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THE REMEDIAL EFFICACY OF NLRB REMEDIES IN *JOY SILK* CASES

Benjamin Wolkinson†

Most employers today respect the right of unions to organize and bargain collectively. However, a minority of employers resist union organizational efforts by illegal means. In a *Joy Silk* case,[1] a common example of such resistance, the employer refuses to bargain with a union which has demanded recognition on the basis of an authorization card majority and thereafter dissipates the union's majority by engaging in additional unfair labor practices. The National Labor Relations Board typically grants relief in a *Joy Silk* case by issuing a bargaining order; this is an effective remedy in a substantial number of cases, but in others it fails to restore the status quo before the continuing unfair labor practices. To more fully achieve the purposes of the Labor Management Relations Act,[2] the Board should formulate and apply additional remedies.

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This article was written before the Supreme Court's decision in NLRB v. Gissel Packing Co., 395 U.S. 575 (1969), wherein the NLRB indicated in oral argument before the Court its virtual abandonment of the "good faith doubt" approach as the basis for determining employer misconduct warranting the issuance of a bargaining order. In the same case, however, the Court affirmed the Board's policy of issuing a bargaining order where the employer's unfair labor practices destroyed the union's card-based majority and precluded the holding of a fair election.

1 So named after Joy Silk Mills, Inc. v. NLRB, 185 F.2d 732 (D.C. Cir. 1950), *cert. denied*, 341 U.S. 914 (1951).

2 29 U.S.C. § 141 (1964).

I

THE APPLICABLE LAW

The Labor Management Relations Act requires only that an employer recognize and bargain with a labor organization that represents a majority of the employees in an appropriate unit.[3] The NLRB usually determines whether or not a union has obtained majority support by holding a representation election, for which either the union or the employer may petition.[4] A representation election won by the union and certified by the Board automatically imposes a bargaining obligation upon the employer. Many unions, however, first seek voluntary recognition from employers. Having obtained authorization cards from a majority of unit employees, the union organizer meets with the employer and requests recognition. At times he will offer the employer or a neutral third party the opportunity to examine and check the cards against the company's payroll records. If the employer accepts the union's demonstration of its majority, bargaining can then begin.

Authorization card procedures set the stage for what may be called a *Joy Silk* case. Consider the following situation. After an organizational campaign, the union succeeds in obtaining authorization cards from a majority of the employees in the unit. Although the union is now in a position to request recognition from the employer as the employees' bargaining agent, the union organizer withholds his request until he has signed up as many employees as possible. In the meantime the employer becomes aware of the union drive and operates swiftly. Individual employees are called into the main office

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[3] The applicable statutory provisions are found in §§ 9(a) and 8(a)(5). Section 9(a) provides that

> Representatives designated or selected for the purposes of collective bargaining by the majority of the employees in a unit appropriate for such purposes, shall be the exclusive representatives of all the employees in such unit for the purposes of collective bargaining in respect to rates of pay, wages, hours of employment, or other conditions of employment . . . .

Section 8(a)(5) makes it an unfair labor practice for an employer "to refuse to bargain collectively with the representatives of his employees, subject to the provisions of section 9(a)."

[4] Before the union can obtain such an election, it must demonstrate that "a substantial number of employees . . . wish to be represented." Section 9(c)(1)(A). The Board has interpreted this provision as requiring a union to show that at least 30% of the unit supports the union before the Board will hold an election. NRLB, RULES AND REGULATIONS AND STATEMENTS OF PROCEDURE § 101.18(a) (1965). Traditionally, unions meet this requirement by obtaining authorization cards from at least 30% of the employees, and often from over 50%, and presenting them to the Board when petitioning for an election.

and interrogated as to the identity of the leaders and supporters of the union campaign. The employer then assembles his employees and lectures them on the possible consequences of unionization: shutdown, elimination of benefits, and stricter work rules. The employer also notes the advantages that might result from the employees' rejection of the union: higher wages, continued job security, and other benefits. He culminates his anti-union campaign by discharging suspected union leaders; alternatively, or even simultaneously, he may establish a company union. When the union finally requests recognition as the employees' collective bargaining representative, the employer questions the union's majority position and demands that the union prove its majority status in a secret ballot election.

Under normal circumstances the Board views the election process as the best means of determining employee preferences. When an employer commits unfair labor practices, however, the Board may conclude that the election is no longer an accurate index of employee choice and may accept other evidence of majority representation.[5] One form of this substitute procedure was legitimatized in *Joy Silk Mills v. NLRB*,[6] which established that an employer does not have an absolute right to an election. The District of Columbia Court of Appeals held that, where the employer's initial refusal to recognize the union was based on his desire to destroy the union's majority position rather than on any good faith doubt, bargaining orders could be issued on the basis of authorization cards.

In *Joy Silk* the court also upheld a Board order requiring the employer to bargain despite the union's loss of its majority due to the employer's unfair labor practices. This aspect of the *Joy Silk* case, however, was not novel. To remedy an employer's unlawful refusal to bargain, the Board in its first cases established the policy of ordering the guilty employer to bargain collectively with the employees' representative.[7] In issuing a bargaining order, the Board, in effect, merely imposed upon the guilty employer his original bargaining obligation. Consequently, in the routine refusal-to-bargain cases the reviewing courts viewed the bargaining order as an appropriate

5 One of the earlier cases wherein the Board expressed this principle was Artcraft Hosiery Co., 78 N.L.R.B. 333 (1948).

6 185 F.2d 732 (D.C. Cir. 1950), *cert. denied*, 341 U.S. 914 (1951). The Board has also accepted as evidence of a union's majority an employer poll in which an employee majority voted for the union and a strike by a majority of employees in the unit following the employer's refusal to bargain.

7 *See, e.g.*, Consumers' Research, Inc., 2 N.L.R.B. 57 (1936); Agwilines, Inc., 2 N.L.R.B. 1, *modified*, 87 F.2d 146 (5th Cir. 1936); Canton Enameling & Stamping Co., 1 N.L.R.B. 402 (1936); Harbor Boat Bldg. Co., 1 N.L.R.B. 349 (1936).

remedy.[8] The Board, however, was soon faced with more serious refusal-to-bargain situations in which the appropriateness of the bargaining order was challenged. In the litigated unfair labor practice case, there arose an inevitable delay between the commission of the employer's illegal acts and the NLRB decision. During this period, and generally as a result of the employer's violations, the union could lose its majority. The appropriateness of the bargaining order as a remedy had previously been challenged on the ground that the union had lost its majority, since under such circumstances a bargaining order contravened the wishes of a majority who no longer supported the union.

In *Bradford Dyeing Association*[9] the employer refused to bargain and then dissipated the union's majority by discharging union supporters and establishing a company-dominated union. The Board ordered the employer to bargain nonetheless; it realized that not to require the employer to bargain would be to reward him for his illegal acts and would render the Act's objectives unenforceable.[10] The Board rejected the argument that a bargaining order under such conditions imposes a bargaining agent upon an unwilling employee majority. It pointed out that the shift away from the union had been forced rather than voluntary; consequently, the only way to safeguard the organizational rights of the majority was to restore, as bargaining agent, the union that the majority had legitimately selected.[11]

Bradford clearly established the Board's authority to issue bargaining orders in cases where the union's majority was destroyed by the employer's unfair labor practices. Still undetermined, however, was the scope of the Board's remedial authority in situations where other factors seemingly unrelated to the employer's refusal to bargain contributed to the dissipation of the union's majority. In *Franks*

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8 Jeffrey-DeWitt Insulator Co. v. NLRB, 91 F.2d 134 (4th Cir. 1937); Agwilines, Inc. v. NLRB, 87 F.2d 146 (5th Cir. 1936).

9 4 N.L.R.B. 604 (1937), *vacated in part and not enforced*, 106 F.2d 151 (1st Cir. 1939), *rev'd*, 310 U.S. 318 (1940).

10 [T]o refrain from ordering the respondent to bargain collectively with the T[extile] W[orkers] O[perating] C[ommittee], would be to hold that the obligation of one subdivision of the Act may be evaded by the successful violation of another; that the freely expressed wishes of the majority of the employees may be destroyed if the employer brings to bear sufficient interference, restraint, and coercion to undermine the representatives' majority support. We cannot permit the purposes of the Act to be thus circumvented.

4 N.L.R.B. at 618.

11 *Id.* at 616-17.

Brothers Company,[12] for example, a number of union supporters quit their jobs during the interval between the filing of a charge and the issuance of a complaint; most of the replacements did not support the union, and the union lost its majority. The employer contended that a bargaining order was unwarranted on the grounds that natural employee turnover rather than his unfair labor practices had dissipated the union's majority. The Board, however, rejected this argument, holding that an employer's unfair labor practices not only destroy a union's present majority but, by intimidating future employees, also eliminate a union's ability to obtain recruits among new employees. The Board's objective was not to allow the existence of secondary factors such as turnover to obscure the corrosive effects of an employer's illegal anti-union campaign. Consequently, the Board attributed the loss of the union's majority to the employer's violations and issued a bargaining order on that basis, notwithstanding the possible effect of other factors.[13]

Thus the decisions in *Bradford* and *Franks Brothers* are the foundation for the *Joy Silk* bargaining order. *Joy Silk* itself merely reiterates the established precedent that an employer who undermines a union's position by means of unfair labor practices cannot excuse his failure to bargain on the ground that the union was no longer the majority representative and applies it to the situation where the union's original majority is based on authorization cards.[14]

Since the *Joy Silk* decision there has been little change in the Board's policy of issuing a bargaining order where the employer's refusal to bargain, concurrent with his other unfair labor practices, have destroyed the union's card-based majority.[15] One addition, however, has been made. In *Joy Silk*, the Board determined on the basis of the employer's subsequent unfair labor practice campaign that his rejection of the union's bargaining request was made in bad

12 44 N.L.R.B. 898 (1942), *enforced*, 137 F.2d 989 (1st Cir. 1943), *aff'd*, 321 U.S. 702 (1949).

13 44 N.L.R.B. at 911-12.

14 *Joy Silk* was subsequently upheld in all circuits. Note, *Union Authorization Cards*, 75 YALE L.J. 805, 811 (1966).

15 It is implicit in the *Joy Silk* decision that the union has two options; it may file a refusal-to-bargain charge immediately after the employer commits unfair labor practices, or it may proceed to an election and, in the event it loses, seek a bargaining order on the basis of the employer's pre-election conduct. In Aiello Dairy Farms, 110 N.L.R.B. 1365 (1954), the Eisenhower Board ruled that the union must elect one procedure or the other; having lost a representation election, the union could not file refusal-to-bargain charges. In Bernel Foam Products Co., 146 N.L.R.B. 1277 (1964), however, the Kennedy Board reverted to the pre-*Aiello* policy.

faith, and a bargaining order issued accordingly. The question whether factors other than unfair labor practices could be used to determine bad faith was resolved in *Snow & Sons, Inc.*[16] There the employer consented to and participated in a card check, which demonstrated the union's majority position, but later repudiated the results of the card check and insisted on an NLRB election. Although the employer had not committed any additional unfair labor practice, the Board ruled that the employer's rejection of the union was not made in good faith, and hence ordered the employer to bargain.[17]

The distinction between *Snow* and *Joy Silk* cases is more apparent than real. Even in the *Snow* cases, where no additional unfair labor practices are committed, the employer's delaying tactics and evasion of his bargaining obligation can erode the union's majority position. This is one of the factors behind the Board's issuance of bargaining orders in such cases. The question regarding the remedial efficacy of the bargaining order is the same in both types of cases.

