employees regardless of whether they are union members or fee payers.

Second, there is the holding and reasoning of *Janus*: public sector employers and unions can no longer enforce a collective agreement that requires employees to pay fair share fees. As noted above in Chapter 6, the usual rule under the First Amendment is that content-based restrictions on speech are permissible only if they meet strict scrutiny: they must be narrowly tailored to serve a compelling governmental interest. You could ask students whether the rules on union dues are a content-based restriction. Then you can ask them whether they are supported by a compelling governmental interest and whether they are narrowly tailored. As a pedagogical matter, looking at this law through the frame of First Amendment analysis is beneficial because it asks big-picture questions in an area of law that often is not focused on the big picture. Should speech on union-related matters be treated differently than speech on other matters? What is the government's interest in regulating how unions collect and spend dues? Are there better ways to achieve this interest? Students also love to discuss whether workers represented

by unions should be treated differently than shareholders who wish to opt out from corporate political expenditures authorized by *Citizens United* (note 6 after *Janus*).

One argument in *Janus* concerned the fact that public sector employees have no First Amendment rights on the job under *Garcetti v. Ceballos* and only limited rights to engage in off-the-job speech under the *Pickering* balancing test. (Public employees who allege they were retaliated against because of First Amendment speech off the job overwhelming lose in the federal district courts and trial courts.) The challenge for the majority in *Janus* was to explain why an individual employee has no First Amendment right to discuss pay or working conditions with a supervisor under *Garcetti* but does have a First Amendment right to refuse to pay fair share fees to a union that engages in such speech on his/her behalf.

Even if public employee bargaining is speech entitled to strict scrutiny under the First Amendment, the question is whether a public employer has a compelling interest in requiring employees to pay their share of it. The *Janus* majority spent most of the opinion explaining why the public employer does not. One interesting feature of the opinion is that *Janus* Court did not hold that public employee bargaining is speech protected by the First Amendment and, indeed, one might wonder whether the Court would so hold. (One aspect of this is the subject of note 5 on p. 1077.) Rather, the only First Amendment right seems to be the right not to pay fees to support the bargaining. This is the only type of speech where the right not to subsidize the speech is protected by the right to engage in the underlying speech is not.

The final thing that students should learn is what options remain to unions and public employers after *Janus*. This is an area of law where we expect significant changes in the months and years since the book and this teachers' manual went to press. Professors are encouraged to do a little research to see what is happening locally or nationally.

Note 2 on p. 1076 predicts that the National Right to Work organization has not won its last victory in the courts. Litigation is pending in federal courts all over the United States challenging various aspects of public sector labor law. Some litigation seeks refunds of dues and fees paid before *Janus* was decided. NRTW has lost that litigation thus far, but if it wins major victories the financial consequences for unions could be dramatic and dire. Some litigation challenges the constitutionality of exclusive representation. The argument is that if fees are speech protected by the First Amendment then the underlying speech that the fees subsidize must also be speech protected by the First Amendment and it violates dissenting employees' First Amendment rights to empower a union to bargain on their behalf.

Notes 3 and 4 on p. 1077 suggest that state and local legislatures may respond to *Janus* by enacting new regimes to address the free rider problem that *Janus* created. Professors might check the status of various legislative initiatives and present a menu to students for discussion of their pros and cons.

4. UNION SECURITY UNDER THE NLRA

The Supreme Court has decided a large number of cases addressing the question whether unions and private sector employers can enter into collective bargaining agreements requiring employees in the bargaining unit to join the union or to finance its work on their behalf. Before you get into coverage of the major cases excerpted in this section, it might help to remind students of the big picture (because this is a convoluted body of law, students tend to lose the forest for the trees). Remind them of the principle of majority rule. Remind them of the duty of fair representation and the sorry history of discrimination, incompetence, and corruption that led to the creation of the duty of fair representation and the law of union security. As you sort out the doctrine, it may also help to remind students of some of the major differences between the Railway Labor Act and the National Labor Relations Act with respect to union security. If you have taught *Janus*, remind students that the First Amendment applies only to government and thus creates additional requirements. *Janus* does not apply to private sector employers; only in public sector employment do collective bargaining agreements with union security provisions raise First Amendment issues, because only in public sector employment is the contract state action. In private sector employment, a union and employer's agreement to require employees to pay fees may be coercive, but it is private coercion that has no obvious constitutional implications.

The Supreme Court found the RLA to require opting out in *Hanson* and *Street* under a bizarre form of constitutional avoidance analysis by saying that because the RLA preempts state right-to-work laws, the federal preemption of state law is state action and, therefore, CBAs in the air and rail industries must meet First Amendment requirements. (If federal preemption of state labor and employment law constitutes state action and requires all private employment and labor contracts to meet constitutional standards, the Court's entire jurisprudence under the Federal Arbitration Act would look rather different than it does.) In *Beck* the Court transported the whole architecture of opting-out into the private sector by deciding that Congress had intended in the NLRA to provide the same rights that the Court had invented under the RLA and had decided was a constitutional requirement under public sector statutes. Query whether the Court would decide now that the NLRA should also be interpreted to require whatever new limits it finds to exist on public sector statutes.

Teachers pressed for time could assign only *General Motors* and *Beck* and omit the nuances of dues calculation, accounting, and disclosure under *Hudson, Ellis,* and the two squibbed cases on disclosure (*Marquez* and *California Saw & Knife*). If you wanted to expand the treatment slightly, you could cover *General Motors, Beck,* and *Marquez*.

To begin the discussion of union security, you might ask why union security matters to unions. What is the justification for it? What are the risks of union security rules? You might also remind students of the relevant history. When Congress enacted the Wagner Act, the majority that favored the Act did not think that union or employer coercion of workers *to join* unions was a problem. They thought the problem was employer coercion of employees not to join unions (the yellow dog contract and the common practices of firing and blacklisting union supporters). Section 8(3) of the original Wagner Act forbade employers to compel employees to join a union but a proviso allowed unions and employers to agree that prospective employees had to be a union member in order to be hired. The view underlying this was that unions were voluntary associations like churches or political parties, and like them they could make their own rules for membership, and employers had no legitimate interest in whether employees were union members. When Congress enacted Taft-Hartley in 1947, a majority perceived union coercion of non-union employees to be a significant problem, and thus created a right *not to join* unions. The Supreme Court expanded on this in a series of cases creating an elaborate body of rules that restrict the gathering and expenditure of union dues. You might point out to students that the body of law on union dues is quasi-constitutional, in the same way that the right to engage in consumer appeals in the secondary activity scenario (*DeBartolo*, Chapter 6) is quasi-constitutional. The Court didn't come right out and say that the NLRA was unconstitutional, but rather that it might arguably be unconstitutional if it were read to allow employers and unions to agree to require union membership or payment of union dues spent for "political" purposes.

To begin the discussion of union dues, you might ask why they matter. Having just covered the varieties of activism that are today considered to constitute effective advocacy to improve working conditions in the U.S., it should not be hard to get students to see all the things on which unions spend money besides the negotiation of collective bargaining agreements and the processing of grievances under them. You might ask students to list some of the things that unions do: Organize workers to increase union density in the industry so that union labor standards are not eroded by low-wage competition in the same labor market. Research economic conditions in order to negotiate CBA. Pay staff, including lawyers, to process grievances and to conduct arbitrations. Organize other workers so they have more bargaining power without the threat of non-union competition. Create and disburse strike funds. Form coalitions with other groups

to make their members' labor market power more effective. Lobby for local, state, and federal legislation to improve working conditions so that they are negotiating from a higher baseline. Run training institutes (for workers to upgrade their skills as jobs change or for workers who lose their jobs due to economic or technological change) or apprenticeship programs (to train new workers in skills that are not taught in high school or college). Administer employee benefit funds. Litigate employment law issues involving their members. Students will easily see that if law denied unions the ability to compel payment of dues, there would be a serious free rider problem. They will also see that if the law allows unions to compel dues payments to support anything at all, some members will object to how the money is spent.

You might ask a student to summarize the general principles underlying the rules regulating union dues. (As noted below, if you aspire to teach this material entirely socratically by asking students to pull the specific rules out of the cases, it will more slowly than if you clarify the specifics for them. But you might find it worthwhile to ask the students to articulate the general principle, which is unions can compel payment of fees only insofar as the dues support activities that are (a) germane to collective bargaining; (b) justified by the policy of promoting labor peace and avoiding free riders; and (c) do not significantly burden free speech beyond that which is inevitable in a system relying on exclusive representation and majority rule.

Professors less inclined to traditional Socratic method may wish to either lecture or give a handout explaining the rules. If you wish to summarize the rules succinctly, the following may be helpful:

(1) A "closed shop" rule (i.e., must be union member before hiring) is illegal. §§ 8(a)(3), 8(b)(2)

(2) A "union shop" rule (i.e., must become union "member" within 30 days of hiring (7 days in construction)) is legal. §§ 8(a)(3), 8(b)(2)

A "union shop" is one in which all employees must become and remain a union "member" within a specified number of days after hiring. It is 30 days under the NLRA, 8 days in the construction industry (§ 8(f)), and 60 days under the RLA (*Street*).

"Membership" is a term of art. Even in states that allow union security agreements (i.e., are not so-called "right-to-work" states), under *General Motors* workers have a right not to be compelled to actually join the union. All they can be compelled to do is to pay "agency fees" (see below # (4), (5)).

(3) Section 14(b) allows states the power to restrict union security agreements, which is an exception to the general rule of broad NLRA preemption. Thus, in "right to

work" states, union shop or agency fee rules are illegal. 27 states are now right-to-work states and in these states, employees represented by the union have a state law right to pay exactly nothing for the services that the union is required by the duty of fair representation to provide to them.

(4) Even where union security agreements are allowed, the union "membership" that can be required as a condition of employment is minimalist. An employee need not actually be a member; need only pay a sum equivalent to the employee's pro rata share of the germane portion of union dues and initiation fees, as explained below # (5). This is known as "agency fee" membership or "financial core" membership.

(5) The sum that dissenters can be compelled to pay may be less than the full amount of dues charged to members.

(a) Dissenters have a right to pay an amount that reflects a pro rata reduction of the portion of the full dues amount that the union spends on purposes not germane to collective bargaining and contract administration.

