

NATIONAL LABOR RELATIONS BOARD

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I. INTRODUCTION

U.S. and Mexican labor law share the same concerns: protecting workers' rights while encouraging business activity. However, U.S. laws rest on assumptions and use procedures that may differ significantly from the Mexican model. The purpose of this paper is to describe generally the purpose and operations of the National Labor Relations Board and to list the specific purposes of other federal laws that protect workers' rights.²

II. NATIONAL LABOR RELATIONS BOARD

1. *History and purpose*

The National Labor Relations Act ("the NLRA") was passed by the U.S. Congress in 1935 as part of the "New Deal" of President Franklin Roosevelt designed to help the United States emerge from the Great Depression. The policy underlying the Act was to promote commerce by encouraging workers and employers to work together cooperatively, through collective bargaining between unions and employers, instead of wasting their energies and resources on strikes, discharges and other

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² This paper summarizes the most important aspects of federal labor law. However, it is not a complete discussion of all relevant statutes and procedures.

forms of industrial unrest. Section 7 established the right of employees to engage in “protected, concerted activities,” including the right to engage in strikes. Section 7 specifically recognized the rights of employees to organize into groups such as unions. When a majority of employees in a bargaining unit have authorized a union to represent them, the employees have the right to engage in collective bargaining with their employers.

The fundamental assumption underlying the Act is that the role of the federal government in labor relations is to encourage employers and unions to negotiate and agree upon solutions to their problems without government input and without intimidation or coercion. The role of the Board is not to resolve the parties’ dispute; the role of the Board is to create a situation that would permit the parties to reach agreement on a solution voluntarily.

The National Labor Relations Board (“the Board”) implements the policies underlying the Act. Its primary activities are:

1. To conduct representation elections in which employees vote about whether or not they wish to be represented by a union in dealings with their employer;
2. To prevent employers and unions from engaging in unfair labor practices that violate the rights of employees, unions, or employers.

2. Structure of the board

The National Labor Relations Board (“the Board”) has two components:

1. The Board itself, which has a chairman and four other members. The President, with the consent of the U.S. Senate, appoints members of the Board for five-year terms. Each Board member is advised and assisted by a staff of lawyers who are career civil servants. The Board’s operations, which are located in Washington, D.C., are described in more detail below.
2. The General Counsel, who is appointed by the President, with the consent of the U.S. Senate, for a four-year term. The General Counsel has a staff of career attorneys located in Washington, D.C., whose specific activities are described in more detail, below. The

General Counsel is also in charge of the Board's 34 Regional Offices and several smaller offices, located in major cities in the United States and in Puerto Rico, that conduct the everyday operations of the Agency. These Regional Offices, which are headed by Regional Directors, are staffed by attorneys and field examiners who are specialists in industrial and labor relations. The operations of these offices are described in more detail below.

3. *Jurisdiction*

The Board has jurisdiction over election petitions and employment disputes of employees of employers in private³ business.⁴ The employers must do sufficient business in at least one state or federal jurisdiction for the Board to conclude that the employer's operations have a sufficient impact on interstate commerce as to warrant the Board's exercise of jurisdiction over the employer.⁵ These "jurisdictional standards" depend on the nature of the business. Thus, the Board will exercise jurisdiction over retail enterprises or stores that have an annual volume of at least \$500,000 and over newspapers that have an annual volume of at least \$200,000. The Board will not exercise its jurisdiction over employers whose operations are too small to meet these jurisdictional standards.

Nor will the Board act on behalf of the following types of workers, because the Act states that these workers are not to be considered "employees"⁶ protected by the Act:

1. Agricultural workers.
2. Domestic servants.
3. Any individual employed by his parent or spouse.
4. Independent contractors.
5. Supervisors and managers.⁷
6. Individuals employed by an employer subject to the Railway Labor Act, which regulates the operations of railroads and airlines in the United States.

3 The Board also has jurisdiction over the U.S. Postal Service, a public-private organization.

4 "Employer" is defined in Section 2(2) of the Act.

5 See Section 2(6) of the Act.

6 See Section 2(3) of the Act.

7 See Section 2(11) of the Act.

7. Government employees, including those employed by the U.S. government, a government corporation or Federal Reserve Bank, or any state or political subdivision such as a city, town or school district.
8. Employees of a foreign governments conducting operations in the United States, such as employees of an embassy or government mission, or employees of international organizations such as the World Bank or the United Nations.