The order to bargain is the Board's major remedial weapon for dealing with employer attempts to destroy the union's majority position. It should be noted that the Board's bargaining order carries with it no immediate sanction; an employer's refusal to comply forces the Board to seek court enforcement, and it is not until he fails to comply with the court order that the employer risks serious penalties.

Commenting on the remedial efficacy of the bargaining order in *Joy Silk* circumstances, Professor Derek Bok has stated, "[s]ince an order to bargain with the union will destroy any value to be derived from violating the law, it provides a highly effective deterrent."[18] This statement is open to question. A union's ability to obtain a satisfactory contract normally depends on its bargaining power relative to that of the employer. The erosion of the union's support within the plant

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16 134 N.L.R.B. 709 (1961), *enforced*, 308 F.2d 687 (9th Cir. 1962). In an earlier case, Cullen-Thompson Motor Co., 94 N.L.R.B. 1252 (1951), *enforced*, 201 F.2d 369 (10th Cir. 1953), the Board issued a bargaining order on the basis of authorization cards when the employer failed to bargain but did not commit additional unfair labor practices. In this case, however, the Board did not examine the issue of the employer's good faith doubt in refusing to bargain.

17 *See, e.g.*, George Groh & Sons, 141 N.L.R.B. 931, *enforced*, 329 F.2d 265 (10th Cir. 1963). In this case the Board accepted in full the Trial Examiner's analysis that:

> The absence of good faith, then, may be manifested as well by attitudes and conduct demonstrating a rejection of the collective-bargaining concept as by more overt, readily discernible Section 8(a)(1) and 8(a)(3) conduct potentially more immediately destructive of the Union's majority status.

141 N.L.R.B. at 940.

18 Bok, *The Regulation of Campaign Tactics in Representation Elections under the National Labor Relations Act*, 78 HARV. L. REV. 38, 133 (1964).

would seem to preclude the union from securing employer agreement to its bargaining objectives and, hence, make any bargaining order of little value to the union. Consequently, to an employer bent on crushing the union's organizational efforts, the bargaining order would seem to be of little deterrent effect.

What, then, is the remedial efficacy of the bargaining order? It is this question which the following pages will seek to answer.

II

FACTORS INFLUENCING A UNION'S ABILITY TO OBTAIN A CONTRACT[19]

A. *Employer Unfair Labor Practices*

An initial finding of this article[20] is that the union's ability to obtain a contract in a *Joy Silk* situation is greatly affected by the

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19 There were several reasons for making the test of the remedial efficacy of the bargaining order the extent to which unions obtained contracts following the issuance of a bargaining order. First, this test allows for an objective evaluation of the Board's effectiveness, since the rate at which unions obtain contracts in *Joy Silk* cases can be measured against the extent to which unions execute contracts in "no prior bargaining" cases where employers have not committed any unfair labor practices. Second, merely observing whether or not contract negotiations followed the issuance of a bargaining order would not accurately indicate the effectiveness of the Board's remedial process, since an employer may emasculate a union's bargaining power by destroying its majority and thereby prevent the union from obtaining a contract. A bargaining order in such a case clearly fails to restore the union's position or to enable the union to bargain effectively for its members. Furthermore, while the execution of a contract is not required by law, "[t]he Act contemplates the making of contracts with labor organizations. That is the manifest objective in providing for collective bargaining." Consolidated Edison Co. v. NLRB, 305 U.S. 197, 236 (1938).

20 The 61 cases studied here were selected from the 227 cases in which, between July 1966 and December 1967, the NLRB ordered an employer to bargain with a union whose majority status was premised on authorization cards. Approximately 90% of the 227 cases were of the *Joy Silk* variety; the other 10% were *Snow*-type cases. Of the 61 cases, 59 are *Joy Silk* cases and 2 are *Snow* cases.

The sample contains two elements of bias. First, selections were made to secure as even as possible a distribution among all regions; cases from 27 of the Board's 31 regions were studied. Consequently, the sample does not reflect the size of a particular region in terms of its normal case load but should provide a basis for analyzing the efficacy of the Board's remedial processes on a national level. Second, a larger number of litigated cases was selected than would have been obtained by a purely random sample. Board data indicate that approximately 34% of all *Joy Silk* cases are litigated; in this study, approximately 55% of the cases were litigated with the remaining 45% having been settled informally. This was done to ensure that a sufficient number of litigating employers would participate in telephone interviews.

Because the conclusions put forth are based not only upon the numerical data, but also on the observations and statements made by other researchers and by the union organizers and employers involved in the cases, the author strongly felt that tests of

extent of the employer's unfair labor practices. Employers may be separated into two groups, using the scope of the unfair labor practices they have committed as the criterion. In the first group are employers whose campaign against the union consisted of "simple" infractions involving threats, interrogations, and promises of benefits in violation of section 8(a)(1) of the Act only.[21] The second group includes employers who were guilty of "complex" unfair labor practices; *i.e.*, employers who, in addition to having violated section 8(a)(1), either discharged union adherents, formed a company-dominated union, or did both, in violation of sections 8(a)(3) and 8(a)(2) of the Act.[22] Where employers commit complex violations of the Act, violating both sections 8(a)(1) and 8(a)(3), or sections 8(a)(1) and 8(a)(2), a union's ability to obtain a contract is reduced.[23]

The reasons that unions face greater difficulty in obtaining con-

significance were not the necessary and sufficient criteria by which to judge their validity. Thus, as Dr. Leslie Aspin pointed out in his study of the Board's reinstatement remedy, the numerical results give structure to the conclusions, but the other sources are of at least equal significance. Aspin, A Study of Reinstatement Under the National Labor Relations Act 10 (unpublished Ph.D. dissertation, M.I.T., 1966). For a detailed discussion of the methodology used in the study, see Wolkinson, Joy Silk Bargaining Orders: An Examination of the Efficacy of NLRB Remedies in Joy Silk Type Cases 20-30 (unpublished M.A. dissertation, University of Chicago, 1969).

21 Section 8(a)(1) makes it an unfair labor practice for an employer to "interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in section 7." While any 8(a)(2) or 8(a)(3) violation is automatically interference or coercion and, hence, violative of 8(a)(1), when mentioned in this study the 8(a)(1) violation will apply to acts of interference or coercion which are independently violative of 8(a)(1). Hence, in the case of multiple violations where, for example, the employer violates 8(a)(1) or 8(a)(3), the 8(a)(3) issue involved is not a specification of the 8(a)(1) issue, but in addition to it.

22 Under 8(a)(2) it is unlawful to "dominate or interfere with the formation or administration of any labor organization," and under 8(a)(3) to discriminate "in regard to hire or tenure of employment . . . to encourage or discourage membership in any labor organization."

23

Bargaining Success (Contracts Achieved) by Type of Employer Unfair Labor Practice

Type of unfair labor practice	Total number of cases	Number of contracts	% contracts obtained in each category
Refusal to bargain only	2[a]	2	100%
8(a)(1)	30	17	57
8(a)(3)	4	1	25
8(a)(1),(3)	17	8	47
8(a)(1),(2)	4	1	25
8(a)(2)	1	0	0
8(a)(1),(2),(3)	3	1	33
	61	30	49%

a These two cases are *Snow* cases.

tracts when an employer, in addition to making threats, discharges union adherents or forms company-dominated unions, are not difficult to perceive. An employer who discharges the key union supporters in the plant strikes a crippling blow against the union, for he deprives the union of the "inside" leaders on whom it depends to rally employee support behind the union.[24] Their elimination leaves the employees bereft of leadership at a time when the employer is attempting to disrupt the union's organizational drive. With the loss of these men, the union organizer must alone attempt to maintain the employees' morale and support for his union in the face of the company's attacks.

Furthermore, in discharging union supporters the employer displays his superior economic strength vis-à-vis the union. To varying degrees, employees are intimidated as the danger involved in supporting the union is made evident. Most will be reluctant to risk their jobs by continuing to support the union. Only one who is militantly pro-union, or who can easily obtain new employment, will not be intimidated by the discharge of others who supported the union. Moreover, to achieve his objective, the employer need not even engage in multiple discharges; most union organizers said that one well-timed discharge is sufficient to defeat an organizing campaign.

The coercive effect of the discharge is intensified by the difficulty of remedying the violation and restoring the status quo. Dr. Leslie Aspin has shown that most employees who have been discriminatorily discharged will either waive or reject an offer of reinstatement during NLRB case processing.[25] Some will procure other employment, while others without work will decline reinstatement rather than work in a hostile climate. Many of those who do return will remain for only a few months.[26] The observations made in this study closely parallel Aspin's findings. In twenty-three of the sixty-one *Joy Silk* cases of this study, a total of fifty-four persons were discharged in violation of

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Thus, in the 30 cases where the employers' violations consisted of only 8(a)(1) infractions, unions were able to obtain contracts in 17 cases (57%). On the other hand, in the 24 cases where the employer violated §§ 8(a)(1) and (3), §§ 8(a)(1) and (2), or §§ 8(a)(1), (2), and (3), contracts were executed in only 10 cases (42%). Taking together all 29 situations where the employer illegally discharged union adherents or formed company-dominated unions, unions obtained contracts in only 11 cases (38%).

[24] "Articulate and respected leaders inside the plant are vital to any campaign . . . .

. . . .

If no potential leaders can be found, the representative had better acknowledge the probability that he will not be able to wage a successful campaign." AFL-CIO, A GUIDEBOOK FOR UNION ORGANIZERS 5, 6 (1961).

[25] Aspin, *supra* note 20, at 14, 15.

[26] *Id.* at 16-17, 43.

section 8(a)(3).[27] Only sixteen sought reinstatement. Furthermore, in the thirteen of these twenty-three cases where no contract was obtained, only fourteen percent of the discriminatees returned to their original positions. On the other hand, fifty-eight percent accepted reinstatement in the ten cases where the unions succeeded in obtaining contracts. The failure of discharged employees to return to their jobs cannot help but impress upon the remaining employees the peril involved in supporting the union; as Aspin notes, it is "a dramatic refutation of the union's claims that it can protect the employees."[28] Thus, notwithstanding the Board's bargaining order or settlement agreement, the union organizer confronted with wrongful discharges has great difficulty in mobilizing employee support behind the union's effort to obtain a contract.

The employer's establishment of an inside union also significantly weakens the union's ability to obtain a contract. While establishment of these counterfeit unions was limited to eight of the sixty-one cases, most of the union organizers involved in those eight cases remarked that the company-dominated union eroded employee support for the labor union. In establishing an inside union, the employer is ostensibly affording the employees their right to organize; he is no longer opposing "unionism" as such and can persuasively argue that the company union will provide the same benefits to the employees without forcing the employees to pay dues to a "stranger" organization. The employer's arguments appeal to those lacking experience with unions; they desert the union in the sincere belief that an inside union will better serve their interests. Others join for fear of combatting the employer's expressed objective of forming a company union. The employer is thus able to root out much of the interest in the legitimate union. Consequently, despite later Board orders requiring an employer to dissolve the company-dominated union and bargain with the outside union, the union organizer is hard pressed to re-obtain support among employees.