(b) The rules for distinguishing germane and not germane expenditures are the five categories described in *Ellis.*

Chargeable expenses are collective bargaining (including research), processing grievances, litigation (all litigation under the NLRA, only litigation on behalf of the bargaining unit under the RLA), the reasonable cost of social activities, and union administration (conventions and publications, though cost of publications addressing nongermane issues is not chargeable), and some aspects of organizing (as explained in Note 3 on pp. 1094-95).

Nonchargeable expenses include political activity and some forms of organizing.

(c) The union has a duty to notify all bargaining unit employees of their right to pay less than full fees. (*Hudson*. If the Supreme Court continues developing the law of compelled speech, you could ask students to think about why the rights of unions are not violated by compelling them to tell their members that they have the right not to be members. This is note 5 on p. 1098.)

(d) The union must create a process for auditing its expenditures to determine the size of the reduction.

(6) Unions cannot induce employers to discriminate against non-union employees or applicants, which means the union cannot seek the discharge of an employee on the grounds of non-membership, but only for failure to pay dues (or agency fees).

(7) Union discipline of members for violating union rules other than those relating to dues is regulated by §§ 8(b)(1) and 8(b)(2) and also by Title I of the LMRDA.

It is difficult in a 3-unit course to discuss the nuances of these rules. You may find yourself with time for thoughtful doctrinal discussion of only one or two specific rules. A particularly good one under the issue of the chargeability of union dues is on the limits of the rule that organizing expenses are not chargeable. You could return to the hypotheticals that began the chapter to examine which aspects of the unions' campaigns on behalf of workers would be chargeable. This is note 4 on p. 1095. You can begin by asking students to parse the meaning and limits of the *Ellis* determination that some organizing expenditures are not chargeable. On the face of it, students might find the Ninth Circuit's en banc holding in the *UFCW Local 951* case (the basis of Note 3 on p. 1094-95) to be inconsistent with *Ellis* (of course there is a difference between the RLA and the NLRA) but they may be able to discern distinctions.

After the Court created the elaborate requirements for union dues collection, accounting, and expenditure, the next step in the legal development was to create a body of rules obligating unions to inform their members about the law. To help students master the rules, you might point out that the law regulates *how clearly, how often, and how* unions must notify members of *Beck* rights. In *Marquez*, the Court held that the union did not breach the duty of fair representation simply by including in a collective bargaining agreement a union security clause framed in the exact language of section 8(b)(3) without explaining that the statutory term "membership" had been interpreted in *General Motors* to mean something other than actual membership. Is this misleading? You might ask the students what a duty to notify means if the notification can be as unclear as the law is. As to *how often* and *how* the union must notify bargaining unit members of their *Beck* rights, the NLRB created an elaborate and detailed set of rules in *California Saw & Knife*. *California Saw* also created rules obligating unions to create a process for auditing expenditures to determine the size of a dues reduction dissenting fee payers will receive.

If you want to step back a bit from the doctrine and focus students on policy, you might ask them to consider why unions have legal obligations to inform employees of their right *not* to support the union under *Beck* but employers have no legal obligation to inform employees of their right to support the union. The Board attempted to adopt a rule requiring employers to post a notice informing employees of their rights under the NLRA, and after both the D.C. Circuit and the Fourth Circuit struck down the rule, *National Association of Manufacturers v. NLRB*, 717 F.3d 947 (D.C. Cir. 2013); *Chamber of Commerce v. NLRB*, 721 F.3d 152 (4th Cir. 2013), the Board gave up on its effort. The courts of appeals found that the Board is a reactive agency that has no power

to require notices to be posted except as a remedy in an unfair labor practice proceeding and that making it an unfair labor practice to fail to post a notice violates section 8(c). Neither court ruled on the First Amendment compelled speech arguments that the Chamber and NAM made in their briefs. Is there a meaningful distinction as a matter of policy between requiring unions to issue notices and failing to require employers to do so? Is this just ideology? Path dependence? If the Board cannot achieve the notice rule by rulemaking, could it do so by adjudication? Could unions litigate to establish a general obligation of employers or unions or both to inform employees about the full range of their rights under the NLRA? What would the legal theory be?

5. OTHER RIGHTS OF UNION MEMBERS VIS A VIS THE UNION UNDER THE NLRA

The topic covered in this section logically fits in Chapter 6 under the heading of efforts by unions to encourage solidarity, for that is where many issues of union discipline of members arise. But the law governing union discipline is complex and draws on the same body of principles governing union dues. Thus, although conceptually *Allis-Chalmers* and *Pattern Makers* belong in Chapter 6, it is much easier to teach these rules here because, on account of the convoluted nature of the rules regarding union security, the opinions are almost incomprehensible to students until they have covered the law of union security and union dues. When teaching the law here, it is important, however, to explain to students how union discipline issues typically arise today, and how the *Pattern Makers* case arose, so that they can see the issue of discipline in the context of the battle for solidarity that arises once the employer exercises its prerogative of hiring permanent replacements for striking workers.

This material presents many teaching opportunities. First, as suggested above, it is a helpful review of the law regarding solidarity during a strike. Second, as suggested by the discussion of the Hollywood writers' strike (Note 3 on p. 1101), it provides an opportunity to consider why union membership matters in certain communities and how unions can use their social power to coerce or cajole members to go along with the decisions of the union leadership. Third, it provides opportunities to talk about the administrative law issues that pervade labor law: is there a principled way to define when and why the NLRB deserves deference from the Supreme Court? Critics of the Supreme Court's treatment of the issue of deference to the Board accuse the Court of deferring only when a majority likes the policy position the Board has taken, and this is an issue that you may have discussed at numerous times during the course (such as when teaching *Lechmere*). Now that the students have read many Board decisions, they are better able to talk in a sophisticated way about where the responsibility lies for the apparent (and perhaps actual) inconsistency in the Court's decisions on deference. If

deference is about expertise, what *is* the Board's claim to expertise? If deference is about policy judgments being made by politically accountable Board members rather than politically insulated federal judges, when should the Court NOT defer?

E. UNION GOVERNANCE AND ELECTIONS UNDER THE LMRDA

1. UNION GOVERNANCE

The LMRDA requires unions to run as constitutional democracies. They must use elections to determine union leadership, they must conduct the elections fairly and regularly, union members must be able to participate in union elections, and the duly-elected leaders of the union must follow rules (the union constitution and by-laws) that were created and amended by a democratic process in union members participate. The so-called union member's bill of rights under the LMRDA continues the metaphor of unions as constitutional democracies by giving union members rights of freedom of speech and due process, rights that are enforceable by federal court litigation brought by the individual or by the United States Department of Labor under the LMRDA. So unions are constitutional democracies whose governance is subject to legal challenge and review by federal courts. Given the long and tense history between federal judges and labor unions, one can see the tension between the goals of the LMRDA and the prospects of federal court oversight of union governance.

The leaders of most or all unions with which we are familiar take very seriously their responsibility to follow the union constitution, to conduct conventions of the union's membership according to a fair process, to elect union leadership, and to amend the union's constitution according to an established process. That said, of course, union members consider leadership within their union a position of considerable power and responsibility, and they are tempted to engage in all the behavior one would expect among people who seek and exercise power. And, of course, we know that in some unions at some times, corruption is and has been a real problem. If you want to cover the LMRDA briefly and largely as a matter of policy, you might present the tension between union autonomy and democracy and the protection of individual rights enforced by federal court litigation under the LMRDA. Are the rights of workers (however defined) better protected if federal courts and the Department of Labor attempt to remove themselves from most internal union disputes because it will force or encourage union members to create vibrant institutions to protect themselves from their own abuses of power? Or are the rights of workers better protected if the LMRDA is vigorously enforced by the DoL and the federal courts? What is the greater risk: that corruption or political favoritism within unions will harm dissident members or that, through ignorance, inadvertence, or hostility to unions generally, the federal courts and the DoL

will use the LMRDA and the dissident union member to weaken unions as institutions and thus strengthen the power of management to break unions, to beat organizing campaigns, or secure concessions in bargaining?

The regulation of union governance under the LMRDA is the bread and butter of the work of union-side labor lawyers and the officials at the U.S. Department of Labor who enforce the elaborate LMRDA record-keeping and disclosure requirements. Most professors probably skip this material. But, because it is quite short and has emerged in the recent years as exceedingly important in some sectors and for some unions, you might consider assigning it.

This chapter's treatment of the LMRDA is very summary and avoids most of the details and the technical issues that may arise. The Notes in the section focus on recent, high-profile, and accessible disputes that arose regarding the law affecting how unions elect their leaders and govern themselves. If you want just one substantive discussion on the LMRDA beyond the general policy discussion described above, you might ask students to focus just on Notes 1 and 4 on pp. 1106 and Notes 1 and 2 on pp. 1112-13. To what extent does or should the LMRDA regulate the ability of the union to create rules governing its own leadership that might seem objectionable to outsiders? We know, for example, that a rule adopted by any public entity creating a racial or gender quota for leadership positions would be subject to constitutional challenge. We also know that private non-profit organizations, including those exercising huge social influence, power and responsibility, maintain such rules (think of the Catholic Church or the Boy Scouts of America).

One of the general-interest hot LMRDA issues as of this writing are whether worker centers are "labor organizations" within the meaning of the LMRDA and must therefore govern themselves as required by the LMRDA rather than under the federal and state law of tax exempt organizations and nonprofit corporations. (This is the subject of Notes 1 and 2 on pp. 1112-13.) The LMRDA does not have a separate definition of what is a labor organization, but simply relies on the NLRA section 2(5) definition. At the time the LMRDA was enacted, the only form of labor organization in existence was a labor union, so it made sense to rely on that statutory definition. If they are labor organizations under the LMRDA, they must file the required financial disclosures (LM-2 forms) with the Department of Labor. Requiring such governance and disclosure would be a hassle for the organizations but would not fundamentally alter what they do. Business interests may seek a holding they are labor organizations under the LMRDA as a back-door way of getting a court to hold they are labor organizations under the NLRA. *That* would be a major alteration in what worker centers do, as noted in Chapter 6, because it would

appear to prohibit them from engaging in secondary activity and open them to unfair labor practice charges under section 8(b)(4) and damages suits under section 303.