Workers who are not American citizens but otherwise meet the definition of employee are protected by the Act. Even workers who are not legally authorized to work in the United States have the right to join unions and be protected by the Act, although if they are unlawfully discharged, they may not be reinstated unless they have obtained authorization to work in the United States.

4. *What the act provides*

The basic right of workers under the NLRA is set forth in Section 7 of the Act, which gives employees “the right to self-organization, to form, join or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection.” Section 7 also gives employees the right to refrain from engaging in such actions.

In addition, Section 7 protects the rights of employees to engage in or refrain from concerted activities even if the employees are not represented by a union and are not seeking union representation. Section 7 would protect, for example, two or more employees who collectively complained their employer about a working condition such as wages or hours even if the goal of the employees is to have the employer respond directly to them about their complaints and the employees are not seeking to have a union represent them in dealing with the employer.⁸

Section 7 also protects the rights of employees to engage in strikes in certain situations, which are described below:

⁸ However, if a union represented these employees, the employer would be obligated to deal with the union and could not deal directly with the individual employees.

1. Economic strikes to compel an employer to improve terms and conditions of employment, such as by agreeing to a new collective-bargaining agreement, or by agreeing to improve a specific condition, such as wages. An employer may respond to an economic strike by hiring permanent replacement employees. The striking employees are entitled to be recalled to their jobs only when the employer has vacant positions because, for example, the permanent replacements have quit.
2. Unfair labor practice strikes to protest employer actions that employees believe violate their rights under the Act.⁹ For example, a strike to protest an employer's discharge of an employee because he attempts to organize a union is an unfair labor practice strike. An employer may hire temporary, but not permanent, replacements for unfair labor practice strikers. Therefore, once the strike ends, the strikers are entitled to return to their jobs promptly. The employer must lay off any temporary replacements it has hired.
3. Sympathy strikes to express support for primary strikes. For example, if employees who work in a factory commence a strike and employees who work in another factory owned by the same employer also go out on strike in support of the group of employees that struck first, the employees in the second group are sympathy strikers. Sympathy strikers have the same rights as the primary strikers, that is, if the primary strikers are economic strikers, so are the sympathy strikers.

Section 8 of the Act sets out the types of actions that Congress has decided are unfair labor practices as well as the rights of employers and unions in certain situations.

Section 8(a): identifies actions that employers may not take. The major¹⁰ provisions are summarized below:

Section 8(a)(1): an employer may not interfere with, restrain or coerce employees in the exercise of their Section 7 rights

Section 8(a)(2): an employer may not dominate or interfere with the formation or administration of a labor organization or contribute financial or other support to it. This provision is intended to prevent the creation

⁹ These unfair labor practices are described in more detail below.

¹⁰ The above list does not include all provisions of Section 8(a) of the Act.

of employer-dominated unions in place of genuinely employee-supported unions. Congress believed that such employer-dominated unions would be more likely to agree to the employer's wishes without regard to the views of employees than would unions that were free from domination or interference by the employer.

Section 8(a)(3): an employer may not discriminate in favor of or against an employee in hiring, firing, disciplining or promoting because of the employee's union activities or lack of union activities. In most, but not all states, an employee can be made subject to a valid union security clause requiring the employee to pay dues or fees to the union. An employer may terminate an employee who fails to make the required payments. While the Act does not compel an employee covered by a union security clause to join the union, in those states in which unions security clauses are lawful, employees may be obligated to pay for the costs of representation, that is, the costs of contract negotiation, grievance processing, and contract administration, even if they do not join the union.

Section 8(a)(4): an employer may not discharge or otherwise retaliate against an employee because he has filed an unfair labor practice charge with the Board or has given testimony in a Board proceeding.

Section 8(a)(5): an employer may not refuse to bargain collectively with a union that is the exclusive collective-bargaining representative of its employees. Thus, an employer may not make changes in employees' working conditions unless:

1. If there is no contract in effect, the employer and the union have bargained to impasse over the proposed change.
2. If there is a contract in effect, the union has agreed to the employer's proposed change.

Section 8(b) lists the actions that a union may not take. The major¹¹ provisions of Section 8(b) are described below.

Section 8(b)(1)(A): a union may not coerce or interfere with employees' exercise of their rights under Section 7 of the Act, although a union can establish its own rules concerning membership in the union.

¹¹ The above list does not include all provisions of Section 8(b) of the Act.

Section 8(b)(1)(B): nor can a union coerce an employer to interfere with the employer's choice of its representative for collective bargaining or the adjustment of grievances between the union and the employer.