Where the employer's violations consist merely of 8(a)(1) infractions, the union can effectively combat the violations and regain the employees' allegiance. For example, the skillful union organizer can negate the effect of a unilateral wage increase by convincing employees that the union was responsible for the wage gain. Similarly, he can point out to employees that the employer's threats to close the plant or decrease production if they select the union as their bar-

[27] There was one other case involving an 8(a)(3) violation which, however, did not involve a discriminatory discharge; the 8(a)(3) violation in that case consisted of a discriminatory temporary layoff.

[28] Aspin, *supra* note 20, at 80.

gaining agent are but typical employer bluffs. This is not to suggest that where only 8(a)(1) violations exist in a case the unions are *always* successful in recouping majorities and negotiating contracts;[29] the threat to shut down, for example, clearly intimidates employees who will have difficulty finding new jobs. However, it is where the anti-union employer enforces his threats with acts, such as discharging union supporters or establishing an inside union, that the union's chances of obtaining a contract following a bargaining order or settlement agreement are most seriously affected.

B. *The Stage of Case Disposition*

An employer charged with an unlawful refusal to bargain with a union has several alternative courses of action. He may settle the case prior to a formal hearing by a Trial Examiner, or he may decide to challenge the regional director's determination that he has unlawfully refused to bargain and litigate the case. Litigation itself has a number of steps: a case may be closed after a Trial Examiner's hearing and decision, a Board decision and order, or a court decision and order.

The stage at which a case is closed has a significant effect on a union's ability to obtain a contract.[30] The major factor behind this relationship is time.[31] The *Joy Silk* case that is settled informally requires an average of 125 days for its completion. The time elapsing

29 *See* note 23 *supra.*

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Stage of Case Disposition and Bargaining Success (Contracts Obtained)

Cases closed after:	Total cases	No. of contracts	% contracts obtained for each type of closing
Settlement	27	17	63%
Trial Examiner's decision	3	2	67
Board order	15	6	40
Court of appeals decree	16	5	31
	61	30	49%

Sixty-three percent of the cases (17 out of 27) which were settled resulted in the execution of contracts. On the other hand, unions succeeded in obtaining contracts in 35% of the cases (only 11 out of 31) which were closed after a Board or court decision. These findings parallel Ross's conclusion that a union's ability to obtain a first contract decreased as litigation increased.

Of the 27 settled cases, 26 were informal settlements, and one was formally adjusted. The only difference between the two is that a formal settlement is enforceable in the courts. Failure of an employer to abide by an informal settlement only results in the reinstitution of the 8(a)(5) charge and the holding of a Trial Examiner's hearing.

31 P. ROSS, THE LABOR LAW IN ACTION 6 (1966).

between the filing and closing of a *Joy Silk* case decided by the Board averages 555 days. Last, a *Joy Silk* case which is appealed to the courts generally takes over three years (1040 days) until it is closed.[32] As a case is being litigated the union loses support from those who are dissatisfied with the union's ability to achieve its promises. Union organizers are well aware that newly unionized employees easily get disgusted and that failure to win quick benefits often results in the union "fold[ing] like a tent."[33] Moreover, while the case is being litigated the union cannot prevent the employer from making speeches to captive audiences, sponsoring petitions urging employees to withdraw from the union, and raising wages to undercut the union's bargaining demands.[34]

A further difficulty facing the union is that the employer's unfair labor practices remain unremedied until a case is finally decided. In such a situation employee support for the union, if not already eliminated, is indeed made perilous.[35]

Time delays also frustrate reinstatement; the evidence suggests that an employer who delays his reinstatement offer until he has exhausted his efforts at litigation will generally succeed in discouraging dischargees from returning.[36] Two factors account for this success.

32 Information supplied by the NLRB.

33 B. KARSH, DIARY OF A STRIKE 63 (1958).

34 Of course, a union could bring additional unfair labor practice charges against such an employer, but this would be time-consuming and involve a series of additional hearings burdensome to union representatives.

35 One organizer remarked, "An employee in the litigated *Joy Silk* case cannot understand that he has definite legal rights; in the end, he becomes disillusioned with the union, feeling that it has dragged its feet and not tried hard enough." The union's statement that relief is being sought from the Board or courts is of small solace to the working man whose continued support for the union may cost him his job.

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Number of Discriminatees Accepting Reinstatement in Litigated Cases by Time of Reinstatement Offer

Reinstatement offered after Trial Examiner's decision (4 cases)		Reinstatement offered after Board or court ruling (7 cases)	
No. of discriminatees	No. accepting offer	No. of discriminatees	No. accepting offer
1	1	1	0
1	1	3	0
3	3	4	0
3	0	3	0
		1	0
		6	5
		3	0
8	5	21	5

The first is that over a year may pass before a Board or court decision is handed down. Clearly, the longer he is jobless, the greater is the economic pressure compelling the discriminatee to find other employment. Furthermore, the discriminatee must be able to show that he has actively sought other employment to be entitled to back pay. Having obtained an equivalent or superior position, the discriminatee refuses reinstatement,[37] especially when following his discharge he has obtained work in another locality. The second factor is fear of company retaliation.[38] By withholding his offer of reinstatement until after the Board or court decision, the employer makes it patently clear to the discriminatee that he is vigorously opposed to the discriminatee's return. Few discriminatees are so bold as to return in the face of continued employer hostility and the risk of further injury.

Even normal events work against the union in the litigated case. Considerable turnover occurs in the time taken to contest a case, and new employees in the *Joy Silk* case can hardly be expected to support a union. Moreover, the evidence indicates that turnover among union supporters is exceptionally great. There were twenty-one litigated cases in which unions failed to obtain contracts. Interviews were made with the employers in seventeen of them. Twelve employers acknowledged that as the case was being litigated, exceptionally large numbers of union supporters quit. One employer remarked, "they left for obvious reasons." Another stated that by the time the case had been decided there was not a single union supporter remaining in the plant. This employer commented that those supporting the union were "in ill-repute and persuaded to leave." This high rate of turnover among union supporters is a clear reflection of employee demoralization, their fear of continued employer discrimination and their view of the futility of the Board's remedial process.

Thus, whether an employer settles or litigates may often be the decisive factor in a union's ability to obtain a contract. The passage of time associated with the litigation of a *Joy Silk* case operates to destroy union majorities and demoralize union adherents. Conse-

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It should be noted that the number of employees "accepting" reinstatement is the number of those who made an initial acceptance of an offer, not the number of those who actually returned to their prior employment. All 5 employees who accepted reinstatement when it was offered following the trial examiner's decision did return, but none of the employees who accepted reinstatement when it was first offered following a Board or court decision returned.

37 Aspin found that two-thirds of those who refused reinstatement had obtained other employment when the offer was made. Aspin, *supra* note 20, at 18-19, 24.

38 Aspin found that most discriminatees refuse reinstatement out of fear of retaliation.

quently, the support that a union can gather following a bargaining order in a litigated case is often marginal; in approximately sixty-two percent of the litigated cases studied here, the union either failed to request bargaining or gave up after futile attempts to gain a contract.

C. *Economic Power and Its Use*

The Teamsters Union was far more successful than other unions in obtaining contracts in the *Joy Silk* situations studied here.[39] The Teamsters obtained contracts in sixty percent of the cases in which they were involved, whereas all other unions combined obtained contracts in only forty-two percent of their cases.[40] The success of the Teamsters can in large part be attributed to their great economic power[41] and their use of that power. A desire to prevent or end a

39

Union Ability to Obtain Contracts in Joy Silk Situations

	Cases	Contracts obtained	% of cases in which contracts obtained
Teamsters	25	15	60
Other unions	36	15	42
	61	30	49%

40

Unions Involved in Joy Silk Disputes

Union	No. of cases	No. of cases in which contract was obtained
Teamsters	25	15
I.L.G.W.	3	1
Retail Store Employees' Union	4	2
Retail Clerks	5	3
Rubber Workers	2	1
Meat Cutters	5	2
Printing Pressmen	1	1
Allied Appliance Workers	2	1
Service & Sales Employees	1	1
Amalgamated Clothing Workers	2	1
Aluminum	1	1
Machinists	4	0
Carpenters	3	1
Lithographers	1	0
Allied Industrial Workers of America	1	0
Woodworkers	1	0
	61	30

41 S. ROMER, THE INTERNATIONAL BROTHERHOOD OF TEAMSTERS: ITS GOVERNMENT AND STRUCTURE 2-4 (1962).

strike or boycott by the Teamsters induced the signing of many more contracts than did a desire to avoid confrontation with other unions.[42] Moreover, the Teamsters have a greater propensity to take strike action[43] and strike to greater effect than other unions. A few examples provided by employers interviewed illustrate the wide scope of the Teamsters' power. In one case a pallet manufacturer capitulated out of fear that a strike would prevent his merchandise from being loaded on the waterfront and shipped overseas. A manufacturer of concrete pipes, against whom the Teamsters had struck, signed a contract following the refusal of craft unions to use the company's products. In another case, a strike prevented an auto dealer from obtaining deliveries of new model automobiles.

Clearly, much of the Teamsters' economic strength is derived from the strategic importance of their trade.[44] Most employers rely on a steady flow of supplies and deliveries to maintain their business

42

Execution of Contracts and Union Economic Power

	No. of cases involved	No. of contracts	No. of cases where union economic power induced employers to sign contract
Teamsters	25	15	10
Other unions	36	12[a]	4

[a] A total of 27 of the 30 employers who signed contracts were interviewed. Three employers who signed contracts with non-Teamsters unions could not be contacted. This accounts for the reduced number of non-Teamsters contracts indicated in the table. The employer statements were checked against union responses as to what factors enable them to obtain contracts. There was general agreement between the responses received from both groups.

43

Union Strike Action and Execution of Contracts

	No. of cases[a]	No. of cases in which union struck	No. of cases where contract was obtained
Teamsters	21	8	7
Other unions	30	4	0

[a] Based on telephone interviews with 51 union organizers.

Besides acknowledging that employer unfair labor practices had eroded union support and precluded a strike, most non-Teamsters organizers indicated that in a first bargaining situation a strike was not the best instrument for maintaining employee support. As one non-Teamsters organizer stated, "it leaves a bad initial impression of unionism." In contrast, Teamsters organizers showed no such hesitancy in utilizing this weapon. Many Teamsters organizers counseled its use as the best means of combatting the *Joy Silk* employers in cases where the employers' violations had not dissipated all union support.

44 R. LEITER, THE TEAMSTERS UNION 264-65 (1957); ROMER, *supra* note 41, at 4, 5, 11.

operations; a primary stoppage may bring economic ruin. However, the Teamsters have multiplied their economic power by skillful use of tactics that other unions have failed to adopt. When a union strikes an employer who transports his own product, for example, the union is allowed to follow the employer's trucks to their destination and picket while pick-up and deliveries are made.[45] By aggressively engaging in this ambulatory picketing, the Teamsters are often able to enforce their embargo of an employer's products. The manufacturer of concrete pipes mentioned above, for example, acceded to the union's demands when his delivery trucks were picketed at the construction site with the result that the craft unions would not handle the product. The right to follow and picket a primary employer's trucks on the secondary site is not limited to the Teamsters Union, but the Teamsters was the only one of the sixteen unions represented in this study that used this tactic.[46] Similarly, only Teamsters-organized employers indicated concern with the possible curtailment of their supplies or deliveries as a result of such ambulatory picketing. Another Teamsters' method of exerting secondary pressure on an employer is to strike the primary employer's suppliers or customers following the expiration of an agreement between the Teamsters and the secondary employer. Outwardly, the strike against the secondary employer appears to be one over contract negotiations. Behind the façade, however, it is an attempt to force the secondary employer to cease dealing with the primary firm.[47] By extending the area in which economic force can be placed against the primary employer, the Teamsters local becomes less susceptible than other

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[45] *See* Sailors' Union of the Pacific, 92 N.L.R.B. 547 (1950) (Moore Dry Dock).