Another hot topic under the LMRDA is whether union-represented workers who are not union members have the right to vote in matters of internal union governance. This is the subject of Note 4 on pp. 1106-07. As the note explains, unions are private membership organizations that, like all other organizations, allow only members to participate in governance. Nevertheless, NRTW and its allies have filed litigation in a number of places arguing that the First Amendment rights of nonmembers are violated by union rules that allow only members to vote on leadership, on negotiating priorities, and on contract ratification. Instructors should check for updates on this litigation before teaching the topic.

2. TRUSTEESHIPS

To the extent that international union leaderships use trusteeships to keep their local affiliates in line with the goals of the union, there is huge potential for corruption (think of the Teamsters) but also the potential to prevent locals from engaging in corruption or incompetence. Trusteeships are the chief weapons unions have to fight corruption in their own ranks (the SEIU put a large local in trusteeship in 2008 after evidence surfaced that the local president was corrupt). They also use trusteeships to protect members of locals from incompetence or bad judgment (which was an argument for the trusteeship of UFCW Local P-9, which is the basis for Note 1 on pp. 1107-08). And they use trusteeships for arguably corrupt or abusive purposes. (A number of blogs or news articles, including many in Labor Notes, accused the SEIU International of corruption and abuse in 2008 when it put a San Francisco Bay Area local affiliate, United Healthcare Workers – West, into trusteeship. The SEIU claimed the trusteeship was necessary to combat incompetence and corruption. The episode was covered, from a variety of perspectives, in a number of publications and blogs, such as *Labor Notes* (hostile to SEIU, favorable to UHW-W), *Los Angeles Times* (skeptical of SEIU), and *Daily Labor Report,* among others.

3. UNION FINANCES
4. UNION DISCLOSURE

One way of teaching the material on union finances and disclosure is to display for the class the detailed information available on the U.S. Department of Labor website. You can find every LM-2 form filed by every international and local union. You can choose one almost at random and study the information provided. Students who have taken securities law will recognize the similarities between the disclosures required to the

SEC and disclosures required to the DOL and you can have a discussion about how elaborate reporting and disclosure affects the work of practitioners in the field and the extent to which disclosure does prevent corruption.

5. PROHIBITIONS ON EMPLOYER CONTRIBUTIONS TO UNIONS

The last section of the chapter, which covers section 302, is technical and you might mention to students that most of the section 302 law arises in connection with jointly-trusteed employee benefit plans and is therefore covered in an employee benefits course, although it is eclipsed in such a course by ERISA and the Affordable Care Act. Section 302 was enacted as part of the Taft-Hartley Act to address union and employer corruption. It broadly prohibits payments of money or anything of value by employers to unions except as allowed in the enumerated exceptions.

To keep the book a manageable length, we opted to omit coverage of section 302. If you wish to teach it, we encourage you to require the students to read the statute carefully and then you might consider supplementing what the book provides with a case or a case study on whichever provisions of greatest interest to you. Here are some suggestions:

You could choose one of the exceptions (other than 302(c)(5), which is too complicated) and ask why this is an appropriate form of labor-management cooperation and what kinds of programs could be created under the exception. (This works well with section 302(c)(9).)

If you have taught *Janus*, you could consider whether under state laws that have an equivalent to section 302 it would be desirable or necessary to amend that law to allow the creation of a collective bargaining fund of the sort described in Note 4 on p. 1077.

You could compare the financing model of unions with that of worker centers (which depend on foundation funding and sometimes provide training or other services funded by the government or by high-road employers in the industry) and consider whether section 302 should prohibit such cooperative arrangements.

CHAPTER 9
ENDING THE COLLECTIVE BARGAINING RELATIONSHIP

A. INTRODUCTION

Chapter Problem (pp. 1116-1116)

The Chapter problem is modeled on the demise of Eastern Air Lines after labor battles between the Frank Lorenzo-led Texas Air Corp., which acquired Eastern in the mid-1980s, and ALPA and the IAM. Two of this casebook's coauthors were involved in various aspects of that dispute on opposite sides. The arena has been changed from the airline industry to the trucking industry in order to make the legal focus the NLRA rather than the RLA. The Eastern Air Lines case is a good hypothetical for this Chapter since the corporate moves involved are typical of complex transactions involving labor that students may face today and also virtually every doctrine related to ending the collective relationship was implicated in the dispute. **Please note some of the problem facts in the 3rd edition have been changed from prior editions to make the problem more realistic.**

NOTES (pp. 1117)

1. The questions in Notes 1 and 2 are not intended to be answered at the beginning of the Chapter, but rather be posed and taken up after each subsection of the Chapter. As will be noted throughout the Chapter, Enderby had a number of options to be able to carry out its corporate vision, but the legal ones require advanced planning. The first important doctrine is successorship. How Enderby structures its purchase matters. To retain the greatest flexibility, it could arrange to purchase assets or, though more complicated, if Enderby operated in ways completely different to unionized companies it purchases then it may be able to operate with a different workforce. Any strategy involving ridding itself of unions simply to get rid of unions but not for some overriding corporate reason unrelated to unionization will be sharply resisted by the NLRA's doctrines as will be seen in this Chapter.

The nonunion operation can maintain its nonunion existence if the operation is kept separate, as explained in the section on doublebreasting. However, there may be good reasons to combine both companies in which case, depending on the size of the operations, New York's labor force will either be accreted into the larger Eastern unit or New York may disappear altogether as a separate entity and the employees of New York will simply be swallowed into Eastern's workforce and become part of the unit that way. In any case, Enderby will at the very least be required to bargain with the existing union over a new contract. Enderby probably will be better off with respect to maintaining flexibility if it arranges for an asset as opposed to a stock purchase, but the Supreme

Court has stated that the form of corporate acquisition does not matter as much as what happens to the workforce. Generally, the more the workforce is kept intact after an acquisition, the more the labor obligations will remain intact also. However, if the nonunion entity is the larger one so that majority status cannot be presumed the union may have to start over. As will be seen in this Chapter, the NLRA has some doctrines, like single employer and alter ego, that can serve to circumvent employer moves to strip out assets and maintain obligations (like labor ones) in a separate entity.

2. Since the unionized carrier, Eastern, is the larger one, Enderby will at the very least under *Burns* and *Fall River* be required to recognize and bargain with the Eastern union as a successor to Eastern. The first thing the union should do is make a bargaining demand which Enderby will have to treat as a continuing demand unless it drastically changes operations and begins hiring from scratch. If Enderby chooses to hire a new workforce (unlikely with such a big company), the union will have to monitor the hiring process carefully to ensure that antiunion motivation does not characterize Enderby offers of employment. Should Enderby keep New York and Eastern separate (likely given the size of New York), the union can argue that New York should be accreted into Eastern or that Enderby is a single employer of Eastern and New York (see *Mercy Hospital*).

Hiding Behind the Corporate Veil (1118-1121)

The excerpt from the article by Crandall, Starrett, and Parker is decidedly pro-labor. The reason for this is primarily that law students come into labor law usually knowing quite a bit about corporate structures and corporate law. They often have more than passing familiarity with merger and acquisition and tax law. They typically, however, lack a perspective on those actions and laws as they impact labor. This excerpt is intended to provide that perspective and therefore is intentionally pro-labor. Beyond its perspective, however, the article, though a bit dated, does a good job of introducing and defining the basic doctrines related to ending the collective relationship that will be studied in this Chapter.

B. WITHDRAWAL OF RECOGNITION

The questions before the case are answered by the case. Traditionally, an employer could withdraw recognition of a union if the employer knew that the union lacked majority support or if the employer had a reasonably grounded (objective, good faith) doubt about the union's majority status and there were no employer unfair labor practices.

Allentown Mack Sales & Service, Inc. v. NLRB (pp. 1122-1130)

Allentown Mack S & S purchased the assets of a Mack factory in Pennsylvania. The new entity engaged in the same business as Mack and hired 32 of the 45 Mack workers. Ordinarily, with such hiring the union's continued majority would be presumed, but a number of employees explained in interviews that they no longer wanted the union, the union representative expressed doubt about whether the union could win an election in

the new company, and a night shift mechanic told a manager that the night shift did not want the union. After a bargaining demand, the employer refused based on doubt and instead arranged for a poll of employees. The union lost the poll 19-13. An ALJ and the Board found that the employer committed an unfair labor practice in polling because it did not have objective, good faith doubt about union loss of majority.

The US Supreme Court held that the ALJ and the Board improperly discredited employee testimony that referred to other employees more generally and that raised doubt about the union's majority status. After looking at the evidence in the case, the Court also criticized the Board's "doubt" standard as being one that in fact required that employers actually know the union lacks a majority either to poll employees or to withdraw recognition. The Court upheld the Board's "doubt" standard and applied it literally contrary to what it said had become the Board's practice.

NOTES (pp. 1130-1131)

Note 1. The answer to the question posed at the end of note 1 will vary depending on perspective. The Board obviously felt that a continuing union relationship should not be upset short of a very reliable and strong indication of lack of majority status. The Court felt that polling may well show a union majority and actually prevent the filing of an election petition by the employer and also felt that just because an employer could poll did not mean it necessarily would poll due to a variety of other constraints.

Note 2. The Board had applied the same standard of certainty for doubt in all three scenarios. Whether you agree with the Board depends on how you balance stability versus free choice as indicated in Note 1. The Board after *Allentown* could well adopt a different standard for straight withdrawal as opposed to just polling, but the Board, it seems, could also just restate its polling standard to achieve a unitary test if it wanted. The Court says the Board's reason for a unitary standard is that polling is so destabilizing that it should only be tolerated when an employer actually had enough evidence to simply withdraw recognition. Yes, this makes some sense although it may not literally square with a standard of good faith doubt.

Note 3. Although the examples are useful, it seems the Board can simply restate its standard using different descriptors and continue with a unitary approach by Justice Scalia's reasoning.

Note 4. Justices Breyer, Stevens, Souter, and Ginsburg wrote in dissent that the Board's approach was justified by "substantial evidence" and that the majority had changed the Board's standard from one of doubt to one of uncertainty. The answer to all the note questions about evidence after *Allentown* would seem to be that all those indications would be acceptable. After *Allentown* a wider range of evidence will be acceptable for polling unless the Board changes how it describes its standard.