Section 8(b)(2): a union may not cause or attempt to cause an employer to discriminate against an employee in violation of Section 8(a)(3) unless the employee has failed to pay the dues or fees required under a legal union security clause

Section 8(b)(3): a union may not refuse to bargain with the employer of the employees the union represents. Therefore, a union may not refuse to engage in contract negotiations or fulfill its obligations established by a collective-bargaining agreement

Section 8(b)(4): a union may not engage in a strike against or refuse to use goods or equipment of a neutral employer where the union's goal is:

- (A) To force an employer or self-employed person to join a labor or employer organization or to enter into a "hot cargo" agreement that is illegal under Section 8(e) of the Act.
- (B) To force a person or an employer to cease doing business with any other person or employer to coerce that employer to recognize or bargain with a union as the representative of employees where the union has not been certified. However, this provision does not make an otherwise lawful strike unlawful.
- (C) To force or require an employer to recognize or bargain with a particular union where another union has been certified as the representative of that employer's employees.
- (D) To force or require any employer to assign specific work to employees represented by a particular union instead of another union unless the employer is failing to comply with a Board order determining the bargaining representative for the employees who perform the work.

Section 8(b)(4) is not intended to prevent a union from engaging in peaceful publicity activities, other than picketing, intended to inform members of the public of the existence of a labor dispute.

Section 8(b)(5): a union may not require employees covered by a union security clause to pay an excessive fee, in light of the practices

and customs of the unions in the particular industry and the wages paid to employees in the industry.

Section 8(b)(6): a union may not cause or attempt to cause an employer to make payments to the union for services that were not performed.

Section 8(b)(7): a union may not picket, cause to be picketed, or threaten to picket an employer to require the employer to bargain with the union or to force the employer's employees to select the union as their collective-bargaining representative unless the union is currently certified as the representative of the employees where:

- (A) The employer has lawfully recognized another union and a question concerning representation of the unit employees may not be raised at that time because, for example, the employees are covered by a collective-bargaining agreement.
- (B) The Board has conducted a representation election within the past 12 months.
- (C) Where the union has picketed for more than 30 days without having filed a valid election petition.

However, a union may picket to inform the public that the employer does not have a contract with the union unless the picketing causes employees of other employers to cease doing work.

Section 8(c): an employer has the right to express its views about union representation or employees' exercise of their Section 7 rights to engage in protected, concerted activity so long as the employer does not threaten to retaliate against or promise benefits to discourage employees from engaging in protected, concerted activity.

Section 8(d): defines collective bargaining as "the performance of the mutual obligation of the employer and the representative of the employees to meet at reasonable times and confer in good faith with respect to wages, hours, and other terms and conditions of employment, or the negotiation of an agreement, or any question arising thereunder" and the negotiation of an agreement. However, neither party is required to agree to a proposal or to make a concession. If the union and the employer do reach agreement on a contract, neither party can change the contract during its term without the consent of the other party. A party

wishing to negotiate a new agreement to replace an expiring one must give notice 60 days before the contract expires.

Section 8(e): bars employers and unions from entering into agreements whereby the employer ceases or agrees to refrain from doing business with any other employer. However, such agreements are lawful in the construction industry and in the garment industry.

Section 8(f): recognizes that standard union organizing techniques and methods of dealing with employers may be inappropriate in ways of reaching employees who perform construction work because such employees often work for short periods for specific employers or on specific construction sites. This section also recognizes that a dispute between an employer and specialized craft employees may halt related construction work on a project even though other craft employees may not be involved in the dispute. Therefore, this section of the Act permits unions and employers involved in construction work to sign contracts even though the employer has not yet hired any employees or a union has not yet demonstrated that a majority of unit employees desire union representation. Contracts covering employees who perform construction work may lawfully impose union security obligations after employees have worked for seven days, whereas contracts covering employees who do not perform construction work may not require union security payments until employees have worked at least 30 days.

Section 8(g): covers employees who work in hospitals or other health care institutions. Until 1974, employees in the health care industry were not protected by the Act. When Congress passed Section 8(g), it recognized the great harm that strikes could cause in the health care industry. Therefore, a union that represents employees in the health care industry must give 10 full days' notice of its intent to strike to the employer and to the Federal Mediation and Conciliation Service, which then attempts to facilitate collective bargaining and thus resolve labor disagreements. With 10 days' advance notice, health care institutions can prepare for a strike by, for example, hiring replacement workers, stocking up on supplies or by transferring patients to other facilities.