[46] The value that the Teamsters place on such ambulatory picketing is made further evident by the union's continued use of this tactic during the 1950's, despite its apparent illegality as a result of the NLRB's decision in Washington Coca Cola, 107 N.L.R.B. 299 (1953), *enforced*, 220 F.2d 380 (D.C. Cir. 1955). In this case, the Eisenhower Board severely limited the legality of ambulatory picketing by ruling that such picketing was illegal if the primary employer had a "permanent" place of business. According to Professors Ralph and Estelle James, the Teamsters used this tactic in organizing the South and the Midwest in the 1950's, the Board's ruling notwithstanding. R. JAMES & E. JAMES, HOFFA AND THE TEAMSTERS 155-56 (1965). The Kennedy Board legalized ambulatory picketing again. In International Bhd. of Electrical Wkrs., 135 N.L.R.B. 250 (1962), it ruled that the fact that a primary employer has a permanent place of business which could be picketed does not render illegal ambulatory picketing which follows the *Moore Dry Dock* rules.

[47] Professor James discloses that in the central and southern states, Teamsters locals insist on open-ended grievance procedures which enable them to strike when a grievance is not mutually resolved. Thus a strike ostensibly over a grievance is another mechanism of forcing a neutral employer to cease dealing with a primary employer. R. James & E. James, *Hoffa's Leverage Techniques in Bargaining*, INDUSTRIAL RELATIONS, Oct. 1963, at 83.

unions to destruction through employer unfair labor practices. The bargaining power of the local is not based entirely on its support within the plant; even if an employer's violations dissipate the union's majority position, the union can force the employer to reach a settlement by blocking shipment of his supplies and deliveries.

The financial and human resources of the Teamsters Union are also significant factors in its success. When an employer's unfair labor practices destroy the union's majority the organizer must reorganize the plant. Former union adherents must be reconvinced that their support of the union will bring tangible economic gains and that they have vindicable bargaining rights. New employees must also be sold on the benefits of unionization. This often involves an entirely new organizing campaign with meetings, posters, letters, and telephone calls. The resources of many unions, however, are limited,[48] and the *Joy Silk* plant tends to be small.[49] At times a union will decide against investing additional funds and manpower in an attempt to organize only a few workers.

D. *Bargaining Unit Size*

There appears to be little correlation between unit size and a union's ability to obtain a contract;[50] union organizers frequently

48 An organizer for the Amalgamated Clothing Workers acknowledged that limited financial resources forced the union to abandon its bargaining efforts. The Machinists Union has only 3 organizers in Arkansas and less than that in Idaho. The Rubber Workers have a very small organizing staff responsible for 11 southern states. Additionally, an organizer's prior commitmeuts in other organizing campaigns may prevent him from continuing his efforts in a *Joy Silk* case.

49 The median unit in the 61 *Joy Silk* cases studied consisted of 11-20 persons.

50

Unit Size and Bargaining Success[a]

Size of unit	Cases	Contracts
1-9	17	5
10-19	17	12
20-29	12	5
30-39	1	1
40-49	3	2
50-59	1	1
60-69	1	1
70-79	3	1
80-89	—	—
90-99	—	—
100+	3	1
	58	29

[a] Data for 3 cases was unavailable.

commented that the militancy of the employees and the aggressiveness of the employer in combatting the union were characteristics of the unit more significant than size. The reason may be that while increasing size benefits the union in some ways, it harms it in others. For example, turnover has less effect in a large unit than in a small unit. On the other hand, the organizer has more difficulty communicating with all employees in a large unit. Some organizers suggested that in a unit of fifty or more employees the employer can more easily disrupt the union's organizing campaign, since it is easier to discriminate against particular employees, spread divisive rumors, and change working conditions to the detriment of the union's position.

However, the data does suggest that the union's chances of success are least in very small units consisting of less than ten persons.[51] In such cases the discharge or voluntary quitting of one or two union supporters or the hiring of one or two men unsympathetic to the union can drastically change the union's position in the unit. Furthermore, small employers often have strong personal relationships with their employees and can exert direct pressure on them to repudiate the union.

One further observation can be made regarding the relationship between unit size and the occurrence of *Joy Silk* cases: the *Joy Silk* case seems more symptomatic of the very small employer than other employer unfair labor practice cases. Approximately eighty percent of the cases studied here involved units consisting of fewer than thirty employees. Board data indicate that its employer unfair labor practice caseload is not so heavily dominated by cases arising in very small business establishments: only 41.3 percent of employer unfair labor practice cases closed during fiscal year 1966 involved units of less than thirty employees.[52] This concentration of *Joy Silk* cases among smaller employers may, in part, be attributed to the greater fear among such employers of the consequences of unionization and to their tendency to view unionization as an act of betrayal by their employees.[53]

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51 *Id.*

52 31 NLRB ANN. REP. 220, Table 18 (July 1, 1965 to June 30, 1966).

53 J. BLACK & J. PICCOLI, SUCCESSFUL LABOR RELATIONS FOR SMALL BUSINESS 103, 104 (1953).

E. *Size of the Union's Original Majority*

There similarly seems to be little correlation between the union's original majority status and the union's ability to gain a contract.[54] The evidence indicates that a union's chances of executing a contract are not any greater where the union had originally signed up as many as ninety percent of all employees in the appropriate unit. Union organizers as a group acknowledged that such other factors as degree of employer unfair labor practices, extent of litigation, and the union's economic and financial resources were the most significant elements determining a union's ability to obtain a contract in a *Joy Silk* case.

F. *Geographical Locale of the Firm*

It might be expected that the employer behavior exhibited in *Joy Silk* cases would be more typical of rural communities than of larger cities or metropolitan areas. Rural areas are less unionized than urban areas in part because of vigorous community opposition to unions; many employers relocate in rural communities in order to escape unionization. Furthermore, rural employers are in a better position than their urban counterparts to campaign against unions by exploiting and integrating economic, political, and community pressures.[55]

The data, however, indicate that the *Joy Silk* case is not a small-town phenomenon: indeed, nearly two-thirds of the sixty-one cases in this study occurred in urban areas.[56] The urban complexion of these *Joy Silk* cases is no doubt a result of the greater concentration of union efforts in the industrialized metropolitan areas. Union organizing

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[54] *Union's Original Majority Position and Bargaining Success (Contracts Obtained)*

% of employees who signed authorization cards	Cases	Contracts	% contracts obtained
50-59	14	8	57
60-69	15	8	53
70-79	5	3	60
80-89	8	4	50
90-99	15	7	47

[55] M. GITELMAN, UNIONIZATION ATTEMPTS IN SMALL ENTERPRISES 46-47 (1963).

[56] In this study a "small town" was defined as a city with a population of 50,000 persons or less which was not within a 25-mile radius of any city having a population of over 50,000. Most of the cases occurring in small towns, however, involved communities having populations of fewer than 25,000 persons.

drives are usually responses to employee requests,[57] and the rural inhabitant is generally more conservative and less inclined to support a union than a city dweller.[58] The greater inclination of urban employees to unionize, coupled with the greater number of potential union members in metropolitan areas, often dictates the location of the union's organizing efforts. Since a *Joy Silk* case arises only out of an organizing campaign, concentration of union efforts in urban areas produces a greater absolute number of urban *Joy Silk* cases.[59] At the same time, however, it is possible that the percentage of rural campaigns resulting in *Joy Silk* cases is higher than the same percentage of urban campaigns.

It might also be expected that the small-town *Joy Silk* employer would have a better chance of destroying the union than would an urban employer. As noted earlier, the rural employer can generally mobilize far more extensive social, economic, and political pressures than the urban employer to frustrate the union's campaign. This condition exists in its most extreme form in those local communities whose economies are dominated by a single or a few large firms.[60] In such instances, a worker will be seriously concerned over the possible loss of his job and hence more susceptible to employer coercion designed to destroy the union's support.

It was found, however, that the rate at which unions obtained contracts in small-town *Joy Silk* cases paralleled the unions' rate of success in urban localities.[61] Countervailing factors operated to bolster the unions' chances in small towns. Where the employees are skilled, for example, a rural employer may have greater difficulty obtaining qualified replacements than would an urban employer. One employer who operates a meat-processing firm in a small town acknowledged

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57 In this study nearly all of the union organizing campaigns were initiated by the employees themselves.

58 AMERICAN ASSOC. OF INDUS. MANAGEMENT, GUIDELINES TO VICTORY 23 (1966).

59 Board experience supports this thesis. According to its officials, the NLRB has found over the years that the great majority of unfair labor practice cases occur in urban areas, and for this reason has located its regional offices in the major cities of this country.

60 Wyle, *Union Organizing Activity Under Taft-Hartley*, PROCEEDINGS OF THE N.Y.U. ELEVENTH ANNUAL CONFERENCE ON LABOR 193-97 (1958).

61

Bargaining Success and Geographical Locale of Firm

	No. of cases	No. of contracts	% contracts obtained
Urban communities	40	19	47
Small towns	21	11	52
	61	30	49%

that he signed a contract because he could not secure qualified replacements in the event of a strike, and this difficulty was shared by several other rural employers. Another countervailing element is the higher degree of solidarity found among workers in rural areas. A strongly unified group often remains undaunted by employer unfair labor practices; in one case lumber workers in California's Sierra Madre Mountains withstood the employer's violations and finally succeeded in obtaining a contract some three years after the union had first filed charges. Another is the occasional ability of a cohesive small community to impose its standards upon a small employer. In one case a union's appeal to the town's civic and church leaders resulted in community pressure on the employer to settle the case; the employer settled and signed a contract with the union.

Summarizing the factors that affect a union's ability to obtain a contract in a *Joy Silk* case, we can sketch the following picture: A union's chances of obtaining a contract following a *Joy Silk* bargaining order are enhanced when the dispute is informally adjusted, the unfair labor practices consist of minor rather than multiple violations of the Act, the unit size is not under ten persons, and the union is able and willing to marshal economic, financial and manpower resources to achieve a contract.[62]

III

Evaluation of the Effectiveness of Board Bargaining Orders

Of the sixty-one instances studied here, unions succeeded in obtaining contracts following bargaining orders in thirty—approximately forty-nine percent of all cases. The union success in these cases is highly encouraging since, theoretically, a bargaining order in a *Joy Silk* situation appears to be a futile gesture. A basic ingredient of the *Joy Silk* case is the destruction of the union's pre-existing majority

62

Bargaining Outcomes by the Essential Characteristics of Each Case

Characteristic	Contract obtained (30 cases)	Bargaining and no contracts (22 cases)	No contract and no bargaining (9 cases)
Informal settlement	53%	37%	33%
Multiple violations of L.M.R.A.	33%	40%	66%
Median size unit	11-20	11-20	1-10
Cases involving Teamsters	50%	36%	33%

by the employer's unfair labor practices. Having lost its support in a plant, a union's chance of securing a contract following completion of NLRB action would appear to be negligible. Contracts in forty-nine percent of these cases, however, may be considered prima facie evidence of considerable NLRB success.