Note 5. See the excerpt on Decertification Elections at pp. 1149-1151 for a perspective on the note question.

Levitz Furniture Co. (pp. 1132-1140)

As a response to *Allentown Mack*, the Board held that an employer may only unilaterally withdraw recognition from an incumbent union (or poll to determine majority support) when the union has actually lost the support of a majority of bargaining unit employees. The Board overruled *Celanese*, the Board decision articulating the old good faith doubt standard at issue in *Allentown Mack.* The Board did maintain its good faith doubt standard for RM elections (employer-initiated elections), but indicated the proof standard for this is higher than suggested by the Supreme Court in *Allentown Mack.* The Board indicated that employers are safest when they rely on employee signed decertification petitions before filing for an election.

NOTES (pp. 1140-1142)

Note 1. Again, the answer to this depends on whether you weigh stability in bargaining relationships ahead of employee freedom of choice. Note Member Hurtgen's concurrence. He's against the change in standard because it might mean that a union will continue to be recognized on some occasions where it does not enjoy majority support because of a prolonged election process.

Note 2. Interestingly, as suggested by the excerpt on decertification elections (pp. 1149-1151), a lot of the reasons will have to do with the trust we have as a matter of policy in the process of employer harvesting of evidence about the union's lack of majority status. Given many employers' general antiunion sentiment, the Board may be correct in suspecting an employer's internal processes. However, a Board requirement of election in the instance of withdrawal or decertification may be used by employers to argue that the process of union collection of authorization cards should yield to elections as well.

Note 3. The process of rulemaking by adjudication has been widely criticized. There were more attempts at rulemaking by the Obama Board, but the Board still overwhelmingly makes policy through adjudication.

Note 4. The union's best strategy depends on whether it believes it maintains a majority and whether it believes that has been eroded by unlawful employer action. If the latter, the unfair labor practice may be the best option. The ULP places the employer on the defensive, but an election petition may be the best option if the employer has been operating in good faith. After *Levitz*, the employer must file an election petition unless it has strong evidence that the union has actually lost majority support.

Note 5. Employer polling after a union has been certified or recognized challenges the status of the current bargaining representative, serving to destabilize a bargaining relationship. The risk is lesser if a union has not yet been recognized.

C. DECERTIFICATION

SFO Good-Nite Inn (pp. 1142-1147)

The prior editions featured the case of *Viv Koenig Chevrolet, Inc. v. NLRB*, 126 F.3d 947 (7th Cir. 1997). That case attempted to answer the question, how much support can an employer lend to a decertification effort without committing an unfair labor practice. As posited by the court, the employer argued it could provide as much support as it wanted so long as it did not interfere with employee free choice. The Board, however, took a much stricter approach—that the employer may provide only ministerial assistance. The court held that the amount of assistance in that case—having the company lawyer review and redraft poll language—though not trivial was unlikely to affect employee sentiment. The court also found that even if the assistance by the employer did rise to the level of being too much under the NLRA, the employer was nonetheless within the law in withdrawing recognition from the union since the polling/vote produced clear evidence that the union no longer enjoyed majority status. The new case, *SFO Good-Nite*, shows the other extreme of employer action during a decertification effort, and while like *Vic Koenig* not strictly a pure decertification decision, also deals primarily with the question relating to how much support may employers provide in decertification efforts.

Case: The employer SFO Good-Nite Inn, was found to have violated Section 8(a)(1) during a decertification campaign. Specifically, the employer coerced three housekeepers into signing a decertification petition and disciplined another employee for speaking against the decertification. After committing these violations, the employer withdrew recognition of the union based on a decertification petition signed by 14 of 24 unit employees.

Law: The Board adopted the judge's finding that Respondent violated Section 8(a)(5) and (1) by withdrawing recognition of its employees' union after committing a number of unfair labor practices directly related to encouraging its employees' decertification efforts. The Board majority explained that, under the circumstances of this case where the employer unlawfully instigates or propels a decertification campaign, and then invokes the results of that campaign to justify withdrawal of recognition of its employees' union, the case was properly controlled by a conclusive presumption of taint set forth in *Hearst Corp.*, 281 NLRB 764 (1986), *enfd. mem.* 837 F.3rd 1088 (5th Cir. 1988). The ALJ had applied a different precedent, *Master Slack Corporation,* used by the Board in cases where there is some attenuation between the decertification effort and the employer ULPs. But in *Master Slack,* the employer threats of plant closure and discriminatory discharges had happened 10 years before the decertification campaign at issue. The Board maintained that *Master Slack* was not relevant to SFO Good-Nite since causation was virtually *per se* and not really an issue in *SFO Good-Nite* with ULPs happening currently in the very context of the decertification campaign. In these types of cases, *Hearst Corp.* is the proper precedent.

Writing separately, Member Hayes agreed that *Hearst Corp.* was the appropriate precedent to apply to the facts of SFO Good-Nite, but argued that *Hearst's* presumption of taint should be rebuttable.

NOTES (PP. 1147-1148)

Note 1. Shows that SFO-Goodnite Inn's holding finding a presumption of taint may be overruled eventually by the Trump Board.

A professor might ask how this case squares with *Levitz*, decided after? Doesn't *Levitz* strongly suggest an employer must have more evidence of union loss of majority than here in order simply to decide to poll? Could the employer do the same things it did here after *Levitz*? The answer is yes since the court's holding was that there was not too much interference and this case involves a decertification attempt. However, the court's finding that the employer could withdraw recognition is arguably affected by *Levitz.* Of course, the *Unifirst* case indicates that an employer may poll after a decertification attempt. But, would that still be the case if the decertification attempt was assisted by the employer?

Note 2. Clearly, Lozano is taking a risk if he engages in any of the listed actions. He would be in trouble under any standard if he actively encourages decertification and if he files the decertification petition. If the lawyer takes a more active role in drafting language than making a mere suggestion, there might be a problem under *Hearst*. Employer explanation of the decertification process is probably only a violation under the stricter, laboratory conditions, standard.

3. Note that RLA decertification is much tougher since there is no official decertification mechanism in the RLA.

Decertification Elections and Industrial Stability: Need for Reform (pp. 1149-1151)

Professor Ray advocates eliminating employer unilateral withdrawal of recognition. The main reason for his suggestion seems to be the inefficiency of the process surrounding union challenges to employer withdrawal. Professor Ray advocates that withdrawal of recognition should happen only after the filing of a decertification petition and a Board-conducted decertification election.

NOTES (P. 1151)

Note 1. The first question to ask the class is whether Professor Ray's proposal was in effect adopted by the NLRB in *Levitz Furniture*? The answer is largely yes, although under *Levitz* the Board seemed to stop short of mandating elections.

Note 2. Although the Board sends a strong signal against employer efforts aiding decertification processes when they cross the line into committing ULPs, the Board seems a long way from requiring secret ballot elections and is not even likely to entertain

arguments to do so while there is no requirement of them in initial representation elections. The note encourages thinking about the issue strategically. Why would unions or employers be for or against decertification secret ballot elections.

D. SUCCESSORSHIP (p. 1151)

NLRB v. Burns Int'l Security Svcs (pp.1153-1157)

Burns replaced Wackenhut in providing security services to Lockheed in Ontario, California. Burns employed 42 guards, the majority of whom, 27, had been employed by Wackenhut and had been represented by a union, which had been elected only four months earlier. Burns refused to recognize and bargain with the union. The Board found that Burns committed an 8(a)(5) violation by refusing to bargain with the existing union that represented a majority of its employees. The Court upheld the Board's finding. The Court disagreed, however, that Burns was under an obligation to observe the substantive terms of the recently executed collective bargaining agreement between Wackenhut and the union. The Court observed that a successor employer has always been held merely to have the duty to bargain with the predecessor's union. The Court's primary reason for finding only a duty to bargain is that a finding that the successor is held to the actual contract may chill the purchase of moribund businesses. The Court also found that the Act does not compel agreement under section 8(a)(5) and therefore cannot require a new entity to honor substantive terms it did not agree to.

NOTES (PP. 1157-1159)

Notes 1-3. The advice to Lozano would be that the hiring process should be devoid of any questions or requirements related to union support or sympathy. The advice after *Burns* is that a bargaining obligation will apply if the majority of the new workforce is former unionized employees of the predecessor. Such a result might not be guaranteed if the employer doubled the size of its workforce or required different skills of its employees, but counsel should emphasize that the employer must be careful not to let unionization guide its action with respect to operations. To ignore that advice would lead to risk of liability under the NLRA.

Fall River Dyeing v. NLRB (pp. 1159-1167)

Sterlingwale operated a textile dyeing and finishing plant in Fall River, Mass. Its employees were represented by the Textile Workers of America, Local 292 for almost all of the thirtyy ears that Sterlingwale had been in business by 1980. After a long period of stagnation, Sterlingwale went out of business in summer of 1982. At the time it went out of business, Sterlingwale had been in negotiation/discussions with the union since its contract had expired in April 1982. Fall River Dyeing purchased the assets of Sterlingwale through another entity, MCRC, and from Sterlingwale's Owner's mother and at auction. In September 1982 Fall River began operating and hiring employees. Fall

River Dyeing hired 12 supervisors, 11 of whom had worked at Sterlingwale (8 as sups, 3 as production ees). The union requested recognition and to begin bargaining in October, but the employer refused even though at the time 18 of 21 employees were formerly from Sterlingwale. By mid-January 1983, Fall River had achieved its goal of an initial shift of 55 employees. Of the 55, representing over half of the number Fall River would eventually hire, 36 were former Sterlingwale employees. Fall River had two full shifts by April; 107 employees (52/53 were former Sterlingwale). The production process was unchanged, employees worked on the same machines, in the same building, same employee job classifications, and virtually same supervisors as before. The union filed ULP Charges 8(a)(1) and (5) in November, 1982. The Board found Fall River a successor and violated the NLRA. First Circuit enforced the order.