5. *The board's operations*

The Board cannot initiate actions on its own. It can act only in response to one of the filing of one of the following documents by an employee, an employer, a union or their agent:

1. A petition to certify or decertify a union as the collective-bargaining representative of a unit of employees.
2. A charge alleging that an employer or a union has committed an unfair labor practice that violates the rights of employees, a union or an employer. An unfair labor practice charge must be filed no more than six months after the unlawful action allegedly occurred.

Any employee, union, employer or any other person can file out the appropriate form provided by a Regional Office, which must be signed and sworn to or affirmed under oath. Board procedures after the filing of a representation petition or an unfair labor practice charge are described in more detail below.

Representation cases concern bargaining units that consist of two or more employees who share a community of interest concerning their terms and conditions of employment. The employees in the unit may work at one or more locations of their employer. Where employers are members of voluntary associations, such as, for example, an association of builders, employees of several employers may constitute an appropriate bargaining unit. The Board will decide whether a group of employees constitutes an appropriate bargaining unit. The Board will consider such factors as any history of collective bargaining, the desires of the employees concerned, and the extent to which the employees are organized. However, the Board will not place professional and nonprofessional employees within the same bargaining unit unless a majority of the professional employees vote to be included in a mixed unit.¹² Nor will the Board include within a bargaining unit an employee who acts in a confidential capacity to an employer's labor relations officials. The Board will also seek to minimize the number of bargaining units in a health care facility, such as a hospital or a nursing home, in order to reduce disruptions in health care services caused by strikes.¹³

¹² Professional employees are defined in Section 2(12) of the Act.

¹³ Health care institutions are defined in Section 2(14) of the Act.

Finally, Section 9(b)(3) of the Act prohibits the Board from including plant guards in the same unit with other employees or from certifying a union as the representative of a plant guard unit if the union has members who are nonguard employees if the union is “affiliated directly or indirectly” with a union that has members who are nonguard employees. This rule is intended to prevent situations in which guards may feel a conflict of interest between the interests of their employer and the wishes and policies of fellow union members who may be acting in opposition to the desires of their employer by, for example, engaging in a strike.

Where an employee or a group of employees or a union submits an election petition signed by at least 30 percent of the employees of the employees in the bargaining unit, the Board will conduct a secret ballot election to determine whether a majority of employees in the unit seek to be represented by a union for the purpose of collective bargaining with their employer concerning the employees’ terms and conditions of employment. The employer must provide a list of all employees in the bargaining unit. The election will be announced in advance, in a notice that gives the time and place of the election, the purpose of the election, the rights of employees to vote for or against union representation without fear of retaliation from either the union or the employer, and the name or names of the union or unions that seek to represent the employees. The election is conducted by officials of the appropriate Regional Office; both the employer and the union may have observers present during the election proceeding. If a significant number of employees in the bargaining unit do not read English adequately, notices and ballots will be made available in the languages read by those employees. If necessary, the Board will also provide translators to help employees exercise their rights under the Act.

If a count of the ballots demonstrates that a majority of the employees who voted in the election voted in favor of representation, the Board will certify the union as the exclusive collective-bargaining representative of the employees. The employer will then be obligated to bargain with that union about the terms and conditions of employment of the unit employees. The employer may not bargain with another union or deal directly with employees about these subjects.

If a majority of employees who vote in the election do not vote in favor of union representation, the employer is not obligated to bargain

with the union. Instead, the employer remains free unilaterally to establish wages, hours, working conditions and to impose discipline, including discharge, for violations of rules it establishes.

The Board will conduct a decertification election when a petition supported by at least 30 percent of the bargaining unit is filed claiming that unit employees wish to vote to determine whether to continue to be represented by the union. If a majority of unit employees vote against continued union representation, the union is decertified and the employer is free to act unilaterally in dealing with unit employees. If a majority of unit employees vote against decertification, the employer must continue to deal with the union as the collective-bargaining representative of unit employees.

The Board will also conduct an election where an employer claims that it has a good faith doubt that a certified union continues to be supported by a majority of bargaining unit employees or where the employer asserts that two or more unions have made competing claims of representing a majority of unit employees. These elections help the employer determine whether it has to deal with the union.