There is strong evidence, however, that *Joy Silk* bargaining orders are not very effective against the strongly anti-union employer who wages a lengthy legal battle against the union and dissipates the union's majority through multiple violations involving discharges and the establishment of a company-dominated union. Thus, in the thirteen cases where the employer committed multiple violations *and* litigated the charges brought against him, unions succeeded in obtaining contracts in only three cases (twenty-three percent). Does this mean that the NLRB is but a passive agent in inducing compliance with the law and influencing an employer to initiate a collective bargaining relationship with the union involved? In other words, is a union's ability to obtain a contract in *Joy Silk* situations basically dependent on employer actions over which the Board has no real control? The evidence suggests that this is not so.

A. *Settlements*

The most significant evidence that the Board's procedures in *Joy Silk* situations are effective is the number of employers who elect to adjust their cases following the issuance of an unfair labor practice charge against them. Board data indicate that sixty-six percent of *Joy Silk* cases are settled, and twenty-seven of the sixty-one cases analyzed in this study were adjusted. These cases generally involved determined efforts to destroy the unions' position through unfair labor practices. What, then, makes such employers settle their cases and, in effect, agree to recognize and bargain with the union, offer to reinstate any employee improperly discharged, cease further violations, and advise their employees of all such actions?

One possible explanation is that the union is so powerful that the employer decides to adjust the dispute rather than risk destroying his own business. This factor may be significant in cases involving the Teamsters Union, but it is not sufficient to explain the changed attitudes of vehemently anti-union employers opposed by other unions, none of which have the economic power of the Teamsters.[63] It seems that in practice employers are influenced by the legal

[63] The Teamsters Union was involved in 48% of all adjusted cases and in 36% of such cases where the employer committed multiple violations.

machinery of the NLRB. What elements, then, generate settlements?

Seventeen of the twenty-six employers who informally settled their cases were interviewed to determine the factors that led each to settle.[64] Table 1 lists the reasons given and indicates their frequency; Table 2 sets forth the various combinations in which the reasons were given:

TABLE 1
Reason for Settling (17 Cases)

No. of times reason mentioned	Reason
7	Unwillingness to undergo litigation expenses.
10	Advice from attorney that there was little chance of winning litigated case and that settlement was advisable.
6	Threat, or actual implementation by union, of economic action.
4	Avoidance of back-pay liability and reinstatement burden.
5	Employer reconsideration that fighting union was unnecessary.
32	

TABLE 2
Reason for Settling (17 Cases)

No. of cases	Reason
2	Litigation costs, reinstatement and back-pay liability, attorney advice.
3	Litigation costs, attorney advice.
3	Attorney advice, employer reconsideration that fighting union was unnecessary.
3	Union economic action.
1	Fighting union nnnecessary.
1	Union economic power, fighting union unnecessary, back-pay liability.
1	Union economic action, litigation costs.
1	Union economic action, attorney advice.
1	Attorney advice.
1	Litigation costs, back-pay liability.
17	

The tables indicate the crucial role that attorneys play in *Joy Silk* settlements; attorney advice that it would be extremely difficult to successfully contest the unfair labor practice charges was the reason most frequently given for settling. This kind of advice is in clear contrast to that given by attorneys who, although they do not antic-

[64] Seven employers, including 5 who shut down, could not be contacted; 3 others refused to be interviewed.

ipate a favorable outcome, expect time to work against the union, and advise their clients that the litigation route is the best means of defeating the union. Two employers in this study acknowledged that their attorneys advised them that in a two- or three-year period of litigation the union would "die on the vine," but the extent of such practices is extremely difficult to determine. Ten of the twenty-eight employers who litigated and were interviewed said they followed their attorneys' advice that the case could be won. One experienced company official remarked that many employers fail to realize that attorneys have a vested interest in litigating a case. Moreover, attorneys often view an unfair labor practice case in an overly legalistic manner. They fail to realize that the company has to live with the employees after the case is closed, and they discount the effect that a union-management struggle has on employee morale and productivity. In this particular case the management official, upon assuming his position, dismissed the attorneys who had advised further litigation, accepted the Trial Examiner's decision, and quickly negotiated a contract with the union. Probably few employers act in this manner, however; they hire attorneys for their expertise and usually act on the basis of it.

A second factor that motivated employers to settle was their reluctance to undergo the costs involved in litigation. This consideration was mentioned in seven cases and confirmed the advice of attorneys in five of those cases. The costs of defending and appealing an unfair labor practice charge rest on the party charged and are substantial. Hiring a first-class labor lawyer to argue the case through the courts of appeal may cost from $25,000 to $50,000.[65] The employer who litigates must also be ready to bear some indirect costs. The small employer is often forced to neglect his business operations and devote his time to the planning of the legal battle; both he and his employees are usually called upon to testify at the Trial Examiner's hearing. Production time is lost, and in service-oriented businesses the losses are unrecoverable. Thus the total costs involved are sufficient to deter many from engaging in lengthy legal proceedings.

The tables also indicate that four out of seventeen employers settled to avoid back-pay and reinstatement obligations. An employer who discriminatorily discharges or lays off workers becomes liable

65 This figure was the one most frequently mentioned by employers who litigated their cases.

for back pay and must offer reinstatement to the discriminatees. For many employers, a back-pay liability can become a difficult financial burden. In fiscal year 1965, for example, the average back-pay award in a discharge case litigated through the courts amounted to $8,077.[66] Furthermore, a strike over a refusal to recognize and bargain becomes an unfair labor practice strike entitling the employee to reinstatement.[67] In such situations, the employer's freedom to hire is restricted since he cannot offer permanent tenure to the replacements.

It is not, however, economic and monetary considerations alone that lead employers to settle. Five employers settled after concluding that fighting the union was unnecessary. Many employers who initially refuse to bargain and commit unfair labor practices act out of fear; unionization conjures up the specter of business ruin.[68] Board action, however, caused three of the five employers to reevaluate their positions. As one employer stated, "Board action forces an employer to ask himself whether or not everything he is doing is all right or justified." Two other employers settled upon realizing that they would gain nothing by litigating. These two employers had independently entered into similiar master agreements covering most of their firms' stores with the same union. Still, they resisted the union's efforts to organize two of their newly built stores. Faced with what they knew would be fruitless litigation procedures, however, they agreed to bring the two new stores under the master agreements.

Tables 1 and 2 thus indicate that a majority of the settlements were induced by Board action. Only six employers stated that the threat or actual implementation of economic action made them settle, and all of these cases involved the Teamsters Union. In three cases the Teamsters struck following the employers' unlawful refusal to bargain, and the signing of a contract quickly followed the settlement. In the other three cases the employers said they settled to avoid a strike or boycott. Teamsters' economic power, however, was not the only factor in some of the cases; three of the employers mentioned that they were also induced to settle by reluctance to undergo the costs of litigation, their attorneys' advice, their own realization that fighting the union was unnecessary, or a desire to limit their back-pay liability and reinstatement obligations.

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66 30 NLRB ANN. REP. 183, Table 4 (July 1, 1964 to June 30, 1965).

67 NLRB v. Comfort, Inc., 365 F.2d 867, 877 (8th Cir. 1966).

68 GITELMAN, *supra* note 55, at 35-36. Five of the 17 employers who informally settled acknowledged that their initial opposition to the union was motivated by fear of the adverse consequences of unionization.

B. *Contracts After Settlement*

The objective of collective bargaining is not just negotiations between union and employer, but the reaching of a contract. Union success in obtaining a contract is the best index of the success of the Board's remedial processes in *Joy Silk* cases.

Unions achieved contracts in sixty-seven percent of the informally settled cases.[69] This ability raises some interesting questions. For effective bargaining to take place, there must be "some equality of bargaining power."[70] Even when a case is settled, however, it is questionable whether the status quo has been fully restored. The employer has threatened and possibly discharged union supporters, and one may doubt whether his offer to reinstate those discharged and to bargain enables the union to regain sufficient support to assert the degree of bargaining pressure necessary for effective contract negotiations. Thus the following questions are important: (*1*) To what factors can we attribute union success in executing contracts?; and (*2*) are these contracts equal to what the unions would have obtained had there been no unfair labor practices?

To answer these questions, interviews were conducted with the union organizers and employers involved in fourteen of the sixteen informally settled cases in which contracts were executed. Table 3 sets forth the factors that influenced the employers to sign:

TABLE 3
Reason for Contract (Based on Employer Responses)
(Total Number of Contracts: 14)

Major factor	No. of cases
Union economic power.	7
Mutual desire to sign contract: no pressure exerted.	4
Fear of NLRB action and union economic power.	3
	14

While legal pressure assisted the unions in obtaining contracts

[69] Unions obtain contracts in approximately 86% of first bargaining situations following Board certification where no unfair labor practices have been committed. Speech by Frank W. McCulloch, in A.B.A. SECT. OF LABOR REL. LAW, Aug. 1962, at 17. Measured against this standard, improvement is needed in the informally settled cases, although there is no question that NLRB remedial action has produced beneficial results.

[70] CREATIVE COLLECTIVE BARGAINING 12-13 (J. Healy ed. 1965).

in three cases,[71] it is clear from Table 3 that unions can exert substantial economic leverage against the employer in contract negotiations when the case is informally settled. Employers mentioned union economic strength as a reason for signing in ten of the fourteen informally settled cases; in seven of these ten cases union economic power was identified as the most important factor. In three of these seven cases, the unions had struck; in the remaining four, employer reluctance to risk a strike or boycott led to the signing of contracts. The unions' ability to regain support in these cases can be attributed to their success in obtaining bargaining rights early and the relatively quick remedying of the other unfair labor practices. In contrast to what occurs in litigated cases, the employees believe that their rights are being protected; they retain their jobs and actively support the unions' bargaining efforts.

In four cases, neither union economic power nor fear of further NLRB action was instrumental in the employers' decision to execute collective bargaining agreements. In these cases, both sides acknowledged that neither had used any pressure during negotiations.[72] Instead, the signing of an agreement was the result of a mutual desire to come to a quick accommodation. These four cases represent the culmination of the change in the employers' behavior towards unions and collective bargaining that is first manifested in the employers' decision to settle.

The efficacy of bargaining in the informally settled case is further demonstrated by the general success of the unions in obtaining standardized contracts. In nine of the fourteen cases, union organizers stated that the benefits obtained paralleled the unions' area standards. In five other cases, the unions acknowledged that the contracts were substandard. The organizers admitted that the original unfair labor practices weakened their unions' economic power and prevented

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71 The obligation to bargain in good faith provided for in § 8(d) of the Taft-Hartley Act does not require an employer to make any particular concession during bargaining negotiations; nevertheless, the courts have held that he must make "*some* reasonable effort . . . to compose his differences with the union." NLRB v. Reed & Prince Mfg. Co., 205 F.2d 131, 134-35 (1st Cir. 1953). In this study the 3 employers came to agreement with the unions involved to avoid further NLRB charges that they had failed to bargain in good faith.