The Court held:

1. The union has a rebuttable presumption of majority status that continues despite a change in employers. The new employer has a duty to bargain with the union so long as a) the new employer is a successor, and b) the majority of its employees were employed by predecessor.

2. Fall River Dyeing is a successor to Sterlingwale. The Court confirmed the Board's "substantial continuity" test, and indicated in determining successorship, based on the Board's approach, key factors include: whether the business is essentially the same, whether the employees are doing the same jobs in the same working conditions with the same supervisors, and whether the new entity has the same production process, produces the same products, and has the same body of customers. The Court also found a seven month hiatus in operations is only a factor in the successor determination and only relevant where there are other indicia of discontinuity.

3. Fall River achieved a "substantial and representative complement" of employees from which to measure a bargaining obligation by mid-January 1983. The Court upheld as reasonable the Board's "substantial and representative complement" test, which looks at whether jobs were filled or substantially filled, whether the operation is in normal or substantially normal production, the size of the complement and the time expected to elapse before a full complement was hired. By mid-January, the Court held Fall River had hired employees in virtually all job classes, had hired at least half of those it would eventually employ, and had begun normal production.

4. The Court held that the union's November request to recognize and bargain constituted a "continuing demand" that applied in mid-January at the time Fall River had reached a "substantial and representative complement." It makes no sense to require a union to renew its bargaining demand over and over when "with little trouble" the employer can regard the initial demand as a continuing one.

Dissent (Powell, Rehnquist, O'Connor): These Justices found the break/hiatus between operations and the lack of any relationship between one entity and the other to be critical. They point out that the purchase was of assets acquired indirectly through third parties

and no purchase of customer lists. The dissent also felt that operations had sufficiently changed as to leave no reasonable expectation in the mind of employees that the employer was the same or similar.

NOTES (PP. 1167-1169)

Note 1. The employer perspective is important because it's critical to be able to predict with accuracy the law and its requirements. Also, remember the admonition in *Burns* that an employer may be more likely to acquire a moribund business if it can effectuate its new vision/direction. Note also that the dissenters argued that even the employees should not have reasonably expected Fall River to be a successor.

Note 2. The note discusses the various ways of thinking about what it means that "it is perfectly clear" that a successor will hire predecessor company employees. This perhaps the most controversial and most litigated piece of *Burns.* Note that several more progressive Board cases on this question have been expressly targeted by the Trump Board's General Counsel for possible re-review.

Note 3. It seems pretty clear now that *Wiley* is a very shaky precedent. *Burns* and *Fall River* suggest a different outcome on arbitrability.

Note 4. The Court's approach to predecessor unfair labor practices only requires that a successor be on notice of them to be liable for them (unless of course the liability is negotiated and handled in a purchase agreement). Although somewhat out of line with the general thrust of *Burns* and *Fall River* here, the Court's approach makes sense lest too much of an economic incentive to evade unfair labor practices exist for marginally performing unionized businesses.

E. REJECTION OF COLLECTIVE BARGAINING AGREEMENTS IN BANKRUPTCY

This section is designed to be a short primer on the application of the insolvency principles governing reorganization proceedings to labor law problems that ordinarily would be governed by the NLRA. To this end, it covers three topics addressing potential conflicts between the competing regimes of bankruptcy and labor law: (1) organized labor's fears about bankruptcy, as realized in the *Bildisco* case; (2) the legislative response to *Bildisco*, as codified in the nine steps to rejection under Section 1113 of the U.S. Bankruptcy Code; and (3) the practical aftermath of what happens once a collective bargaining agreement is rejected by a bankruptcy court.

The material can be fully covered in no more than two hours, but most instructors can cover the key points in one hour. If the latter path is chosen, the focus should be on *Carey Transportation* and the nine steps to rejection under Section 1113.

1. LABOR'S FEARS ABOUT BANKRUPTCY

Summary of *NLRB Bildisco & Bildisco (pp. 1170-1171)*

The holding of this case is twofold: first, the business judgment rule sets too low a barrier for an employer seeking to reject a collective bargaining agreement; second, such rejection, should it occur, does not constitute an unfair labor practice under Section 8(a)(5). The practical effect of *Bildisco* was to give an employer who had filed for reorganization under Chapter 11 the power unilaterally to abrogate a contract, without either engaging in direct negotiations with the union or seeking permission from the bankruptcy judge. Section 1113 was the direct response of Congress, at the urging of organized labor, designed to overturn this practical effect.

2. THE LAW RESPONDS

A. IN THE PRIVATE SECTOR: SECTION 1113

In re Carey Transportation Inc. (pp. 1173-1183)

The holding of this case is that the debtor-employer, a bus company offering transportation between New York City's major airports, satisfied all nine steps under Section 1113. Therefore, rejection of collective bargaining agreements covering bus drivers and station personnel was proper.

NOTES (PP. 1183-1185)

1. The note summarizes the extensive literature, including some empirical work, addressing the effects of Section 1113. An early study examined rejection decisions reported by the bankruptcy courts during the first ten years of the statute's existence (1984 to 1993). As noted, it found that, of the nine steps, the most important seemed to be step 3 – the "necessary" requirement. The study also found that the rejection rate was 67% before and 58% after the enactment of Section 1113. *See* Christopher D. Cameron, How "Necessary" Became the Mother of Rejection: An Empirical Look at the Fate of Collective Bargaining Agreements on the Tenth Anniversary of Section 1113, 34 Santa Clara L. Rev. 841, 906-07 (1994).

An unpublished follow-up study by Professor Cameron – noted here but not in the third edition – reviewed decisions by the bankruptcy courts reported during the next 15 years of the statute's existence (1994 to 2008). It found that, although step 3 remains influential, the most important step seemed to become step 8 – the requirement that the union have "good cause" to refuse the employer's proposal to modify the contract. The follow-up study also found that the rejection rate remained steady at 58%, but that the rate at which collective bargaining agreements were abrogated after asset sales and failed reorganizations were accounted for as well jumped to 70%. Professor Cameron called

this the "true" rejection rate. He also acknowledged the point, raised by union advocates, that the reported decisions do not reflect the higher number of applications and threatened applications under Section 1113(c) that are never decided on the merits, but force substantial concessions from unions anyway. *See* Christopher David Ruiz Cameron, Is "Necessary" Still the Mother of Rejection? The Treatment of CBAs on the 25 Anniversary of §1113 (unpublished PowerPoint presentation) (on file with author).

2. *Masterpiece theater?* The note askswhether steps 4 and 9 are really the same thing. The answer is maybe. The question is posed to illustrate the frequent criticism that Section 1113 "is not a masterpiece of draftsmanship." *American Provision Co*., 44 Bankr. 907, 909 (D. Bankr. Minn. 1984). The statute's various redundancies (e.g., the word "necessary" shows up twice, in both step 3 and step 5), not to mention its relatively large number of steps, make it unusually complex for the world of labor relations; few other multipart legal tests have nine separate factors.

3. *Of equities and iniquities*. The note asks what stops cost-conscious employers in general from declaring bankruptcy for the purpose of rejecting their collective bargaining agreements. The answer is three reasons. The first is loss of control. Once the company enters Chapter 11, incumbent management, not to mention other constituencies, must share substantial information about, and control over the fate of, the enterprise with other creditor constituencies, including secured and unsecured creditors and bondholders, as well as the bankruptcy judge. (Most managers would prefer to share less of both with fewer players.) The second is the high cost of having to pay bankruptcy professionals – the legions of lawyers, accountants, and consultants whose fees are considered administrative expenses that are entitled to priority treatment. The third is harm to the debtor's public and private image: its status, brand name, credit rating, and employee morale. All of this adds up to a very high price to pay, perhaps too high a price to achieve the singular goal of dumping a union contract. The public scrutiny to which General Motors and DaimlerChrysler, respectively, were subjected when they filed for Chapter 11 in 2009 can be discussed as examples of part of the high costs of filing for reorganization. *See, e.g.*, David E. Sanger, Jeff Zeleny & Bill Vlasic, G.M. to Seek Bankruptcy and a New Start, N.Y. Times, Jun. 1, 2009, at p. A1; Jill Rutenberg & Bill Vlasic, Chrysler Files for Bankruptcy; UAW and Fiat to Take Control, N.Y. Times, May 1, 2009, at p. A1.

4. *Concession bargaining*. The note asks a series of questions designed to underscore that the rules of bargaining are significantly different under the NLRA versus bankruptcy reorganization proceedings. Under the NLRA, the employer cannot escape midterm contract obligations by demonstrating financial distress, whereas under Section 1113, this is quite possible. Failure to bargain in "good faith" under Section 8(a)(5) may produce a procedural remedy (an order to go back and bargain), whereas a failure of "good faith" in step 7 may produce a substantive remedy (denying on the merits the employer's application to reject the collective bargaining agreement). And under the NLRA, the employer has no duty to provide information to support its financial claims, except in limited circumstances, whereas under Section 1113, it must provide to the union financial information necessary to support its reorganization proposal.

B. IN THE PUBLIC SECTOR

Squib of *In re County of Orange (pp. 1186-1187)*

This case holds that Section 1113 does not govern a municipal employer's attempt to reject a memorandum of understanding (MOU, or collective bargaining agreement) in a Chapter 9 proceeding (as opposed to a Chapter 11 reorganization), but that general equitable principles do – and require the municipality to prove the existence of a fiscal "emergency" under a multi-factor test established by the applicable California public sector labor relations statute before it may unilaterally abrogate the terms of an existing MOU. The squib is followed by summaries of a series of cases in which municipal governments invoked Chapter 9 to abrogate pension and other obligations deemed to be too costly.

3. THE AFTERMATH: WHAT REJECTION MEANS

This subsection lays out the three most important changes worked by the effective rejection of a collective bargaining agreement: first, the union creditor loses the full benefit of its economic bargain, because unsecured claims are typically paid at cents on the dollar, if they are paid at all; second, even if funds are available to pay unsecured claims, many collectively-bargained rights – such as the principle of seniority and the establish of a grievance and arbitration procedure – are hard to liquidate into cash once they are abrogated; and third, rejection may cause a strike that cripples the reorganization effort.