Sometimes the union or unions or the employer participating in the representation election will object to the certification of the ballot tally on the grounds that the other party, i.e., the union or the employer, engaged in objectionable conduct that prevented the employees from voting without coercion or intimidation. In such situations, the Regional Office will hold a hearing on election objections in which participants will be able to describe the conduct that they alleged interfered with the running of a fair impartial election, such as unlawful discharges of union supporters before an election, promises of benefits to employees who vote for or against union representation, threats of retaliation or violence because of the way employees vote, etc. If the Regional Director, whose decision may be reviewed by the Board, concludes that the alleged misconduct did not interfere with the running of the election, the election results will be certified. If the Regional Director decides that the alleged misconduct was so serious as to prevent employees from voting freely, without fears, the Regional Director can direct that the results of the election be set aside and that a rerun election be scheduled. In some situations that misconduct may have been so serious that the Regional Director may conclude that a fair rerun election cannot be held. In those

situations, if the union has demonstrated in some manner other than the election, such as by presenting a petition or union authorization cards signed by a majority of the employees in the bargaining unit, that a majority of bargaining unit employees wish to be represented by the union, the Regional Director will certify the union. The employer will then be obligated to bargain with the union even though the union did not win the election.

Unfair labor practice cases start when an employee, an employer, a union or any other person files an unfair labor practice charge in a Regional Office. The Region will investigate the charge by talking to the charging party and its witnesses and the charged party and its witnesses. The Region may take affidavits. It will also consider documentary evidence such as contracts, letters, memoranda, etc. The investigating Board agent, who may be a field examiner or an attorney, a supervisor and a management official will discuss the legal merits of the charge.

If the officials of the Regional Office conclude that the charge lacks merit, the charge will be dismissed unless the charging party withdraws it. However, if the charge is dismissed, the charging party may file an appeal of the dismissal with the Office of Appeals, located in the Board's headquarters in Washington, DC. Attorneys in the Office of Appeals will review the charge and the Region's investigation and reach an independent determination of the merits of the charge. If they agree with the Regional Office, the charge will be dismissed. If they believe that there is merit to the charge, or that further investigation might be useful, they will present the case to the General Counsel. If the General Counsel agrees with the Regional Director's original decision, the charge will be dismissed. If the General Counsel decides, contrary to the Regional Director, that the charge has merit, it was be processed in the manner described below.

If officials of the Regional Office conclude that the charge is meritorious, that is, that it alleges an unfair labor practice under the Act, the Region will notify the parties and attempt to work out a settlement that is acceptable to the parties. In such situations, the charging party may decide to withdraw the charge. Sometimes, the action attacked as an unfair labor practice may also be a violation of a collective-bargaining agreement between a union and an employer.

If, as is common, the collective-bargaining agreement includes a provision permitting the unhappy party to file a grievance and requiring the other party to the contract to agree to arbitration of the dispute by a neutral third party, the Regional Office will decide to defer, or hold in abeyance, the unfair labor practice charge while the contractual dispute is submitted to arbitration. The Board's deferral policy is rooted in the belief that the parties to a collective-bargaining relationship should be encouraged to develop mechanisms to resolve their problems themselves, without direct input from the Board. Arbitrators are usually private attorneys experienced in dealing with labor law and contract issues. Parties pay for the arbitration. However, arbitration is often faster and cheaper than sometimes lengthy litigation before the Board. After the arbitrator's award is issued, the Regional Office and, sometimes, the Board will review the award to see if it is consistent with federal labor law. If the award is consistent, it will resolve the unfair labor practice dispute. If the award is repugnant to the Act because, for example, it permits an employer to discriminate against a union activist, the Regional Office will not defer to the award. Instead, it will litigate the original unfair labor practice charge that had been pending during the arbitration proceeding. Of course, if the parties cannot resolve their problems satisfactorily, the Board will exercise its traditional powers.

In some situations, a Regional Office may decide that a charge raises extremely complex or novel legal questions or significant policy questions or that the charge requires interpretation and application of recent Supreme Court decisions or other laws. The Regional Office will then write a Request for Advice describing the facts of the case, the difficult legal questions, the relevant law and the Region's view of the way the case should be handled. The Region will send this Request to the Division of Advice in Washington, where attorneys will do detailed legal research and close analysis of the difficult questions, and determine the views of the General Counsel. The Division of Advice will then prepare an Advice Memorandum, which will give specific legal instructions to the Regional Office as to whether they should dismiss the charge or issue complaint. The Division of Advice may also give litigation advice and review subsequent developments in cases in which the Division authorized complaint.