72 At the same time, it must be realized that the possibility of economic pressure is a background factor in all bargaining, although it may not be employed by either side. In these 4 cases, the unions were attempting to consolidate their position through a contract rather than risk a strike, while the employers were seeking to eliminate the ill-will and distrust that built up following their initial refusal to bargain.

their obtaining better benefits. Had there been no unfair labor practices, these unions might have obtained greater benefits, but from this alone it does not necessarily follow that bargaining was not meaningful. The organizers indicated that it was not unusual for first contracts to contain fewer benefits than existing contracts. Moreover, they said that the contracts obtained were livable and not so low as to depress or erode union conditions elsewhere.

Eleven of the fourteen organizers involved in informally settled contract cases stated that their relationships with the employers were good and that they expected no difficulty in negotiating a second contract. Only three, all of whose unions failed to obtain standardized contracts, remarked that the unions' day-to-day relationship with the employers was one of friction; they spoke of having to continually police and enforce the contracts' terms. It appears that in these cases the employers have not fully accepted the unions' role as bargaining agent.

Employers generally shared the unions' view that stable collective bargaining relationships had been established. Ten of the fourteen employers interviewed remarked that their working relationships with the union were good.[73] Thus only for a minority of unions and employers had collective bargaining failed to produce a mutually satisfactory relationship. The effective contractual relations which developed in the great majority of settled cases are evidence that the bargaining order is, in such circumstances, of substantial remedial efficacy.[74]

C. *Litigated Cases*

Table 4 sets out the reasons for signing contracts given by eleven employers who chose to litigate their cases:

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73 In saying that their working relationships with the unions were "good," these employers acknowledged that unionization had not caused productivity to drop or friction to develop between management and employees; in general, it had not interfered with the employers' general business operations. So long as the contract was followed, little was heard from the union.

74 The failure of a stable relationship to develop following the signing of an agreement does not necessarily indicate that a bargaining order has been ineffective. To the author's knowledge, there is no study that indicates the degree to which contractual agreements are followed by what may be considered a "good" working relationship between union and employer; thus, there is no basis for comparison. On the other hand, the evidence that in these cases a good working relationship had been established following the signing of a contract strongly confirms the original conclusion that bargaining orders, in such cases, are beneficial.

TABLE 4
Reason for Signing Contract in Litigated Cases[75]
(Total Litigated Contract Cases: 11)

Reason	No. of cases
Fear of further NLRB action.	6
Union economic pressure.	2
Fear of further NLRB action and union economic pressure.	2
Mutual desire to reach agreement.	1
	11

Table 4 shows that in litigated cases unions must rely more heavily on Board pressure and are less able to exert economic pressure than in informally settled cases. Typically, the NLRB does not close a case until it is satisfied that the guilty party has complied with the Board or court decision; compliance officers maintain contact with the parties to see whether the employer is bargaining in good faith. It is this continued surveillance[76] and the specter of further litigation costs and possible court fines[77] that provide the real impetus for employers to reach agreements with unions. In only two cases did the employers remark that the unions' economic power was the sole reason for signing a contract.

D. *Contracts After Litigation*

Despite their minimal economic power in litigated cases, the unions were still able to obtain contracts that compared favorably with their area standards. In only four of the eleven cases did union representatives state that the contracts executed were below par. Siguificantly, these were cases where the contracts were entirely due to the employers' fear of further NLRB action; a union's ability to use economic pressure is probably its best guarantee of obtaining a beneficial contract.

At the same time, the evidence also indicates that harmonious working relationships were established between unions and employers.

75 There were 13 such cases. One employer refused to be interviewed; another had sold his store while the case was being litigated.

76 "The Company keeps checking if I am in contact with you and I tell them that I am reporting every meeting. Without your assistance in looking over the shoulders of the Company, we would not get anywhere." Letter from a union organizer to one NLRB regional attorney.

77 Should an employer be found in contempt of a court order, the court can fine and/or imprison the employer until he complies.

In nine of the eleven cases, union organizers felt their chances for renewing the contracts were good. In one of the other cases the union organizer said that the employer was still aggressively anti-union; in the other, economic difficulties resulted in the shutdown of the organized unit. Employers in eight of the eleven cases similarly viewed their relationships with the unions as good. One employer expressed strongly negative opinions concerning his plant's unionization, charging the union with fomenting friction between management and the employees, and making the employees arrogant and difficult to supervise. The other two employers, while not critical of the unions' role, thought that a successful decertification election was a good possibility.

The execution of contracts and the development of productive collective bargaining relationships in these litigated cases indicate that the Board's remedial policies can be effective in the most difficult *Joy Silk* cases. However, their effectiveness is limited. Contracts were obtained in only thirty-eight percent of the *Joy Silk* situations in which the employers litigated the cases, and they were obtained in only forty-one percent of the cases in which multiple violations were committed. Against this record must be measured the general ability of unions to obtain contracts in approximately eighty-six percent of first bargaining situations. Thus, while *Joy Silk* bargaining orders are not an exercise in futility, they are not always the best that could be desired.

E. *Bargaining Orders Not Followed by Contracts*

No contracts were executed in thirty-one out of sixty-one, or fifty-one percent, of the *Joy Silk* cases. Inability to execute a contract generally reflects the union's loss of its majority within the plant, and in such cases the union has little choice but to relinquish its position as bargaining agent and withdraw from the plant. The bargaining order requires the employer to bargain with the union for a reasonable time only;[78] if no agreement is reached and the employer has evidence that the union is not the majority representative, the employer may then terminate his recognition of the union. It is generally quite easy for an employer to withdraw recognition; in many cases, it is the employees themselves who ask the union to leave the plant.

In assessing the degree to which the ineffectiveness of Board bargaining orders as remedial devices are responsible for the union's inability to obtain a contract in a *Joy Silk* case, it must be remembered that a union's failure may result from other factors. Board records indicate that fourteen percent of all newly certified unions do not ob-

78 NLRB v. Lovvorn, 172 F.2d 293, 294-95 (5th Cir. 1949).

tain contracts even in situations where employers have not committed any unfair labor practices. Plant shutdowns, a union's lack of economic power, and employee dissatisfaction with union leadership can all prevent a union from obtaining an agreement.

The thirty-one cases where unions failed to obtain contracts may be divided into two groups for analytic purposes: *(1)* cases where, following a bargaining order, no bargaining occurred; and *(2)* cases where bargaining occurred but no contract was obtained.

There were nine cases in which unions did not even attempt to negotiate a contract following a bargaining order. In four of these cases the employer had shut down. In the other five cases, the employers committed complex violations—in addition to committing 8(a)(1) violations, the employers discharged union supporters—and in four of these cases the employers litigated the charges against them. In one typical case, involving a unit of five employees, the employer refused to bargain and discharged the three union adherents. The discharged employees declined reinstatement, and their replacements disclaimed any interest in the union. After the bargaining order was issued, the union organizers called a meeting of employees to draw up contract proposals, but these meetings drew little response from the employees. Thus no bargaining occurred because the union organizers felt that their loss of support, stemming from the employer's illegal acts, would have made bargaining useless.

An examination of the remaining twenty-two cases where the unions bargained with employers, but failed to obtain contracts, reveals that *Joy Silk* bargaining orders and settlement agreements are not fully adequate as remedial devices. Again the unions' failure to obtain contracts was not always due to the ineffectiveness of the Board's processes; in five cases the unions did not achieve contracts because of other factors.[79]

In seventeen cases, however, the union organizers claimed that they were unable to obtain contracts primarily because they had lost support among the employees by the time the Board bargaining orders were issued. Fifteen of these cases involved either litigation or multiple

[79] In one case, a plant shut down for economic reasons. In another, the company was unable to pay the union rate, and the union, rather than risk undermining union contracts elsewhere, broke off negotiations. In two cases, the employees were unskilled and lacked economic power to strike effectively; in a third case, the employees refused to ratify a contract agreed upon by both union and employer. The union agent in this case explained that while the contract closely paralleled union standards for the industry, the employees believed they should have gotten more. This is one of only two cases where the union's failure to obtain a contract did not result in the union's demise. The union is supported by a majority and expects to obtain a contract soon.

violations of the Act, and five involved both. In nine cases the employers acknowledged that the unions made no economic threats; in three others strikes were attempted but failed.[80] Aware of the unions' inability to back up their demands through economic pressure and feeling under no obligation to reach a contract,[81] the employers assumed, according to the union organizers, a "take-it-or-leave-it" policy. Negotiations were doomed from the start.

In such a situation unions face the difficult choice of abandoning the plant or accepting seriously substandard contracts. Like most unions, the unions here chose the first route as the lesser of two evils. A substandard union contract will undermine contract conditions throughout the locality. Furthermore, competing employers whose employees are represented by the same union could be expected to protest vigorously the union's granting of a low-cost contract to a competitor.

It is evident that there are some employers who seek to destroy a union's majority status via the unfair labor practice and litigation routes, notwithstanding the legal sanctions brought against them.[82] Of the twenty-eight employers in this study who litigated their cases and were interviewed, thirteen acknowledged that they litigated against the advice of their attorneys, because they found it advantageous to do so. The first advantage accruing to the employer is that during the time the case is being litigated he is able to maintain the status quo in the plant. The savings he acquires by not operating under a union contract reduce his actual litigation costs.[83] Second, the employer who litigates is able to deduct his legal costs from his taxable income, as a business expense; back pay is similarly deductible. Finally, and perhaps most significantly, the employer knows that in litigating he buys time during which the union's chances of survival decrease.[84] Thus for many employers, the process of litigation becomes a business proposition.

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80 Three employers would not discuss their cases, and two could not be contacted.

81 Nine employers indicated that their bargaining strategy was grounded upon the demand that the union accept without significant modification their first offer. As one employer remarked: "Good faith bargaining under the law did not require the company to sign anything or enter into an agreement. Our strategy was to wear them out and we did."

82 The Pucinski Committee charged that the expanding caseload of unfair labor practices and the resulting delay are in part attributable to attorneys who counsel their employer clients to engage in unfair labor practices as a means of destroying union organization.

83 One employer stated: "For five years I was able to run the business without even talking or negotiating in any way with the union. This itself saved me $100,000."

84 One extremely anti-union employer who litigated his case through the court of appeals stated that he wrote 1,000 employers counseling them that litigation is the surest

This is not to suggest that all employers coldly calculate the costs of fighting the union and decide that keeping the union out will, in the long run, save the company money. Some employers are ideologically opposed to unions and would under no circumstances recognize a union; for some, a shutdown would be preferable. The question is who shall wield power and authority, and in such a conflict relative costs are not determinative. Keeping the union out is the objective, and the employers realize that the unfair labor practice and litigation routes are the most efficacious means of doing so.[85]

In cases involving such employers, *Joy Silk* bargaining orders are inadequate remedial devices. In roughly one-third of the *Joy Silk* cases examined in this study, unions were unsuccessful in obtaining contracts, primarily because of their inability, following employer unfair labor practices, to regain support among employees. The Board's bargaining orders failed to restore the status quo—the union's majority status and the bargaining position it enjoyed prior to the employer's unlawful refusal to bargain and his accompanying unfair labor practices. Thus, in certain circumstances, a bargaining order must be supplemented by additional remedies to restore the union to the position it occupied prior to the employer's illegal acts.