NOTES (P. 1191)

1. The note asks why on earth would a union ever call a strike against an employer whose finances were so dire that it was compelled to file for bankruptcy protection. The answer is found in the back story to many Chapter 11 proceedings. Typically, the company has been in trouble for some time, and the union has already given substantial concessions, sometimes more than once. The feeling that labor has already made great sacrifices, or worse, that those sacrifices have been taken for granted, can exacerbate the normal tensions accompanying any labor negotiation. At a certain point, even rank-and-file members may feel that they have nothing to lose by going on strike, and striking is one of the few ways in which they can express their anger or frustration. The sentiment is captured by an old saying applied to employer demands perceived as outrageous: "no self-respecting union" could accept them.

2. *Choose your (economic) weapons.* The note asks whether a health care facility facing a strike by nurses during Chapter 11 proceedings can hire replacements. The

answer is yes. In fact, the governor is entitled to call out the state national guard to provide the required medical personnel. But the state's payment of subsidies to such a facility in anticipation of the adverse effects of a strike, and to transport replacement nurses to work, is probably preempted by the NLRA. *See New England Health Care Employees Union, District 1199 v. Rowland*, 221 F. Supp. 2d 297 (D. Conn. 2002).

3. *Flying the not-so-friendly skies*. The note suggests that different rules may govern lockouts by bankrupt air and rail carriers subject to the Railway Labor Act. In the hypothetical posed, the union was denied an injunction preserving the status quo during first contract negotiations until RLA procedures were exhausted. *See Int'l Brotherhood of Teamsters v. North American Airlines*, 518 F.3d 1052 (9th Cir. 2008).

F. ANTITRUST AND THE END OF THE COLLECTIVE BARGAINING RELATIONSHIP

This section is designed to offer a short introduction to the complex interrelationship between federal labor law and federal antitrust law. To this end, it covers three topics: (1) the nature of the statutory labor antitrust exemption and the nonstatutory labor antitrust exemption; (2) the application of antitrust principles to industries in which there is multiemployer bargaining with unions in general; and (3) the application of antitrust principles to industries in which there is multiemployer bargaining with unions in professional teams sports.

The material can be fully covered in less than an hour, but an instructor who is inclined to treat collective bargaining in professional team sports may choose to spend more time. Typically, this material is covered in some depth by the basic survey course in Sports Law.

1. STATUTORY AND NONSTATUTORY LABOR ANTITRUST EXEMPTIONS

This subsection lays out the two labor antitrust exemptions: statutory and nonstatutory. The statutory exemption shields unions from liability to which otherwise they would be exposed under the Sherman Antitrust Act of 1890, and is so named because it was created by statute – namely, Sections 6 and 10 of the Clayton Act Amendments of 1914. The nonstatutory exemption shields employers from liability to which otherwise they would be exposed under the Sherman Act, and is so named because it was created by judicial interpretation rather than by statute.

Squib of *Brown v. Pro Football, Inc. (p. 1193)*

The quoted material from this case lays out the rationale for creating the nonstatutory labor antitrust exemption by judicial interpretation: as a practical matter, it makes no sense to exempt unions from liability for the anticompetitive consequences of

collective bargaining without exempting their bargaining partners too. The case holds more broadly that the nonstatutory labor antitrust exemption expires when the collective bargaining relationship ends – and not upon either termination of the collective bargaining agreement or impasse in negotiations at the bargaining table.

2. APPLICATION TO MUTIEMPLOYER BARGAINING IN GENERAL

This subsection lays out the three-part progression of arguments that are typically made in the context of labor antitrust litigation: first, the defendant employer may argue that it is shielded by the nonstatutory labor antitrust exemption; second, the plaintiff union or employees may rebut by arguing that the defendant's conduct exceeded the proper scope of the exemption; third, the parties each may argue the merits under the Sherman Act, including the per se and rule of reason analyses.

3. APPLICATION TO WORKERS CHARACTERIZED AS INDEPENDENT CONTRACTORS

This subsection makes the important point that workers who are legally and correctly classified as independent contractors are exposed to potential antitrust liability if they undertake group practices deemed to be anticompetitive, because they are considered employers rather than employees – and therefore, unable to raise the shield of the statutory labor antitrust exemption. This fact portends serious and potentially deleterious consequences for "gig" economy workers, such as Lyft and Uber drivers, who seek to engage in concerted activities for mutual aid or protection, such as by forming labor organizations to bargain collectively with the "app" companies who dispatch them to provide services to consumers. The article by Professor Paul is especially illuminating in this regard.

4. APPLICATION TO MUTIEMPLOYER BARGAINING IN PROFESSIONAL TEAM SPORTS

This subsection treats the importance of the nonstatutory labor antitrust exemption in the context of major league team sports in North America. The exemption is behind much of the litigation strategy that players, their unions, the leagues, and their teams engage in when they have been, or fear they will be, unsuccessful at reaching agreement at the bargaining table. Without this exemption, most of the collectively bargained "hot button" issues in sports – such as the rookie draft, the reserve clause, the minimum salary, free agency, salary arbitration, and the salary cap – would be deemed anticompetitive, and fall under the weight of the treble damages imposed by Sherman Act liability. And the teams and/or the leagues would have to pay these damages.

Therefore, as to the application of the second argument in the progression described above – the proper scope of the nonstatutory labor antitrust exemption – it may be helpful to know that this exemption dissolves upon the dissolution of the collective

bargaining relationship, which is why unions representing players in the NBA, NFL, and NHL may threaten to decertify themselves and sue the league and team owners if they cannot get their way in negotiations. (Note: Major League Baseball once had its own special, judicially-created nonstatutory antitrust exemption, but Congress abrogated it in 1988. In theory, MLB team owners are now subject to the same antitrust litigation tactics as the other major sports leagues' team owners, but in recent years, they have favored entering into long-term collective bargaining relationships with the MLBPA that shield them from such exposure.)

CHAPTER 10
PREEMPTION

A. INTRODUCTION

No subject in the field of collective bargaining is more complex, or has reached the U.S. Supreme Court more often, than federal labor preemption. In light of this complexity, the chapter pursues two goals. The first goal is to lay out, as simply and clearly as possible, the three most common forms of the doctrine: *Garmon* preemption, which precludes state regulation of conduct that is "arguably" protected by Section 7 or prohibited by Section 8 of the NLRA; *Machinists* preemption, which precludes state regulation of areas that Congress intended to leave unregulated by any legal regime, whether state or federal; and Section 301 preemption, which precludes state law claims that are "inextricably intertwined" with the interpretation of a collective bargaining agreement. The second goal is to show that, despite the wide berth given to federal policy, preemption doctrine preserves some narrow but vital areas of local concern that may be regulated by the states.

For the instructor who wishes to integrate federal labor law with other subjects in the work law curriculum – including subjects that may have a state law basis, such as employment discrimination, fair labor standards, privacy, and wrongful termination – preemption doctrine can be used as a portal for doing so. For example, the hypothetical problem used to introduce the chapter, *Salazar v. Rons Grocery Company*, offers two state law claims alleging harassment: one that is clearly preempted by *Garmon* (Salazar's NLRA-type claim for harassment based on her union organizing activities) and another that presents a much closer question for preemption by Section 301 (her California state law hostile work environment tort claim for harassment based on sex, which is incorporated by reference into the collective bargaining agreement). The hypo is followed by variations in the notes that can be used to explore other potential conflicts between federal labor policy and various state laws.

The material here can be fully covered in three hours, or about one hour for each form of preemption. It can also be covered in as little as one hour, if the instructor introduces preemption by lecturing on two of the forms, and then invites more in-depth student discussion of the third. If the latter path is chosen, it is recommended that the focus be on either Section 301 preemption, which is the form most likely to be encountered by practitioners, or *Machinists* preemption, which is the subject of much creative litigation, including *Chamber of Commerce v. Brown*, the most recent Supreme Court pronouncement on the doctrine.

NOTES (PP.1202-1206)

1. *Salazar v. Rons Grocery Company* illustrates two of the three types of federal labor preemption treated by this chapter: *Garmon* preemption and Section 301

preemption. (With a spin on the facts, Note 3, infra pp. 1203-1204, illustrates a third type: *Machinists* preemption.)

The first paragraph of the note asks questions inviting students to think strategically about Salazar's first claim attempting to pursue a state law remedy for an unfair labor practice. Why would she do this when federal law addresses the same harm? There are a number of answers. First, she has less control over NLRA proceedings. The Act provides no private right of action; meritorious claims must be pursued by the General Counsel, rather than by Salazar or her attorney. Second, the NLRB as a forum may be less favorable to the claimant; a dispassionate administrative bureaucracy, rather than a judge or potentially emotional jury, gets to evaluate and decide the claim. Third, the fruits of victory are less generous under the NLRA; only make-whole remedies – such as reinstatement and backpay – are available. Punitive damages are not recoverable, as they are for most state law tort claims.

The second paragraph of the note applies a traditional Section 301 preemption analysis to Salazar's second claim for California state law hostile work environment tort claim for harassment based on sex, which is incorporated by reference into the collective bargaining agreement.

The third paragraph of the note asks questions about how collective bargaining agreements are enforced. As discussed in Chapter 7, the individual rank-and-file union member is not a signatory party to such contract; only her union and the employer have "standing" to pursue grievances. As a result, with respect to grievances over contractual rights, the union – not the grievant – typically controls the grievance procedure, including the decision whether to take the grievance to arbitration if it cannot be resolved amicably at an earlier step. The union has much discretion in this process. And with respect to state or federal statutory rights that are incorporated by reference into the collective bargaining agreement, the line of cases running from *Lingle* through *Universal Maritime* and *Pyett* holds that the union can waive the employee's right to pursue her claim in a judicial forum, and force her into arbitration, if such waiver is clear and unmistakable.