If the Region and the parties do not agree on a settlement, the Region will issue a complaint which will briefly described the alleged unfair labor practice and the sections of the Act that have been violated. If the alleged unfair labor practices are extremely serious and might inflict irreparable harm on the rights of employees, unions or employers during the years it might take for a final order to issue in the case, the Regional Office might request that the Division of Advice ask the Board for authorization for the Regional Office to seek a temporary injunction, under Section 10(j) of the Act, from a U.S. district court. That injunction would seek to restore the status quo ante, or the situation that prevailed before the unfair labor practices were committed, and to preserve that status quo ante until a final order issued in the case. Examples of temporary injunctive relief include an order requiring the reinstatement of employees who were unlawfully discharged because they were leaders in a union organizing campaign, an order requiring an employer to bargain with a union, or an order requiring a union not to physically attack employees who work during a strike.

The complaint will also schedule a hearing before an administrative law judge (“an ALJ”), an independent federal employee with experience in litigating and adjudicating labor questions under the Act. The hearing is usually held in or near the city or town where the dispute arose in order to minimize inconvenience and costs for the parties. The hearing may be held in a hearing room in a Regional Office, a room in a public building, a room in a hotel, or in another location. The charging party may be represented at no cost by the attorney for the General Counsel. The charging party and the charged party may also retain, pay for and be represented by private counsel. The parties may also choose not to have counsel and instead may appear and participate in questioning on their own. Each party may call and question their witnesses and cross-examine opposing witnesses. The Board will provide translators for witnesses who have trouble understanding or speaking English. Exhibits may also be introduced. In general, the proceedings are conducted in accordance with the Federal Rules of Civil Procedure.

After the hearing closes, the ALJ will examine a transcript of the hearing and all exhibits and write a decision (“an ALJD”) describing the facts, the legal questions and arguments, and rendering a decision. If the ALJ finds that the General Counsel has not proven his case, the

ALJ will dismiss the complaint. If the ALJ finds that the Act was violated as alleged, the ALJ will issue an order containing such a finding and ordering the charged party to take certain specific remedial action to remedy the violation.

The General Counsel, the charging party or the charged party may except or object to some or all of the ALJ's decision by identifying the specific conclusions excepted to and filing a brief in support of exceptions with the Board. Members of the staffs of the Board members will review the transcript of the ALJ hearing, the ALJ's decision, the exceptions and any briefs filed in support of the exceptions or the ALJ's decision. They will then make recommendations to either a panel of three Board members or, if the case is unusually important, to the full five-member Board. After the Board members deciding the case reach a decision, their staffs draft and circulate a proposed decision among the Board members. When all the Board members agree on the draft decision, or individual Board members wrote concurrences or dissents, the decision is published.

The Board's decisions are available to the general public. New decisions can be obtained through the Board's Division of Information, which also publishes summaries of decisions released every week. Bound volumes containing Board decisions are published by the U.S. General Printing Office. Board decisions are also available on Westlaw, a computer-based research system, and from commercial printing and reporting services such as the Bureau of National Affairs, which publishes Board decisions and relevant court decisions weekly in the Labor Relations Reporter. If the ALJ finds a violation but the charged party does not file exceptions to the ALJ's decision, the Board adopts the ALJ's decision. If the ALJ dismisses the complaint and neither the General Counsel nor the charging party files exceptions, the case is closed.

However, a Board decision finding that a charged party has violated the Act does not obligate that charged party to remedy the violation. If the charged party does not agree to comply with the Board order, thus ending the case, the Board will file a petition for enforcement. The charged party can also file a petition for review to challenge the Board's order. Either petition can be filed with the U.S. Circuit Court of Appeals in whose jurisdiction the unfair labor practice occurred or with the U.S. Court of Appeals for the D.C. Circuit, which has jurisdiction in any

Board case. A three-judge panel of the court will review the Board's decision and underlying record before issuing its decision. Sometimes the court will rest its decision only on written materials, such as the Board's decision and briefs filed by the parties. On other occasions, attorneys for the Board and for the parties will also argue their cases before the court.

The court's decision is legally binding upon the parties. Sometimes the court issues a decision in favor of the Board and obligating the charged party to take some remedial action, and the charged party refuses to do so. In such situations, the Board's Contempt Litigation and Compliance Branch will institute court action to have the charged party held in contempt of the court. In civil contempt proceedings, the Board will seek to have fines imposed upon the charged party until it complies with the court's order. In extreme situations, the Board will seek to have the charged party held in criminal contempt. If a court finds that the charged party has engaged in criminal contempt of the court's order, the court can order that the charged party or its agent be jailed until the Board order is complied with. Such situations are extremely rare.