IV

Proposed Remedies and Summary Observations

This study has indicated that *Joy Silk* bargaining orders are of weak remedial efficacy in situations where the employer has committed multiple violations and then litigated the charges against him. The problem of developing effective remedies is further complicated when the union lacks economic power, adequate financial and human resources, and attempts to organize a very small unit. This section will discuss new remedies and new approaches that should enable the Board more effectively to remedy the violations of the *Joy Silk* employer.

A. *Reinstatement of Discriminatees in the Joy Silk Case*

The *Joy Silk* bargaining order has been shown to be least effective where the employer discharges union supporters.[86] The major reason

means of preventing a union from ever obtaining representative status. He added that by increasing the NLRB's already swollen docket, the increasing backlog of cases would soon make the law unworkable.

85 This may explain why an employer with a unit of only two employees will undergo heavy litigation costs to prevent the unionization of those two employees.

86 *See* text accompanying notes 19 through 29 *supra.*

for this is that the reinstatement remedy operates inadequately; the realities of industrial employment often frustrate the Board's efforts to reinstate discriminatees. It is only normal that, once discharged, a discriminatee will be reluctant to return to his former position. Having obtained a new job, the average worker will not risk further economic injury through reinstatement. His natural inclination to reject reinstatement is solidified if he has obtained a better position since his discharge.[87]

The discriminatee's failure to return signifies the Board's failure to restore the status quo. The consequences are notorious. Aspin reported that unions generally fail to win representation elections in cases where a discriminatee refuses reinstatement;[88] this study demonstrates that a dischargee's failure to return seriously impairs the union's chances of gaining a contract. The discriminatee's failure to return forcefully discloses to the remaining employees the price they may pay for supporting the union. In such cases, a bargaining order is often futile.

In *Joy Silk* cases where a discriminatee refuses to be reinstated, the union rather than the employer should have the authority to select the discriminatee's replacement.[89] This remedy would enable the union to regain its original level of support, and prevent the employer from creating an anti-union majority. Furthermore, defections from the ranks of union supporters would be lessened as employees observed that the employer was unable to profit from his unfair labor practices. The employees' fear of their own illegal dismissal would, to some extent, be allayed by their knowledge that the employer's predisposition to engage in further discharges would probably be curtailed by his inability to exploit this weapon. Coupled with a bargaining order, the new remedy would help restore the union to the position it enjoyed prior to the employer's illegal campaign.

The Board has the authority to provide this remedy. Section 10(c) of the Act, which provides that the Board "shall issue and cause to be served . . . an order requiring such person to cease and desist from such unfair labor practice, and *to take such affirmative action includ-*

87 Aspin, *supra* note 20, at 16-17, 24, 43.

88 *Id.* at 78-79.

89 Naturally this remedy can be applied only in cases in which the union is able to select qualified replacements; the employer should be under no obligation to hire an unqualified worker. Possible conflicts between the parties over qualifications could be resolved at the back-pay hearing. The employer should also be able to treat the union-selected replacements in the same manner that he would have treated the original discriminatees had they returned. The issue of dual loyalty can be completely eliminated by a Board regulation that no union-selected replacements could be on the union payroll.

ing reinstatement of employees with or without back pay, as will effectuate the policies of this [Act],"[90] gives the Board broad powers to remedy unfair labor practices. The courts have recognized the wide latitude the Board has in remedying employer violations. In vesting the Board with power to order affirmative relief, the Supreme Court acknowledged that

> Congress could not catalogue all the devices and stratagems for circumventing the policies of the Act. Nor could it define the whole gamut of remedies to effectuate these policies in an infinite variety of specific situations. Congress met these difficulties by leaving the adaptation of means to end to the empiric process of administration.[91]

Similarly, in *NLRB v. Seven-Up Bottling Co.*, the Supreme Court declared that "[i]n fashioning remedies to undo the effects of violations of the Act, the Board must draw on enlightenment gained from experience."[92] The only limitations on the Board's authority are that its orders be remedial and not "punitive," and that they be appropriate to the particular situation before the Board. By the term "punitive" the courts have generally meant a remedy that goes beyond an attempt to restore the status quo existing before the unfair labor practice.[93]

What are the possible challenges to the new reinstatement remedy? It will be argued that this remedy inflicts punitive sanctions upon an employer, since allowing the union to select a discriminatee's replacement violates the employer's traditional prerogative of hiring his employees. Moreover, the remedy goes beyond restoring the status quo, since this can be accomplished only by reinstatement of the discriminatee. It may also be contended that while reinstatement is designed only to relieve an injured employee, ordering the employer to hire an employee selected by the union serves only to bolster the union's position. These arguments, however, are not persuasive. First, the Supreme Court has acknowledged that the language of section 10(c) does not

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90 29 U.S.C. § 160(c) (1964) (emphasis added).

91 Phelps Dodge Corp. v. NLRB, 313 U.S. 177, 194 (1941).

> Because the character of the Statute is "essentially remedial," it can be no more effective than its implementing remedies. The administrators of the law and others who share their desire to carry out its policies can do no less than constantly evaluate and reevaluate the remedies of the Labor Act in the light of experience, changing circumstances, and the insights of scholarship.

McCulloch, *New Remedies Under the National Labor Relations Act*, in PROCEEDINGS OF THE N.Y.U. TWENTY-SECOND ANNUAL CONFERENCE ON LABOR 223, 242 (1969).

92 344 U.S. 344, 346 (1953).

93 "The Board must establish that the remedy is a reasonable attempt to put aright matters the unfair labor practice set awry." Carpenters Local 60 v. NLRB, 365 U.S. 651, 658 (1961) (concurring opinion).

restrict reinstatement to those discriminatorily discharged. In *Phelps Dodge Corporation v. NLRB*[94] the Court declared that the Board's power "to order an opportunity for employment does not derive from the phrase 'including reinstatement of employees with or without back pay,' and is not limited by it."[95] Instead, the Board's remedial authority is based on the congressional mandate to take "affirmative action" that "will effectuate the purposes of the Act."[96]

The Supreme Court has also recognized that the employer's right to hire and discharge is not absolute and may be restricted to remedy his unfair labor practices. In upholding the constitutionality of the Wagner Act, the Court said that "[t]he Act does not interfere with the *normal* exercise of the right of the employer to select its employees or to discharge them."[97] The employer who refuses to recognize a union representing a majority of his employees and who discharges union supporters, however, creates an extralegal and abnormal situation. In hiring replacements for the discriminatees refusing reinstatement, the employer is not exercising his normal right to hire but is, in effect, exploiting his violations of the law.

Moreover, this remedy cannot be rejected on the grounds it does not restore the status quo or fulfill the purpose of reinstatement. Reinstatement is not only a remedy for the particular employee discharged but is also an attempt to lessen the discharge's effects on the remaining employees. To limit reinstatement to the particular employee is in many cases to deny a remedy. A discriminatee's concern for his economic security will often result in rejection of the reinstatement offer. Furthermore, in replacing the discharged union supporter, the employer dramatically refutes the union and the Board's claim to protect the employees; he demonstrates to all the continued peril involved in supporting the union. Consequently, the restoration of the status quo—the reestablishment of the union's bargaining position and the elimination of the discharge's intimidating effect upon the employees—requires that the Board extend the scope of its reinstatement remedy. It should authorize unions to replace discharged union supporters.

Ordering a *Joy Silk* employer to hire union-selected replacements would not violate the closed-shop prohibitions of the Act. Possibly the union-selected replacements would all be union members, but this

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94 313 U.S. 177 (1941).

95 *Id.* at 191.

96 *Id.* at 188.

97 NLRB v. Jones & Laughlin Steel Corp., 301 U.S. 1, 45 (1937) (emphasis added).

alone does not constitute the formation of a closed shop, in which union membership is a prerequisite to all jobs in the plant. The union's authority to select employee replacements would apply only to the former jobs of the discriminatees and in no way restrict the employer in hiring whomever he chooses to fill other jobs. The remedy has no effect on the employer's normal employment policies.

B. *Use of the 10(j) Injunction*

This study has also indicated that the time delay involved in deciding a case seriously cripples the union's bargaining position. By the time a bargaining order is issued, the union may have no one for whom to bargain. Under section 10(j) of the Act, however, the Board has discretionary authority to seek interim relief from the federal courts as soon as a violation has occurred.[98] In issuing a 10(j) injunction in a *Joy Silk* case, a court could order the immediate reinstatement of discriminatees and compel the employer to cease all violations and bargain with the union. The argument in support of this 10(j) procedure is that it preserves the status quo—the union's bargaining position—during the lengthy interval between the issuance of the complaint and the Board or court decision.

Presently, Board use of the 10(j) injunction procedure is running at a snail's pace. Although the NLRB makes a point of publicizing its activities in this field, it is an understatement to say that the 10(j) procedure has been sparingly used.[99] In 1967, unions and regional directors requested 10(j) relief in 164 employer unfair labor practice cases; the Board authorized the General Counsel to seek 10(j) injunctions against employers in twenty-two cases.[100] Furthermore, nearly all of the Board's attempts to obtain 10(j) injunctions in refusal-to-bargain cases were made in cases where the employer had refused to bargain with an already certified union rather than in *Joy Silk* cases. In light of the way in which delays in *Joy Silk* proceedings prejudice the

98 Section 10(j) provides that "[t]he Board shall have power, upon issuance of complaint . . . charging that any person has engaged in or is engaging in an unfair labor practice, to petition any United States district court . . . for appropriate temporary relief or restraining order."

For a suggestion that the Board make more liberal use of the 10(j) injunction procedure, see *Hearings on General Study Into the Procedures of the NLRB and Its Administration of the Labor-Management Relations Act of 1947 as Amended Before the Subcomm. on National Labor Relations Board of the House Comm. on Education and Labor*, 87th Cong., 1st Sess. 53 (1961).

99 Chairman McCulloch has referred to the Board's expanded use of the 10(j) procedure in his speeches. *See* McCulloch, *supra* note 91, at 137.

100 *Id.*

unions' efforts, and because employers might be induced to settle their union disputes when faced with an injunction,[101] the 10(j) remedy should be given greater consideration in *Joy Silk* disputes.

In *Joy Silk* cases where the unit is large and the employer challenges the validity of a great number of authorization cards, the Board's reluctance to use the 10(j) procedure is perhaps justified. The difficulty of proving to a court's satisfaction that the union had obtained a majority of valid authorization cards could tax the Board considerably. Most *Joy Silk* cases do not present this difficulty, however. In many cases the employer never challenges the validity of the authorization cards: this was the situation in twenty-four of the sixty-one cases in this study. Furthermore, the unit in the *Joy Silk* case is typically small; the median unit size in the sixty-one cases studied here was eleven to twenty employees. Consequently, even if the employer were to challenge the validity of the cards, the Board's burden in proving that the cards reflected the employees' preferences would not be so imposing as to preclude the injunction procedure.