2. *Stain removal?* The note asks whether Rons could remove Salazar's state law claim for sexual harassment on the theory that the company's federal preemption argument creates federal question jurisdiction. The answer is maybe. Federal preemption is usually pleaded as a defense. And under *Louisville & Nashville Railroad Co. v. Mottley*, 211 U.S. 149 (1908), the general rule is that a defendant's federal question ***defense*** may not be used to create federal question jurisdiction, which must be based instead on the plaintiff's federal question ***claim***. The same rule applies to both a plaintiff seeking to file in federal court, and a defendant seeking to remove to federal court. A rare exception arising in the removal context is the complete preemption theory, which holds that some state law claims are so thoroughly preempted by federal law that they are actually federal question claims themselves, which may be removed after all. *See Bill Johnson's Restaurants Inc. v. NLRB*, 461 U.S. 731, 752 (1983) ("Congress can and does preempt some state causes of action by providing for exclusive federal jurisdiction over certain types of disputes . . . but such complete preemption is not lightly

implied."); *see also, e.g., Olguin v. Inspiration Consolidated Copper Co.*, 740 F.2d 1468 (9th Cir. 1984) (permitting removal of state law claims under Section 301), *abrogated on other grounds, Miller v. AT&T Network Systems*, 850 F.2d 543, 549 (9th Cir. 1988).

3. *State contract law: breach of contract, or into the breach?* The questions posed by the note ask what would happen if California had enacted a separate statute prohibiting any private employer holding a state government contract from spending state treasury funds received under that contract to encourage or discourage workers from forming or joining unions – assuming that Rons had such a contract. The answer is that such a statute is likely preempted. *See Chamber of Commerce v. Brown*, 554 U.S. 60 (2008).

B. *GARMON* PREEMPTION

San Diego Building Trades Council v. Garmon (pp. 1206-1209)

The holding of the case is that a state court in California may not award damages for employer losses caused by peaceful picketing for union recognition that the court did not have the power to enjoin in the first place. The reason: conduct that is arguably protected by Section 7, such as picketing, or arguably prohibited as an unfair labor practice by Section 8, such as undertaking a secondary boycott, may not be regulated by state law. An aggrieved party's sole recourse lies in filing the appropriate unfair labor practice charge with the NLRB's General Counsel, who has the discretion to issue a complaint and pursue the matter, or not.

NOTES (PP.1210-1211)

1. The note summarizes long-settled doctrine about what is "arguably" protected by Section 7 or prohibited by Section 8, and cites the leading cases recognizing two narrow exceptions permitting state regulation: first, activity of "merely peripheral concern" to the NLRA, such as internal union-member contractual relations; and second, activity that touches interests "so deeply rooted in local feeling and responsibility," such as tort damages caused by violence and imminent threats to the public order, as sometimes occurs in the contest of labor disputes.

2. The note supposes that State X, eager to supplement the limited make-whole remedies available under the National Labor Relations Act, enacts a statute directing its Department of Labor to maintain a list of every person or firm found by judicially-enforced orders of the NLRB to have violated federal labor law at least three times within a five-year period. It supposes further that the statute forbids state procurement agents to purchase any product known to be manufactured or sold by anyone included on the violators' list, and requires that a violator's name must remain on the list for three years. The note then asks whether the State X statute is preempted by *Garmon*. The answer is yes, because the only remedies available for violations of federal labor law are the ones made available by the NLRB under the NLRA. For preemption purposes, no difference

is recognized between state regulation seeking to add or subtract liability for unfair labor practices on the one hand, and state regulation seeking to enhance or reduce the penalties for committing those ULPs on the other hand. *See Wisconsin Dep't of Industry, Labor & Human Relations v. Gould, Inc.*, 475 U.S. 282 (1986).

3. The note supposes that a State Y statute authorizes the state's courts to intervene in labor disputes by issuing injunctions against mass picketing and intimidation of passersby. It supposes that, shortly after a union started an organizing campaign among a supermarket's meat cutters, the market began interrogating them about their union preferences, engaging in surveillance of union meetings, and threatening active union adherents with discharge. The union responded by filing unfair labor practice charges under Section 8(a)(1) that were upheld by the administrative law judge, and set up a picket line advising customers about its legal action. The market responded by petitioning a State Y court to limit the number of picketers and to enjoin them from both passing out handbills containing certain messages and speaking with customers. Although it found neither violence nor a breach of the peace, the State Y court issued the injunction. Meanwhile, the NLRB adopted the administrative law judge's findings and recommendations, and issued a cease and desist order. The Board now files suit in federal district court to restrain enforcement of the State Y court's injunction on the ground that the agency alone has jurisdiction to adjudicate and remedy unfair labor practices. The note asks whether the Board should prevail. The answer is yes, because to prevent frustration of the uniform application and enforcement of federal labor policy, the agency has implied authority to seek the injunction, at least insofar as the state court seeks to enjoin the picketing on the ground that it is an illegal secondary boycott. *See NLRB v. Nash-Finch Co.*, 404 U.S. 138 (1971). But State Y may exercise jurisdiction as to the "trespassory aspects" of the picketing, and issue an appropriate injunction as to those aspects. *See Sears, Roebuck & Co. v. San Diego County District Council of Carpenters*, 436 U.S. 180 (1978).

4. The note supposes that a state has enacted a union-supported law prohibiting any "job targeting" or "market recovery" program. Is such a program preempted? The answer is probably no.

5. The note asks whether there is such a thing as federal labor preemption of conflicting "other" federal (as opposed to state) regulation. The answer is maybe. *Garmon* preemption is usually thought of as precluding the enforcement of conflicting state law. But some authority suggests that it precludes the enforcement of conflicting federal law too. Reference is made in the note to the research of Professor Michael Duff and some reported cases he cites as supporting this view. *See* Michael C. Duff, *What Brady v. NFL Teaches About the Devolution of Labor Law*, 52 Washburn L.J. 429, 460-63 (2013).

6. The note delves into the arcane area of agency fee preemption and the "free rider" problem. It asks whether Section 14(b) of the Act can be read to support the interpretation offered in the cited article by Professors Sachs and Fisk, who argue that the preemptive scope of Section 14(b) should allow states to enact laws requiring employees

to join union or pay an amount equivalent to dues, but preclude the enforcement of any state laws banning agreements requiring employees to pay only their pro rata share of the costs of negotiating and administering collective bargaining agreements. This interpretation of the statute clearly is at odds with the conventional wisdom that the NLRA permits so-called "right to work" laws enacted by states. More advanced students may be invited to weigh in on this discussion.

7. The note reminds students that U.S. preemption doctrine is not the only way to think about potential conflicts between national and local regulation of labor relations. The examples from Canada and Mexico, our closest and arguably most important trading partners, are on point.

7. The note supposes that State Z, citing the International Covenant on Civil and Political Rights of 1992 (ICCPR), passes the Workers' Safe Haven Act, a law that not only declares State Z to be a sanctuary for undocumented laborers, but also provides the remedies of reinstatement and back pay to such persons when they are fired for attempting to organize a union, both in contravention of *Hoffman Plastic Compounds, Inc. v. NLRB*, 535 U.S. 137 (2002). The note then asks whether the Safe Haven Act is preempted. The answer is probably yes, by *Garmon* – even though the application of preemption principles could place the U.S. in violation of the ICCPR's guarantee of freedom of association. Similarly, a private right of action under the ICCPR, brought by an undocumented worker whose State Z rights under the Safe Haven Act are preempted, is probably preempted too. The ICCPR is probably unenforceable in American domestic courts by virtue of the terms on which it was ratified. Although the ICCPR is one of the few international labor conventions to which the U.S. is signatory, the Senate ratified it with a number of reservations and declarations, including a declaration that ratification creates no private right of action in U.S. courts.

Some scholars have discussed the alternative of bringing private rights of action under one or more of these theories: the Alien Tort Statute (ATS), 28 U.S.C. § 1350; Section 1983 of the Civil Rights Act of 1871, 42 U.S.C. § 1983; and the doctrine of *jus cogens*. See, e.g., Justin D. Cummins, Invigorating Labor: A Human Rights Approach in the United States, 19 Emory Int'l L. Rev. 1, 48-49 (2005). Still, this is probably a long shot. Compared to most Western nations, the U.S. has been reluctant to enforce international human rights treaties, and the only international norms that U.S. courts have consistently entertained are those articulated under the ATS – whose enforcement has been curtailed by *Kiobel v. Royal Dutch Petroleum*, 133 S. Ct. 1659 (2013) (declining to permit against foreign corporation ATS claims arising out of relevant acts alleged to have been committed outside U.S.), and more recently, by *Jesner v. Arab Bank, PLC*, 138 S. Ct. 1386 (2018) (declining to permit against foreign corporation ATS claims, regardless where relevant acts are alleged to have been committed). *See* Penny M. Venetis, Enforcing Human Rights in the United States: Which Tribunals Are Best Suited to Adjudicate Treaty-Based Human Rights Claims?, 23 S. Cal. Rev. L. & Soc. J. 121, 124-28 (2014). As one scholar has put it, "The United States has come kicking and screaming into the modern world of international human rights treaties." William A. Schabas, Spare the RUD or Spoil the Treaty: The United States Challenges the Human Rights Committee

on Reservations, in The United States and Human Rights: Looking Inward and Outward 110 (David P. Forsythe ed., 2000).

C. *MACHINISTS* PREEMPTION

Lodge 76, International Association of Machinists & Aerospace Workers v. Wisconsin Employment Relations Commission (p. 1215-1221)

The holding of the case is that the peaceful use of economic weapons or "self-help" by labor and management alike was intended by Congress to be left unregulated and left instead "to be controlled by the free play of economic forces." Such economic weapons include the strike, the picket line, and the boycott (by labor) and the lockout (by management). If these weapons are to be regulated, as they sometimes are, then it is up to Congress – not the states – to do so. Therefore, Wisconsin, acting through its labor commission, was precluded from adjudicating a complaint alleging that a partial strike, which took the form of a concerted refusal to work overtime, was an unfair labor practice under state law.

NOTES (PP.1221-1222)

1. The note supposes that Maine enacted a statute requiring every employer to provide a one-time severance benefit to its employees in the event of a plant closing. It then asks whether this would be preempted by Machinists. The answer is no, because *Machinists* preemption does not necessarily undermine the social safety net traditionally erected by the states in the form of fair labor standards, including the minimum wage, overtime compensation, and mandatory rest periods. *See Fort Halifax Packing Co. v. Coyne*, 482 U.S. 1 (1987) (holding Maine statute not preempted); *cf. Metropolitan Life Insurance Co. v. Massachusetts*, 471 U.S. 724 (1985) (holding Massachusetts statute setting minimum benefits to be included in general insurance polices not to be preempted by ERISA).