More often, charged parties file petitions for certiorari, or appeals of a circuit court's decision to the U.S. Supreme Court, arguing that the circuit court's decision was wrong as a matter of law or that there is a conflict between the decision of that circuit court and the decisions of other U.S. circuit courts. It is extremely rare that the Supreme Court grants such petitions for certiorari. If the Court does grant such a petition, the Board and the parties to the case will file specially written briefs addressing the questions that the Court has stated it wants to decide. Other interested parties, including unions, employers and associations, may file briefs as "amici curiae," or "friends of the court." The Court will then schedule an oral argument, generally lasting one hour, on the case. The Board's position may be argued by a Board attorney or by the Solicitor General, who is a high-ranking official of the Department of Justice, or a member of his staff. The Court's decision is final and binding upon the parties and establishes the law covering similar disputes among the Board and different parties.

Of course, at any time during the proceedings described above, the parties may settle their dispute or the charged party may decide to comply with the decision of the Agency.

6. Remedies

As described above, the goal of the Act is to promote industrial stability and workers' rights through collective bargaining; the goal is not to punish either employers or unions who have engaged in unfair labor practices. Therefore, the Board's remedies are intended to create a situation in which the policies underlying the Act can be fulfilled and furthered.

The Board's remedies usually¹⁴ fall into two categories:

1. Remedies intended to undo the unfair labor practice and restore the lawful status quo ante. Thus, employers may be ordered to reemploy unlawfully discharged union activists and to pay them back pay for the period they were unlawfully unemployed. Employers may also have to pay for expenses that employees incurred because they were unlawfully discharged. For example, if an unlawfully discharged employee lost health insurance and had to pay for medical expenses, an employer might be ordered to pay the employee for those medical expenses. Unlawful discipline, such as warnings, must be expunged from employees' personnel records. Employers that have made unlawful changes in working conditions, such as failing to give required increases, must make employees whole. If the unlawful changes were improvements, such as wage increases, employers must bargain with a union and give the union the option of maintaining or modifying the change. Unions that have obtained the discharge of employees or that have refused to refer employees for unlawful reasons will be ordered to state that they have no objection to the reinstatement or the hiring of those employees and to pay them backpay for the period in which they were unlawfully unemployed.
2. Remedies intended to operate prospectively in order to facilitate employees' exercise of their Section 7 rights and to facilitate meaningful collective bargaining relationships between unions and employers. Charged parties will be ordered to post notices at the affected workplaces for 60 days stating that they have remedied specific unfair labor practices and will not engage in such unfair

14 The following lists and examples of typical remedies are not exhaustive.

labor practices in the future. The notices will also state the rights of employees to engage in protected concerted activities as defined by Section 7 of the Act. If appropriate, the notices will be translated into languages read or spoken by significant portions of the employer's workforce.

Unions and employers may be ordered to engage in good faith bargaining and, if they reach agreement on terms to be contained in a collective-bargaining agreement, to sign such an agreement. Unions and employers may also be ordered to provide to the other party information that is relevant and necessary for collective bargaining, such as financial information (especially useful if an employer claims that it cannot afford wage increases demanded by a union), information about personnel records, etc.

If either an employer or a union has filed a lawsuit that is legally baseless and is intended to retaliate against rights under the Act, or seeks an unlawful purpose, or is preempted by federal law, the Board will order the plaintiff in the lawsuit (the charged party in the unfair labor practice case) to withdraw the lawsuit and to pay the legal fees of the defendant in the lawsuit (the charging party in the unfair labor practice case). If an employer has closed a facility, such as a store, an office or a factory, to retaliate against the exercise of Section 7 rights, the employer will be ordered to reopen the facility.

If an employer closed the facility for economic reasons and bargaining might have resulted in an agreement that might have eliminated the financial reasons for closing the facility, the employer will be ordered to bargain with the union about the closing. Where an employer decides to close a facility or move work to another facility for lawful business reasons, not to retaliate against the exercise of Section 7 rights, the employer will be ordered to bargain with the union about the effects of the closing decision. Thus, the employer and the union can bargain about such subjects as job transfers to another facility, severance benefits, continuation of health insurance, letters of recommendation, etc.

If a union has engaged in unlawful secondary picketing or interference with the operations of a neutral employer, the union will be ordered to cease such activity. Indeed, the Board can seek interim relief of this

type under Section 10(l) of the Act because of the great harm that such secondary activity can cause neutral employers.

The Board does not award the type of punitive damages that might be awarded under other laws, such as anti-trust laws. However, where extraordinarily flagrant unfair labor practices have been committed, the Board will order the charged party to pay the charging party's legal fees and, if appropriate, the costs of negotiating a collective-bargaining agreement. The Board may also order a Board employee or a high ranking company official to read the Board's remedial order aloud to assembled employees to ensure that they know that the federal government will protect their rights despite their employer's unlawful actions.