There is a basic inconsistency in the Board's exercise of its discretionary authority to seek 10(j) injunctive relief. Under section 10(*l*), the Board is not required to petition for injunctive relief against unions in section 8(b)(4)(D) cases, which involve jurisdictional dis-

101 This view is held by Chairman McCulloch. Speaking of a 10(j) injunction, he stated that "[i]t is not uncommon in these as in other cases for the Board's institution of extraordinary action to precipitate settlements or agreements to end alleged unlawful conduct pending final decision." McCulloch, *An Evaluation of the Remedies Available to the NLRB—Is There Need for Legislative or Administrative Change?*, 15 LAB. L.J. 755, 760 (1964). The following table indicates that during the period 1964-68, the Board was either granted a 10(j) injunction or was able to obtain a settlement agreement in 66% of the cases in which it requested 10(j) relief:

Disposition of Board Requests for 10(j) Relief

Fiscal year	No. of injunction cases disposed of by courts	No. of cases in which injunction was granted	No. of cases in which settlements were obtained	No. of cases in which request was withdrawn or denied
1964	11	5	2	4
1965	15	5	3	7
1966	9	7	2	0
1967	21	11	4	6
1968	15	5	3	7
	—	—	—	—
	71	33	14	24

NLRB ANNUAL REPORTS, Table 20. This success in seeking 10(j) injunctions in all unfair labor practice cases suggests the potential for more vigorous prosecution of 10(j) relief in *Joy Silk* cases.

putes;[102] yet it routinely does so. In fiscal year 1966, for example, the Board sought forty-nine injunctions under section 10(*l*) in jurisdictional-dispute cases. This figure is more than three times the number of 10(j) injunctions sought by the Board in *all* employer unfair labor practice cases. Thus the Board routinely exercises its discretion to obtain injunctive relief in union unfair labor practice cases but withholds it in cases of employer violations which, in the *Joy Silk* case, are often of the most flagrant nature.

Empirical evidence concerning a similar procedure indicates that the issuance of a 10(j) injunction would increase the unions' chances of obtaining contracts in *Joy Silk* cases. A study of unlawful refusal-to-bargain cases in which consent decrees were issued shows that unions achieved contracts in forty-eight percent of the cases; by way of contrast, contracts are reached in only thirty-four percent of the litigated cases.[103] A consent-decree case is one in which the employer consents to a court decree enforcing the settlement. This type of settlement is the only one the Board will enter into with an employer whom it feels is likely to violate the normal informal settlement agreement; failure to comply with the decree is punishable as contempt. Thus in the consent-decree case, as in the 10(j) case, the employer bargains with the union under the constraint of court action. The consent-decree case also resembles a 10(j) case with respect to the element of time; in contrast to the litigated case, both can normally be closed in the space of months. The similarity of the two procedures suggests that increased use of the 10(j) injunction would enhance the unions' chances of obtaining contracts in *Joy Silk* cases.

C. *Compensatory Relief*

The Board now has under consideration four refusal-to-bargain cases in which unions request a new remedy.[104] The unions have sug-

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102 Section 10(*l*) provides that "[i]n situations where such relief [injunctive] is *appropriate* the procedure specified herein shall apply to charges with respect to [section 8(b)(4)(D)]." The Board thus has the discretion to decide in jurisdictional-dispute cases whether or not injunctive relief is "appropriate" and should be sought. The Board does not have this discretion in secondary boycott, recognitional and organizational picketing, and hot cargo cases. *Id.*

103 Ross, *supra* note 31, at 115-16. Ross himself drew the opposite conclusion from his data. In a summary of his findings, he stated that "unions armed with consent decrees did not gain more contracts than were obtained after prolonged litigation." *Id.* at 31. This author feels, however, that Ross's statement in his summary is in clear opposition to the data Ross himself has presented at 115-16.

104 Ex-Cell-O Corp., 25-Ca-2377; Zinke's Food, Inc., 30-Ca-400; Herman Wilson Lumber Co., 26-Ca-2536; Rasco Olympia Inc., 19-Ca-3187.

gested that an employer who refuses to bargain collectively be required to compensate his employees for the financial injury they have sustained as a result of the employer's failure to bargain.

The argument for the remedy makes two basic assumptions: (*1*) Unions generally obtain contracts in cases where the employer recognizes and bargains in good faith with the union, and (*2*) collective bargaining generally results in increased benefits to the employees. Granting the assumptions, the employer's refusal to bargain inflicts monetary losses upon the union's members, which should be compensated. Existing evidence supports these assumptions. Board data indicate that unions obtain contracts in eighty-six percent of the first bargaining situations when employers have not committed any unfair labor practices. Nearly all of the union organizers in this study who obtained contracts reported that the contracts provided for increased economic benefits. Significantly, the unions achieved this success despite the loss in bargaining power caused by the employers' unfair labor practices.

The difficulty of choosing an objective standard that the Board could use to calculate the amount of benefits lost by employees as a result of the employer's refusal to bargain is not insuperable. A reasonable estimate of the employees' losses could be obtained by (*1*) using Bureau of Labor Standards data on average wage and benefit increases granted in collective bargaining for the period in question; (*2*) comparing the benefits offered by respondent's firm during the case's adjudication with the average increases secured by unions in firms similar to respondent's in regard to location, size, and industry; or (*3*) combining these methods.[105]

A compensatory remedy would be valuable in *Joy Silk* cases. As this study has shown, union chances of obtaining contracts in litigated cases are minimal. While the case is being litigated, the union loses the support of many employees who become dissatisfied with the union's inability to fulfill its promises; following the issuance of a bargaining order, efforts to reconvince employees that their support of the union will bring them tangible economic gains are often futile. Implementing this remedy should help correct the situation. Compensating employees for the losses they sustain as a result of the employer's failure

105 The proposed remedy would probably not apply in cases where the employer was a high-wage employer; *i.e.*, one whose wage and fringe benefits exceeded or paralleled those offered in unionized firms. This discussion quite evidently has barely skimmed the surface of the many problems associated with this remedy. The writer's major purpose, however, is to relate this remedy to the difficulties the Board faces in remedying the violations of the *Joy Silk* employer.

to bargain would demonstrate that the NLRB and the union can protect their interests. Consequently, employees would be more inclined to support the union during the litigation period and in contract negotiations. The remedy would thus make the employees whole for their losses and enhance the union's chances of executing contracts in the litigated *Joy Silk* cases.

Additionally, such a remedy is necessary to eradicate a situation in which the present ineffectiveness of Board sanctions invites determined employer efforts to violate their duty to bargain. Of the twenty-eight employers who litigated, thirteen acknowledged that litigation was pursued because of its accompanying advantages—savings in labor costs resulting from not having to implement a union contract and the destruction of the union's support within the plant. A bargaining order alone is ineffective because, to paraphrase Professor Chamberlain, an employer's willingness to abide by the law depends on the costs involved in violating the law relative to the costs of compliance.[106] By eliminating the profit that the *Joy Silk* employer accrues from his law-breaking, the compensatory remedy would significantly increase the relative cost of his anti-union campaign. Under such circumstances many of the most inveterate anti-union employers might be dissuaded from violating their obligation to bargain collectively.

To be sure, Board acceptance of these proposals would generate much controversy.[107] The fear of being labeled pro-labor or pro-management, however, should not deter the Board from critically examining the effectiveness of its present remedial policies and from fashioning new remedies to correct existing inadequacies. Only by pursuing such a policy can the Board fulfill its mandate to protect and promote the collective bargaining process.

THE EFFECTIVENESS OF BOARD REMEDIES IN *Joy Silk* CASES—A SUMMARY VIEW

One commentator has written that "[t]here is reason to believe that economic considerations, economic strength, and not the processes of the NLRB, ultimately will resolve almost every labor-management

106 N. CHAMBERLAIN, THE LABOR SECTOR 231 (1965).

107 It should be emphasized that these measures would come into effect only after an employer had refused to bargain and attempted to destroy the union's majority. Hence they would in no way alter the balance of bargaining power or interfere with the activities of either unions or employers who were lawfully engaged in the collective bargaining process.

quarrel that comes before the NLRB."[108] This article strongly suggests that the above statement is incorrect or, at best, a misleading generalization. Economic considerations do have a significant effect on the outcome of labor-management disputes; in approximately one-half of the *Joy Silk* cases studied here in which unions executed contracts, the union's economic power was a decisive element in the employer's willingness to negotiate a contract. But as the figure itself indicates, this is only half the picture. In the other half of the cases in which unions obtained contracts, the legal sanctions of the Board's remedial processes provided the basic impetus for the employers to reach agreements. Union reliance on the efficacy of the Board's remedial processes was especially strong among non-Teamsters unions whose loss of majority support generally precluded their taking effective economic action. In the litigated cases, even the Teamsters had to rely on the efficacy of Board pressures to successfully negotiate contracts.

This study, therefore, has shown that the Board exercises considerable influence over the actions and attitudes of employers. The Board's legal sanctions inhibit the majority of employers from engaging in multiple violations and extensive litigation; in approximately two-thirds of all *Joy Silk* cases, settlements are attained. These Board-generated settlements form the basic foundation for a union's later success in obtaining a contract. The effectiveness of the Board's remedial processes is further made evident by the development of mutually satisfactory contractual relations in the great majority of the cases in which contracts were executed.

On the other hand, the success of the Board's remedial policies is not complete. Among employers who violate section 8(a)(5) by refusing to recognize a majority union, there is the "hard-nosed 33-1/3 percent" willing to go to extreme lengths to defeat the union despite legal sanctions. A bargaining order in *Joy Silk* cases involving such employers will generally prove futile. Here the Board must intervene with new remedies; the need for new remedies is most acute where an employer who litigates multiple unfair labor practice charges is opposed by a union lacking adequate financial and economic power to resist the employer's violations.

The Board can act now to strengthen its remedial policies in *Joy Silk* cases. By expanding its utilization of the 10(j) injunction procedure, by providing for compensatory relief, and by broadening its standard reinstatement remedy, the Board can both limit the effect of

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108 Graham, *How Effective is the National Labor Relations Board?*, 48 MINN. L. REV. 1009, 1046 (1964).

and discourage the illegal actions of the *Joy Silk* employer. In so doing, the Board would be meeting its responsibility to protect and promote the collective bargaining process.

APPENDIX

Joy Silk CASES BY METHOD OF CLOSING AND EXTENT OF UNFAIR LABOR PRACTICES FORMAL AND INFORMAL SETTLEMENTS

	No. U.L.P.	8(a)(1)	8(a)(3)	8(a)(1)(3)	8(a)(1)(2)	8(a)(2)	
Total	2	12	2	10	1		= 27
Contracts	2	8	1	5	1		= 17

Trial Examiner's Decision

	No. U.L.P.	8(a)(1)	8(a)(3)	8(a)(1)(3)	8(a)(1)(2)	8(a)(2)	
Total		2			1		= 3
Contracts		2			0		= 2

Board Orders

	No. U.L.P.	8(a)(1)	8(a)(3)	8(a)(1)(3)	8(a)(1)(2)	8(a)(2)	
Total		7	1	4	2	1	= 15
Contracts		4	0	2	0	0	= 6

Court Decrees

	8(a)(1)	8(a)(3)	8(a)(1)(3)	8(a)(1)(2)	8(a)(2)	8(a)(1)(2)(3)	
Total	9	1	3			3	= 16
Contracts	3	0	1			1	= 5

Joy Silk CASES BY TYPE OF UNFAIR LABOR PRACTICE

	No. U.L.P.	8(a)(1)	8(a)(3)	8(a)(1)(3)	8(a)(1)(2)	8(a)(2)	8(a)(1)(2)(3)	
Total	2	30	4	17	4	1	3	= 61
Contracts	2	17	1	8	1	0	1	= 30

Joy Silk CASES BY METHOD OF CLOSING

	Informal Settlement	Formal Settlement	Trial Ex. Dec.	Board	Court	
Total	26	1	3	17	14	= 61
Contracts	16	1	2	6	5	= 30