2. The note asks whether New York, which unlike many states authorizes the payment of unemployment compensation to strikers, ran afoul of *Machinists* by engaging in an impermissible side-taking. The answer is yes. *See New York Telephone Co. v. New York State Dep't of Labor*, 440 U.S. 519 (1979). The note also askes whether it be preempted if, instead of authorizing unemployment compensation for strikers, the state barred it The answer is no. *See Baker v. General Motors Corp.*, 478 U.S. 621 (1986) (rejecting challenge to Michigan statute). Students can be invited to agree or disagree with these results, and to state why.

3. The note supposes that Michigan enacted a statute denying welfare assistance to strikers on the ground that during the ongoing recession there the state could not afford to subsidize activity that is harmful to the state's economy – even though the NLRA clearly guarantees strikers the right to do just that. The note then asks whether such a statute would be preempted. The answer is probably no. *Cf. Lyng v. Automobile*

Workers, 485 U.S. 360 (1988) (rejecting free association attack on amendment to federal food stamp program precluding household from eligibility for program if member of household is on strike).

4. The note illustrates the steps that local governments sometimes take to protect workers from the perceived ill effects of employer conduct that may also run afoul of the NLRA. The note supposes that, to cope with a strike, a paper mill hired replacement workers and housed them in dozens of mobile homes set up near the mill. The question also supposes that the town in which the mill is located responded by enacting three ordinances: the Professional Strikebreaker Ordinance, which prohibits any firm from hiring or offering to hire employees who have twice before been hired for jobs ordinarily performed by striking workers; the Environmental Protection Ordinance, which requires town officials to take extra care to enforce existing federal, state and local environmental laws, and creates a special fund to pay for enforcement efforts; and the Temporary Housing Ordinance, which prohibits town property owners from constructing temporary or mobile living quarters housing 10 or more tenants. The note then asks which, if any, of the ordinances are preempted. Only the housing ordinance was declared to be preempted. *See International Paper Co. v. Town of Jay*, 672 F. Supp. 29 (D. Me. 1987). Whatever the outcome(s), the same result should obtain if the ordinances were passed by popular referendum, after being placed on the ballot by a board of selectmen that included some of the striking mill workers. *See International Paper Co. v. Town of Jay*, 736 F. Supp. 359 (D. Me. 1990), *aff'd*, 928 F.2d 480 (1st Cir. 1991).

Chamber of Commerce v. Brown (pp. 1225-1231)

The holding of the case is that a California statute forbidding an employer that receives state government funds from using those funds to "assist, promote, or deter union organizing" is preempted by Section 8(c) of the Act, which leaves noncoercive employer speech unregulated. The objective of AB 1889 was impermissible; California could neither "directly regulate noncoercive speech about unionization by means of an express prohibition," nor "indirectly regulate such conduct by imposing spending restrictions on the use of state funds" (p. 1228).

NOTES (PP.1232-1234)

1. The note asks whether the result might have been different if AB 1889 had been drafted more carefully. The answer is maybe. If the statute were rewritten to emphasize that state funds must be spent in solely in accordance with the purposes for which they were appropriated in the first place, and to downplay references to deterring union organizing, then it might withstand another *Machinists* preemption attack. After all, California could require that a freeway subcontractor spend awarded state funds solely on building roads, and not, for example, on advertising to promote the use of those roads – or, for that matter, on building something else, such as parking lots. In addition, to satisfy the Supreme Court, a redrafted statute might have to reduce or shift the considerable accounting burdens imposed on the employer by AB 1889.

2. The note suggests that it is too soon to tell whether *Chamber of Commerce v. Brown* signals that state-imposed neutrality agreements are now more likely to be preempted by *Machinists*, or whether municipalities may continue to insist on such agreements as a condition of contractors' accepting disbursements from state treasuries. In any event, two reasons support the notion that overruling *Chamber of Commerce v. Brown* is unlikely. First, *Boston Harbor* was cited with approval by the majority, and presumably remains good law. Second, *Boston Harbor* is distinguishable on the ground that its neutrality agreements were required in the municipality's role as market participant rather than regulator. Typically, more preemption leeway is given to the former than the latter.

3. The note supposes that a city passed an ordinance refusing to renew the Yellow Cab Company's taxi cab franchise unless and until it settles an ongoing labor dispute with drivers represented by the Teamsters Union. It further supposes that the Teamsters supported the ordinance on the ground that any franchise extension would simply stiffen Yellow Cab's resistance at the bargaining table, and thereby prolong the strike. The answer probably depends on whether the city was acting in its capacity as market participant (in which case *Machinists* preemption is inapplicable) or market regulator (in which case *Machinists* preemption applies). If he city in question – Los Angeles – was trying to act in its capacity as market regulator, then the ordinance would be preempted. *See Golden State Transit Corp. v. City of Los Angeles* (Golden State I), 475 U.S. 608 (1986); *see also Bus Employees v. Missouri*, 374 U.S. 74 (1963).

4. The note supposes that a small town adjacent to major tourist attractions in the San Francisco Bay Area passes an ordinance requiring bell men, chamber maids, culinary workers, and others working in the hospitality industry to be paid a minimum wage of either $9 per hour if the employer offers medical benefits, or $11 per hour if the employer offers no such benefits. It then asks whether such a "living wage" law runs afoul of *Machinists* preemption. The answer may be no. The ordinance, which was passed by town voters, will probably be upheld against a constitutional attack, if it is a proper exercise of the state's power to set minimum wages and other fair labor standards. *Cf. Woodfin Suite Hotels, LLC v. City of Emeryville*, 2007 WL 81911 (N.D. Cal. 2007) (dealing with subsequent award of attorney's fees to prevailing party in such case).

5. The note supposes that a city enacted an ordinance providing a mechanism through which drivers-for-hire may collectively bargain with Lyft, Uber, and other ride-hailing services. It then asks whether preemption challenges by the local Chamber of Commerce would succeed. According to a federal court in Seattle, the answer is no. *See Chamber of Commerce of U.S. v. City of Seattle*, 274 F. Supp. 1155 (W.D. Wash. 2017).

6. The note ask whether a city may combat a successor employer's attempt to get rid of its workforce – and with it, any residual collective bargaining obligations – by requiring the successor to employ the predecessor's employees for at least 90 days following a transfer of ownership. According to the California Supreme Court, the answer is yes, because the ordinance dealt with employee retention on the job, and the

Court could "discern no evidence that Congress affirmatively intended to leave the subject of employee retention unregulated by states and municipalities." *California Grocers Ass'n v. City of Los Angeles*, 52 Cal. 4th 177, 198 (2012). Whether other state or federal courts would agree, however, is an open question.

D. SECTION 301 PREEMPTION

Lingle v. Norge Division of Magic Chef Inc. (pp. 1235-1238)

This case, which draws on *Allis-Chalmers Corp. v. Lueck*, 481 U.S. 202 (1985), holds that an employee's claim under Illinois that he was discharged without just cause – in this case, in retaliation for filing a worker's compensation claim – is not preempted by Section 301. The employee's state law claim was not "inextricably intertwined" with his rights under the collective bargaining agreement covering his employment, because resolution of that claim did not depend upon the meaning or interpretation of that agreement.

NOTES (PP.1238-1241)

1. The note asks whether the result in *Lingle*, which found no preemption as to a retaliation claim under Illinois law due to filing for worker's compensation, can be harmonized with the result in *Lueck*, which found preemption as to a worker's state law tort claim under Wisconsin law for bad faith handling of a claim relating to insurance benefits created by a collective bargaining agreement. The answer is probably no. Perhaps the unresolved conflict between *Lingle* and *Lueck* is evidence supporting the old saying that one of the purposes of going to law school is to learn how to see confusion clearly. It is generally accepted, however, that *Lingle*, as the later-decided case, is the more faithful interpretation of current preemption doctrine under Section 301.

2. The note calls upon students to play the role of general counsel for the employer in a series of cases, and to give a yes or no answer as to whether the following are preempted by Section 301:

- Religious or disability discrimination claims based on state antidiscrimination statutes? ***No***: *Cook v. Lindsay Olive Growers*, 911 F.2d 233 (9th Cir. 1990) (religious discrimination); *Ackerman v. Western Elec. Co.*, 860 F.2d 1514 (9th Cir. 1988) (disability discrimination).

- Whistleblower claims, in which an employee alleges retaliatory discharge for reporting an employer's violation of state or federal law? ***No***: *Brevik v. Kite Painting, Inc.*, 416 N.W.2d 714 (Minn. 1987).

- State law tort claims alleging that the employer's handling of discipline caused the employee to suffer intentional infliction of emotional distress? ***No***: *Hanks v. General Motors Corp.*, 906 F.2d 341 (8th Cir. 1990). ***Yes***: *Douglas v. American*

Info. Technologies Corp., 877 F.2d 565 (7th Cir. 1989). What about a state law tort claim by an employee that his union caused him to suffer intentional infliction of emotional distress? ***No***: *Farmer v. United Brotherhood of Carpenters & Joiners, Local 25*, 430 U.S. 290 (1977).

- State law wage claims by nurses for premium pay due to extra hours worked, after a grievance filed and pursued by their union under the CBA did not obtain full relief? ***Yes***: *Kobold v. Good Samaritan Regional Medical Center*, 832 F.3d 1024 (9th Cir. 2016).

3. The note asks whether the resolution of the plaintiff's claim in *Salazar v. Rons Grocery Company* is "inextricably intertwined" with the collective bargaining agreement between Rons and Local 17 of the Retail Clerks Union. The pro and con arguments can be fashioned only by reference to the facts about two key provisions of the CBA, which are described supra p. 1202. These arguments would profit from knowing that in most jurisdictions the hostile working environment form of sexual harassment requires proof of three elements: (1) the employer's agent engaged in conduct of a sexual nature (2) that is unwelcome and (3) severe and pervasive enough to alter working conditions from the point of view of a reasonable victim. *See, e.g.*, *Ellison v. Brady*, 924 F.2d 872, 875-76 (9th Cir. 1991); *accord Lyle v. Warner Bros. Television Productions*, 38 Cal. 4th 264, 279 (2011).