III. OTHER RELEVANT FEDERAL AGENCIES, STATUTES

As explained above, the Act protects employees' rights to engage in group, or collective, activity. There is no federal law requiring an employer to show just cause for discharge of an individual employee, although unions and employers may negotiate to include such a requirement in a collective-bargaining agreement. Instead, the relationship between employers and employees is characterized in American law as "employment at will." Thus, in the absence of a contract with such a just cause provision, an employer may discharge an employee, even a satisfactory employee, for any reason except a reason that is unlawful under a federal or a state statute. A number of federal laws give individual employees the right to be free from various types of unlawful actions.¹⁵ These laws broadly fall into two categories and are summarized below. The departments or agencies that enforce such laws develop their own standards and procedures.

1. Statutes intended to regulate employees' working conditions:

a. The Fair Labor Standards Act, which is administered by the Department of Labor, requires, among other things, that:

1) Employees be paid at least a minimum wage, which is established and changed by Congress periodically.

¹⁵ Many states have similar laws that give workers various employment rights.

- 2) Employees be paid overtime for all hours worked in excess of 40 hours a week.
 - 3) Children be protected from working in oppressive or dangerous conditions.
 - 4) Men and women be paid “equal pay for equal work”.
- b. State workers’ compensation statutes intended to pay workers who cannot work because of injuries they incurred while working.
- c. The Occupational Safety and Health Act of 1970, which is intended to insure safe working conditions for employees. It permits inspectors of the U.S. Department of Labor to conduct reasonable safety and health inspections and, if appropriate:
- 1) To obtain abatement orders requiring employers to correct unsafe working conditions.
 - 2) To impose fines on any employer maintaining any unsafe working condition.
- d. The Federal Mine Safety and Health Act of 1970, which is intended to protect workers who work in frequently dangerous mines. Mine inspectors have the right to order the immediate closing of all or part of a mine because of unusually dangerous conditions. Miners affected by such closings are entitled to pay for up to a week. Employers must also give health and safety training to new miners.
- e. State unemployment compensation statutes that provide payments for several months for employees who have been laid off from their jobs because of lack of work, not because of any complaint about their performances. During the period laidoff employees are receiving unemployment compensation, they are supposed to seek new jobs.
- f. the Consolidated Omnibus Budget Reconciliation Act of 1986 (COBRA) conditioned the right of an employer of 20 or more employees to deduct the costs of providing group health insurance plan benefits, as a business expense for tax purposes, upon making those benefits available to terminated employees for at least 18 additional months unless they were terminated for gross misconduct.

- g. The Workers Adjustment and Retraining Notification Act (WARN) requires all but smaller employers to notify employees or their union and the local government 60 days in advance of a facility shutdown. An employer who fails to give this notice is liable to employees for backpay equal to normal weekly pay, including benefits and contributions, that they would have received during the notice period. The policy underlying the statute is the belief that advance notice gives workers time to look for new jobs and reduces subsequent unemployment.
2. Statutes intended to protect the civil rights of workers against unlawful discrimination because of their status as members of various groups.
 - a. Title VII of the Civil Rights Act of 1964 protects employees against discrimination in employment with respect to compensation, terms, conditions or privileges of employment based upon race, color, religion, national origin and sex. Title VII is enforced through the Equal Employment Opportunity Commission. However, employees may also file federal court lawsuits under the Civil Rights Act at their own expense.
 - b. The Immigration Reform and Control Act of 1986 (IRCA) states that an employer commits an “unfair immigration-related employment practice” by discriminating in employment against any individual other than an alien unauthorized to work in the United States.
 - c. The Equal Pay Act requires employers to pay men and women equally for performing equal work on jobs which require equal skill, effort and responsibilities and are performed under similar working conditions.
 - d. The Age Discrimination in Employment Act of 1967 (ADEA) prohibits employers of at least 20 employees from engaging in age-based discrimination in employment against workers who are at least 40 years old.
 - e. The Americans with Disabilities Act of 1992 (ADEA) bars employers from engaging in employment discrimination against “a qualified individual with a disability,” such as an individual who

- has a disability and can perform the “essential functions” of the job with or without reasonable accommodation by the employer.
- f. The Family and Medical Leave Act (FMLA) gives workers unpaid time off to deal with their serious medical problems or with those of a parent, spouse or child.

The statutes described above generally have provisions making it unlawful for an employer to retaliate against an employee because the employee has invoked his rights under a specific statute.

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